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ADJUDICATING NON-JUSTICIABLE RIGHTS: SOCIO-ECONOMIC RIGHTS AND THE SOUTH AFRICAN CONSTITUTIONAL COURT

Eric C. Christiansen*

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.¹

I. INTRODUCTION

It has historically been argued and traditionally accepted that socio-economic rights are non-justiciable. Advocates of this position have asserted that, while rights to housing, health care, education, and other forms of social welfare may have value as moral

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1. *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para. 8 (S. Afr.) [hereinafter *Soobramoney*]. This and all South African Constitutional Court cases are available online at the Court's official website, <http://www.constitutionalcourt.org.za>.

statements of a nation's ideals, they should not be viewed as a legal declaration of enforceable rights. Adjudication of such rights requires an assessment of fundamental social values that can only be carried out legitimately by the political branches of government, and the proper enforcement of socio-economic rights requires significant government resources that can only be adequately assessed and balanced by the legislature. Judges and courts, according to this argument, lack the political legitimacy and institutional competence to decide such matters.

Nevertheless, a steadily increasing number of countries have chosen to include socio-economic rights in their constitutions—with varying (and sometimes unclear) levels of enforcement.² At the core of such “social rights” are rights to adequate housing, health care, food, water, social security, and education.³ Each of these rights is enumerated in the 1996 South African Constitution.⁴ Moreover, most

2. Inclusion of piecemeal social rights, such as the right to education only, or of comprehensive but non-justiciable rights remains the norm. See 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). South Africa is exceptional for its comprehensive list of enumerated, enforceable social rights. See Eric C. Christiansen, *Survey of Socio-economic Rights in National Constitutions: Healthcare, Education, Social Security, Housing, Food and Water* (December 2005) (unpublished manuscript, on file with author); accord Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socio-Economic Rights*, 6 Law Democracy & Dev. 159 (2002), available at http://www.communitylawcentre.org.za/Projects/Socio-EconomicRights/research/socio-economic-rights_jurisprudence/evolving_jurisprudence.pdf.

3. There is no set list of which rights are properly defined as “socio-economic” rights. Rather than attempting to create a new orthodoxy regarding the contents of such a list, I am including those 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, and have as their evident purpose the improvement of society through an impact on individuals’ social welfare. Similarly, I use the terms “social” and “socio-economic” to describe the same collection of rights; I have avoided “red” rights, “second-generation” rights, and “positive” rights (except when explained in the text) as they are less helpful descriptors for the same rights.

4. S. Afr. Const. 1996. For the full text of these rights provisions, see *infra* Part II.B.3.b. Other 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

of them have been the subject of full judicial proceedings before the South African Constitutional Court.⁵ This makes the South African situation unparalleled in international constitutional jurisprudence. Although some other countries' constitutions enumerate socio-economic rights, few countries' courts have found such rights to be fully and directly justiciable, and even fewer have multiple, affirmative social rights opinions. No other country has developed their case law sufficiently to outline a comprehensive jurisprudence.

As a consequence, South Africa's role in the social rights adjudication debate is seen as revolutionary and heroic by proponents of justiciability and as irresponsible and doomed by its detractors. Now, as the first generation of justices leaves the Court,⁶ sufficient judgments exist to articulate a novel but coherent jurisprudence. What is revealed is a Court that has been both less revolutionary and less irresponsible than commentators expected (and continue to allege). This is because the Court's jurisprudence has incorporated the concerns of the jurists who argue that courts lack the legitimacy and competence to decide such matters, even

services and social services"), and 35 (detainees' rights to, *inter alia*, "adequate accommodation, nutrition, reading material and medical treatment").

5. The South African judicial system permits constitutional review of social rights (as with all rights) by lower courts (trial-level High Courts and the appellate-level Supreme Court of Appeal) as well. As a consequence, social rights rulings have also been issued by the High Courts (trial courts found in each province) and the Supreme Court of Appeal (an intermediate appellate court for constitutional issues and final review court for non-constitutional issues). I am not considering those judgments, except where noted, because the Constitutional Court has the capacity to review all such decisions and has altered the lower courts' orders and presented its own reasoning in each such case. *See* S. Afr. Const. 1996; *see also* discussion *infra* Part IV.B. Moreover, this paper seeks to elucidate and evaluate the comprehensive jurisprudence issuing from the Court rather than to merely poll the various, and sometimes divergent, rulings of all South African courts. For a review of these 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> (last visited Jan. 13, 2007) [hereinafter SERP's Case Reviews].

6. *See* Const. Ct. of S. Afr., <http://www.constitutionalcourt.org.za> (official website) (follow "Judges" hyperlink). Currently five of the eleven justices appointed in October 1994—Langa, Madala, Mokgoro, O'Regan, and Sachs—remain on the court. Newly appointed justices are appointed for non-renewable terms of 12 to 15 years depending on the age of the Justice at the time of appointment. S. Afr. Const. 1996, ch. 8, § 176.

while the Court is performing the affirmative review and remediation functions desired by the jurists who favor judicial enforcement of social rights. The Court maintains an affirmative social rights jurisprudence tempered by internalized justiciability concerns.

This paper begins with an examination of social rights in the South African constitutional drafting process. Following a review of the traditional arguments against the justiciability of socio-economic rights, it then examines the South African Constitutional Court cases addressing social rights, focusing on four primary cases: the antecedent case *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*⁷ and three substantive social rights cases, *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal*,⁸ *Government of Republic of South Africa v Irene Grootboom and Others*,⁹ and *Minister of Health v Treatment Action Campaign (No. 2) (TAC)*.¹⁰ This Article then constructs a South African jurisprudence related to socio-economic rights and highlights its distinctive characteristics. The final part of this paper demonstrates why the Court's jurisprudence is best understood as a viable, affirmative jurisprudence of social rights that is typified by a series of internal, self-imposed limitations shaped by the theoretical arguments against the justiciability of such rights.

II. SOCIO-ECONOMIC RIGHTS IN A POST-APARTHEID CONSTITUTION

Although the South African constitutional drafting process involved significant struggle, it ultimately achieved a goal considered impossible for decades: a relatively non-violent transition from

7. *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.) [hereinafter *In re: Certification of the South African Constitution*].

8. *Soobramoney*, *supra* note 1.

9. *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para. 2 (S. Afr.) [hereinafter *Grootboom*].

10. *Minister of Health v Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC) (S. Afr.) [hereinafter *TAC*]. There were four similarly titled cases in the South African Constitutional Court because of direct applications and interlocutory appeals. This citation is to the final judgment.

“racial autocracy to a non-racial democracy, by means of a negotiated transition, the progressive implementation of democracy, and respect for fundamental human rights.”¹¹ Because of unique elements of the drafting process, the Constitutional Court played a decisive role in assuring the success of the South African transition to democracy and in finalizing the Constitutional text. One fundamental disagreement that arose in the drafting process—a conflict eventually settled by the Court itself in its *Certification* opinion—involved whether or not socio-economic rights were permissibly included in the Constitution as justiciable rights enforceable by courts.¹²

A. Drafting a New Constitution for a Democratic South Africa

In December 1991, delegates of South Africa’s various political parties gathered at Johannesburg’s World Trade Centre for constitutional negotiations at a forum called the Convention for a Democratic South Africa (CODESA).¹³ Disagreement about the process for drafting the constitution formed an initial, core conflict between the dominant negotiating parties preceding any conversations about particular constitutional provisions. Was the purpose of CODESA merely to create a workable transition structure that would facilitate democratic elections and thereby enable a popularly elected body to draft the Constitution, or were the party-appointed CODESA delegates empowered to write the entire constitution? This question was about far more than democratic constitutive theory; the opposing positions represented the

11. Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. Int’l L. & Pol. 695, 695 (1996); accord African National Congress (ANC), Mzabalazo: A Brief History of the African National Congress, <http://www.anc.org.za/ancdocs/about/umzabalazo.html> (last visited Jan. 13, 2007).

12. *In re: Certification of the South African Constitution*, supra note 7, paras. 1–19, 76–78.

13. The total work of the CODESA (and its follow-up negotiations, the Multi-Party Negotiating Process) was carried out by five Working Groups. The bulk of the Bill of Rights determinations and the procedural details of the constitutional process—and the vast majority of the most divisive issues—came out of Working Group Two. Other Groups addressed different aspects of the transition to democracy. See Lourens du Plessis & Hugh Corder, *Understanding South Africa’s Transitional Bill of Rights 4–6* (1994).

fundamental strategic goals of the National Party (NP), representing the white-minority apartheid government, versus the African National Congress (ANC), the popular and newly unbanned anti-apartheid party. The ANC wanted the smallest possible mandate for CODESA so that the constitution would be drafted by a new, sure-to-be ANC-dominated popular legislature. The NP wanted CODESA to write an entire constitution that would protect the white minority through codification of individual and group rights, protection from prosecution for apartheid-era actions, and clauses preserving the economic status quo.¹⁴

The solution to this core, procedural conflict was a two-stage constitutional drafting process with a newly-formed constitutional court enforcing the parties' negotiated agreement.¹⁵ The first stage involved drafting a preliminary constitution (the 1993 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 1996 Constitution)¹⁶ 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 constitution¹⁷ and a constitutional court appointed under the Interim Constitution with the task of certifying that the final Constitution

14. See generally Allister Sparks, *Tomorrow is Another Country: The Inside Story of South Africa's Road to Change* (1995); Patti Waldmeir, *Anatomy of a Miracle* (1997) (both books providing general histories of the political transformation of South Africa at the end of the apartheid era).

15. The basic structure of this plan was originally proposed by Nelson Mandela one year prior to the start of CODESA, tacitly approved by President de Klerk at CODESA's inaugural session, and formalized over the course of CODESA. Waldmeir, *supra* note 14, at 194–95.

16. It is, of course, a bit of a misnomer to refer to the 1996 Constitution as the final constitution. The designation "final" refers not to its projected permanence but to its place at the end and as capstone of the transition from apartheid to multi-racial democracy. The Constitution has been amended twelve times since its completion in December 1996. Amendments are listed and noted in text on the website for the Constitutional Court of South Africa, <http://www.constitutionalcourt.org.za/site/theconstitution/thetext.htm> (last visited Jan. 13, 2007).

17. S. Afr. (Interim) Const. 1993, sched. 4.

did not violate any of the thoroughly negotiated Thirty-four Principles.¹⁸ The Thirty-four Principles guided—or obstructed, depending on one's perspective—the drafting process for the final Constitution and the resultant current form of government in South Africa.

Altogether, nearly two years passed between the start of formal constitutional negotiations at CODESA and the approval of the Interim Constitution and the Thirty-four Principles by the party delegates late in the evening on November 17, 1993.¹⁹ The provisions of the Interim Constitution, including establishment of the Constitutional Court, came into effect on the first day of South Africa's first multiracial elections, April 26, 1994.²⁰

The Constitutional Assembly, comprised of the 400 newly-elected members of the National Assembly and the ninety members of the Senate, began working on the text of the final Constitution in May 1994. Under the Interim Constitution, the constitutive body was given two years from its first post-election meeting to complete its task.²¹ The text of the proposed final Constitution was adopted by an overwhelming majority in both houses of Parliament—eighty of ninety Senators and 321 of 400 National Assembly members, significantly above the required two-thirds majority of the entire 490-member body.²² However, the final Constitution could not be signed by the President or come into force unless and until the

18. Albie Sachs, *South Africa's Unconstitutional Constitution*, 41 St. Louis U. L.J. 1249, 1255 (1997).

19. Du Plessis & Corder, *supra* note 13, at 2–17.

20. South Africa's democratic elections were held over several days beginning on April 26, 1994. Despite serious allegations of fraud and ballot tampering, the results (outside KwaZulu-Natal) conformed with expectations to a significant degree: the ANC received a strong but not overly dominant 62.7%, the NP received a disappointing 20.4%, the Zulu-nationalist Inkatha Freedom Party won the KwaZulu-Natal Province, and the extremist parties on both the left and right received only marginal percentages. Election '94 South Africa: The Campaign, Results and Future Prospects 187 (Andrew Reynolds et al. eds., 1994).

21. S. Afr. (Interim) Const. 1993, ch. 5, § 73.

22. 3 Debates of the Constitutional Assembly, Rep. of S. Afr. 447–50 (1996) [hereinafter *Debates of the Constitutional Assembly*]. Only one party, the African Christian Democratic Party, voted against the text (with two votes). The Freedom Front, a white right-wing party, abstained from the vote with 13 votes. *Id.*

Constitutional Court “certified” it, confirming there were no conflicts between the Thirty-four Principles and the draft final Constitution.²³

B. Socio-Economic Rights in the Drafting Process

1. Socio-Economic Apartheid

Inaugurated in 1948 by the Afrikaner-dominated National Party, apartheid, or “separateness,” developed into a comprehensive political philosophy and social policy that sought to formally separate the legally defined races in all areas of social, economic, and political life. Apartheid expanded upon earlier segregation policies by criminalizing a wide variety of human activities and denying the rights and harshly restricting the freedoms of all non-white South Africans. As they evolved and expanded throughout the 1960s and 1970s, apartheid laws impacted nearly every aspect of people’s lives, and apartheid definitions of race circumscribed their rights, opportunities, and relationships with others and the state. Apartheid dictated a policy of separation with only the merest pretence of equality, theoretically guided by the development needs of the “inferior races” but in fact effecting a tremendous socio-economic advantage for whites, especially Afrikaners.²⁴ The crushing impact of apartheid on non-whites had always been experienced in the social and economic elements of South Africans’ lives as well as the political.²⁵ As Kader Asmal, CODESA negotiator and member of the Constitutional Assembly for the ANC described it:

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. Our Bill of Rights therefore must reflect . . . the multidimensional and all-encompassing nature of the struggle for liberation.²⁶

Although precise information about the South African economy is either unavailable or unreliable for the waning years of

23. *In re: Certification of the South African Constitution*, *supra* note 7, paras. 1–19, 26–31.

24. See Frank Welsh, *A History of South Africa* 414–99 (2000).

25. See *The Post-Apartheid Constitutions: Perspective on South Africa's Basic Law* 408–09 (Penelope Andrews et al. eds., 2001).

26. 3 Debates of the Constitutional Assembly, *supra* note 22, at 122–23.

apartheid and the subsequent transition to democracy, it was unquestionably “among the world’s most unequal economies.”²⁷ And, the inequity closely traced apartheid’s racial divide: the standard of living for whites was nearly on par with residents of Norway or Sweden while black South Africans had a standard of living below that of residents of Ghana or Kenya.²⁸ This desperate socio-economic situation existed prior to and during the constitutional transition period and directly impacted the process.²⁹

2. Negotiating the Interim Constitution

Because political and socio-economic oppression were fundamentally intertwined throughout the anti-apartheid struggle, the ANC’s commitment to the transformation of the socio-economic

27. Julian May, Talking to the Finance Minister about Poverty: Pro-Poor Policy and the Political Economy of Information 10, paper prepared for the International Conference on Staying Poor, University of Manchester (April 7–9, 2003), *available at* <http://www.chronicpoverty.org/pdfs/2003conferencepapers/May.pdf> (citing the World Bank’s description of South Africa’s economic inequality).

28. *Id.* at 9 (based on United Nations Development Programme data from 2001). Statistics for all individual aspects of the South African economy track such discrepancies during the transitional period. While just one percent of whites fell below the national poverty line, over 60% of blacks did. *Id.* 65% of whites had completed secondary education compared to 24% of blacks—and 24% of blacks had no formal schooling (compared to one percent of whites) at the time of the transition. A.J. Christopher, *Atlas of Changing South Africa* 233 (2000).

Although President Thabo Mbeki reported, in his 2006 State of the Nation address, that there had been a 60% increase in real social expenditure per person between 1983 and 2003, the stark socio-economic legacy of apartheid will haunt South Africa for many decades more. See SouthAfrica.Info, *The Poor Must Also Benefit: Mbeki* (Feb. 6, 2006), http://www.southafrica.info/ess_info/sa_glance/social_delivery/stateofnation2006-social.htm (last visited Jan. 13, 2007).

Significant progress has been made but enormous improvement is still required to overcome the dramatic inequalities of apartheid. The housing situation illustrates the continuing challenge: even though 1.46 million subsidized houses were built in the decade prior to 2004, 36% of households still do not reside in formal housing. See Gov’t Comm’n and Info. Sys., Rep. of S. Afr., *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> [hereinafter *Toward 10 Years of Freedom*]. Similar statistics are available for other socio-economic indicators. *Id.*

29. Soobramoney, *supra* note 1, para. 8.

lives of South Africans can be traced back throughout its history; socio-economic equality was inextricably linked to political emancipation in the ANC's vision of a post-apartheid South Africa.³⁰ For the National Party, apartheid was a system of socio-economic benefits (not just political control) and their negotiating position sought to maintain the beneficial status quo through exclusion of justiciable socio-economic rights. These strongly opposed viewpoints regarding one of "the most contentious questions in the South African constitutional debate" typified the gulf to be bridged in crafting the post-apartheid constitution.³¹

a. The ANC Position

As a consequence of its history, the inclusion of social and economic rights in the new constitution was a near-requirement for the ANC. The party leadership and the general population saw no separation between the political and the socio-economic restrictions that were the overwhelmingly harsh reality of apartheid for most South Africans. As one ANC leader stated in the debates on the final 1996 Constitution, "Our people did not give their lives in exchange for the mere freedom to walk the streets . . . nor to suffer continued deprivation while the architects of the old rules live in splendor"³²

These principles took on a new formality and greater consequence with the drafting of the strongly socialist Freedom Charter.³³ The Freedom Charter, a statement of political principles

30. See Kader Asmal, The Bram Fischer Memorial Lecture for 2004 (July 9, 2004), <http://www.anc.org.za/ancdocs/speeches/2004/sp0709.html> (last visited Jan. 13, 2007) (Asmal, a leading ANC figure, discussing the background of the ANC's struggle against apartheid).

31. Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. Afr. J. on Hum. Rts. 464, 465 (1992).

32. Const. Assembl., Rep. of S. Afr., *The Constitutional Assembly: Annual Report 1996* (1996), available at http://www.polity.org.za/html/govdocs/constitution/ca/ANREPORT/Ca95_96.pdf (quoting Kader Asmal from open debate in Constitutional Assembly).

33. 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. 13, 2007) [hereinafter Freedom Charter]. It is controversial to describe the Freedom Charter as strongly socialist. Although the Charter declared that the "national wealth of our country . . . shall be restored to the people; [t]he mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole;

by South Africans opposed to apartheid, was popularly ratified at the Congress of the People in Kliptown, near Johannesburg, on June 26, 1955.³⁴ The Freedom Charter called for a multiracial, democratically elected government in South Africa with equal opportunities for all. 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 mothers and young children³⁵

Though not a formal ANC document, the Freedom Charter represented the guiding philosophical expression of the anti-apartheid movement generally, and the ANC specifically, over the ensuing decades. It was the precursor to some of the ANC's most important constitutional documents: the 1988 *Constitutional Guidelines for a Democratic South Africa*,³⁶ *Ready to Govern* in 1992,³⁷ and the draft Bills of Rights produced beginning in 1990.³⁸

[and] [a]ll other industry and trade shall be controlled to assist the wellbeing of the people," its socialist tendencies have, at various times or for different audiences, been exaggerated or downplayed.

34. The Congress of the People was composed of members of various anti-apartheid groups including the African National Congress, the South African Indian Congress, the South African Congress of Democrats, and the Coloured People's Congress. The Freedom Charter was later adopted independently by all four organizations. *Id.*

35. Freedom Charter, *supra* note 33; see also ANC, Africans' Claims in South Africa, Bill of Rights (1943), available at <http://www.anc.org.za/ancdocs/history/claims.html> (strongly urging "the establishment of free medical and health services for all sections of the population" and demanding "[r]ecognition of the sanctity or inviolability of the home as the right of every family . . . [and] the right of every child to free and compulsory education").

36. ANC, *Constitutional Guidelines for a Democratic South Africa* (1988), reprinted in 21 Colum. Hum. Rts. L. Rev. 235 (1989) [hereinafter *Constitutional Guidelines*].

37. ANC, *Ready to Govern: ANC policy guidelines for a democratic South Africa* adopted at the National Conference (1992), available at <http://www.anc.org.za/ancdocs/history/readyto.html> [hereinafter *Ready to Govern*].

38. ANC, *Building a United Nation: ANC Policy Proposals for Final*

The *Constitutional Guidelines for a Democratic South Africa* were drafted by the ANC Constitutional Committee and made public as the possibility of a negotiated end to apartheid, with an unbanned ANC playing a major role, began to seem promising. It was a pithy working document of ANC constitutional policy that directly referenced the Freedom Charter: "The Constitution shall include a Bill of Rights based on the Freedom Charter The state and all social institutions shall be under a constitutional duty to take active steps to eradicate, speedily, the economic and social inequalities produced by racial discrimination."³⁹

In 1992, the ANC produced *Ready to Govern*, which expounded their guidelines for the constitution to be drafted at CODESA.⁴⁰ Where the *Constitutional Guidelines* affirmed the ANC's commitment to the values of the Freedom Charter, *Ready to Govern* demonstrated a more mature application of those values to the larger project of constitution-making within the South African context. The more developed and sophisticated policies of *Ready to Govern* grew out of the years of intense domestic debate generally, and significant internal ANC discussions specifically. *Ready to Govern* identifies 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.⁴¹

Constitution (1995), available at <http://www.anc.org.za/ancdocs/policy/building.html> [hereinafter Building a United Nation].

39. Constitutional Guidelines, *supra* note 36, at 237.

40. Ready to Govern, *supra* note 37.

41. *Id.*

The subsequently proposed draft Bills of Rights adhered to these principles and were advanced by the ANC's negotiators for inclusion in the Interim Constitution.

b. The National Party / Government Position

For the ruling National Party, the traditional arguments against the justiciability of socio-economic rights and *realpolitik* arguments about the South African economy formed the core of their opposition to the inclusion of socio-economic rights. Claiming to represent economic realism in the face of populist pressures, the NP leader Frederik Willem de Klerk argued "only if economic security can be maintained together with political security will we have the stability which is necessary to build a new South Africa."⁴² But behind such assertions, what the NP truly feared was a dramatic change in the economic status quo.⁴³ Even more dramatically than it harmed all non-white South Africans, the system of apartheid had preserved socio-economic privilege for white South Africans, especially Afrikaners.⁴⁴ Rights that might alter the distribution of domestic wealth were a direct threat.

The NP's constitutional policies, expressed in its *Proposals for a Charter of Fundamental Rights*, advanced traditional libertarian doctrine in allowing only negative enforcement of rights against the state.⁴⁵ As proposed by the NP, the Constitution would only allow claims to restrict government action, and only when such action interfered with the rights of individuals. The Bill of Rights would not recognize any affirmative claims upon the state to care for its citizens or to provide social welfare benefits. The NP Bill of Rights would have precluded any significant challenges to the status quo and was thus in direct opposition to the transformational social philosophy of the ANC. Indeed, the NP proposals even conflicted with the quasi-governmental South African Law Commission, which

42. Robert Henderson, *De Klerk and "Law and Order" in South Africa*, Commentary No. 5 (Aug. 1990) (an unclassified publication of the Canadian Security Intelligence Service), available at <http://www.csis-scrs.gc.ca/en/publications/commentary/com05.asp>.

43. Du Plessis & Corder, *supra* note 13, at 32.

44. Welsh, *supra* note 24, at 463–99.

45. Du Plessis & Corder, *supra* note 13, at 32–33. It is, of course, a great irony that the most heavily interventionist of governments had an eleventh-hour conversion to "hands-off" government (on the eve of its loss of power).

proposed an approach to social rights based on "directive principles."⁴⁶ But even "directive principles," constitutional statements about budgeting priorities that are legally unenforceable,⁴⁷ went too far for the NP. Ultimately, the only social right the NP proposed in its draft Bill of Rights was a qualified right to primary education—and this was motivated by the NP's insistence on Afrikaans-based education rather than by concern for substantive equality.⁴⁸ If the NP had prevailed, the socio-economic legacy of apartheid would not have been addressed by the Constitution. Further, if the newly democratic government had attempted to remedy the economic legacy of apartheid, the Bill of Rights would have actually protected individuals against such government action.

c. Interim Constitution

The Interim Constitution was initially intended to be a mere framework document, sufficient for the period leading up to South Africa's first democratic elections and for governing the country during the drafting of the final Constitution, but otherwise limited.⁴⁹ An expansive list of civil and political rights but few social rights were included in the Interim Constitution.⁵⁰ Furthermore, social rights were not expressly mentioned in the Thirty-four Principles that would guide the drafting of the final Constitution.⁵¹ The Interim

46. *Id.* at 26–29.

47. *See, e.g.*, India Const. arts. 36–51 ["Directive Principles of State Policy"] (Article 37 states: "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."); Ir. Const., 1937, art. 45 ["Directive Principles of Social Policy"] ("The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas [Irish legislature]. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution."); and Namib. Const. arts. 95–101 ["Principles of State Policy"] (Article 101: "The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles.")

48. Du Plessis & Corder, *supra* note 13, at 32–33.

49. S. Afr. (Interim) Const. 1993.

50. *Id.* ch. 3.

51. *Id.* sched. 4.

Constitution guaranteed only the right to basic education⁵² and, for children, the rights to “security, basic nutrition and basic health and social services.”⁵³ It also stated that the “right freely to engage in economic activity and to pursue a livelihood” did not “preclude measures designed to promote the protection or the improvement of the quality of life . . . human development [and] social justice.”⁵⁴ In addition, the Interim Constitution required basic nutrition and medical care for prisoners.⁵⁵

In part, this dearth of social rights is attributable to the strength of the NP’s negotiating position in the initial stage of the constitutional drafting process. Also, as the negotiating parties neared the end of the period for completing the Interim Constitution, final settlement of several issues was simply postponed in order to get the document finished and to hold the long-delayed democratic elections.⁵⁶ Moreover, in order to speed its implementation, the ANC sacrificed some of the party’s goals for the Interim Constitution.⁵⁷ As a result, the divisive issue of socio-economic rights remained unsettled when the Constitutional Assembly gathered to draft the final Constitution.

52. *Id.* § 30(a).

53. *Id.* § 30(c).

54. *Id.* § 26.

55. *Id.* § 25(b).

56. 1 Debates of the Constitutional Assembly, *supra* note 22, at 80–81 (statement of Abdul Asmal, Member, ANC) (“[T]he controversial issues which we skirted . . . have to be looked at here . . . because we have to look at the issues that were not fully dealt with . . . [including] economic and social rights, because we cannot make promises of liberal and democratic rights without a full familiarity with economic and social rights . . .”).

57. Du Plessis & Corder, *supra* note 13, ch. 1; *see also* Hassen Ebrahim, *Soul of a Nation: Constitution-Making in South Africa* 165–72 (Oxford University Press 1998). Other niceties were sacrificed in finalizing the Interim Constitution, a document described by one drafter as “sloppy, untidy, unstructured, obscure in many places and without . . . stylistic coherence. . . . [I]t is like South Africa . . . large, unwieldy and uncontrollable” 1 Debates of the Constitutional Assembly, *supra* note 22, at 78 (statement of Abdul Asmal, Member, ANC).

3. Socio-Economic Rights in the Interim Constitutional Period

a. Socio-Economic Rights and the Constitutional Assembly

Political circumstances were very different during the drafting period for the final Constitution. The ANC was no longer just one of nineteen negotiating parties⁵⁸ or an inexperienced, recently-legalized political party. Following the elections, it became South Africa's dominant political force. The ANC received 62.7% of the popular vote in the first multiracial elections and Nelson Mandela was elected the President of the Republic of South Africa.⁵⁹ As a result of their sweeping electoral victory—the next most popular party in the elections (the NP) received only one-third as many votes—the ANC provided 312 members of the 490-member Constitutional Assembly that was to draft the final Constitution. Also, the ANC's primary negotiator of the provisions of the Interim Constitution, Cyril Ramaphosa, became Chairperson of the Constitutional Assembly, further strengthening the ANC's position.⁶⁰

In the debates, the party representatives addressed a variety of contentious issues, including the expansion and enforceability of socio-economic rights in the final Constitution.

Inclusion of social rights was expressly supported in floor debates by representatives of the ANC and the Pan African Congress, which together represented 317 out of 490 members in the Constitutional Assembly.⁶¹ However, much of the debate over

58. Du Plessis & Corder, *supra* note 13, at 4.

59. Election '94 South Africa: The Campaign, Results and Future Prospects 183 (Andrew Reynolds et al. eds., 1994).

60. Const. Assembl., Annual Report May 1994–May 1995, at 3 (1995), available at http://www.polity.org.za/html/govdocs/constitution/ca/ANREPORT/Ca94_95.pdf. General debates were held for the Constitutional Assembly as a whole but much of the detailed drafting was carried out by the nine Theme Committees, aided by ad hoc Technical Committees and led and managed by the Constitutional Committee. *Id.*

61. *Id.* The individual members and their party affiliation are identified at the opening of each Constitutional Assembly session. Debates of the Constitutional Assembly, *supra* note 22, at vi-xi.

inclusion of social rights did not make it to the formal floor debates of the entire assembly.

From the first session of the Assembly, the ANC signaled its commitment to socio-economic rights. In Cyril Ramaphosa's first address as Chairperson of the Assembly, he asserted that "the Constitution we draft must reinforce the aspirations of all our people" on socio-economic development matters.⁶² This statement reflected the culmination of ANC thought on the importance of the Bill of Rights generally and on the inclusion of social rights specifically. As expressed in the ANC's proposals for the final Constitution, entitled *Building a United Nation: ANC Policy Proposals for the Final Constitution*:

The Bill of Rights shall 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 shall commit the courts to take into account the need to reduce malnutrition, unemployment and homelessness when making any decisions.⁶³

In light of the novel nature of their potential inclusion, however, justiciable social rights were by no means a primary focus of discussion. ANC speakers merely affirmed their support for inclusion and briefly addressed the arguments against such rights, generally confident that opposition to their inclusion would be insufficient.⁶⁴

62. 1 Debates of the Constitutional Assembly, *supra* note 22, at 7.

63. *Building a United Nation*, *supra* note 38.

64. 1 Debates of the Constitutional Assembly, *supra* note 22, at 136–37 (statement of Brigitte Mabandla, Member, ANC) (reviewing arguments against inclusion during the drafting of the Interim Constitution); *Id.* at 152 (statement of Patricia De Lille, Member, Pan African Congress) (calling for greater social rights than are found in the Interim Constitution); *Id.* vol. 2, at 9 (statement of Thabo Mbeki, Member and future national President, ANC) (calling the inclusion of social rights "essential" on first day of open debate); *Id.* at 29 (statement of Richard Sizani, Member, Pan African Congress) (supporting a Bill of Rights that allows the state "to provide for the well-being of all members of our society. . ."); *Id.* at 36 (statement of Kader Asmal, Member, ANC) (saying that the Constitution "must guarantee the twin goals of a better life for all—because the right to life is meaningless without the right to a better life—and a dramatically transformed life for the poor.") (emphases added).

Nevertheless, some opposition was expressed in formal debates, most often and forcefully by the NP: "[S]o-called second generation rights—for example, rights to social benefits . . . should not be entrenched as rights against the State. The State could simply not afford the cost of them."⁶⁵ Additionally, some of the comments of assembly members, although not concerning social rights specifically, may have been targeted at the feared economic consequences of making such rights justiciable by courts.⁶⁶ The cost of such rights would threaten the economic viability of the state. With unacknowledged irony, the NP also claimed to oppose such rights because they could harm South Africa's "fragile" human rights culture that was "but 9 months old"—overlooking that the NP's own grossly unjust policies had given rise to that situation.⁶⁷ The NP's proposed compromise on this issue was to implement constitutional provisions that were merely socio-economic "directive principles" for the national and provincial governments (following the model of India⁶⁸) rather than enforceable rights, but this idea received little support in the Constitutional Assembly.⁶⁹

The Democratic Party stressed feasibility arguments in opposing inclusion of constitutional rights, stressing that legislative programs could provide "a better and more worthwhile life for all South Africans."⁷⁰ The Democratic Party also argued that a constitution could not endure over multiple generations if social rights were included, since such rights necessarily change over time. If such rights were fulfilled, they would no longer need to be included and if they were not fulfilled, they would become mere "paper promises," weakening the legitimacy of the Constitution itself.⁷¹

65. 2 Debates of the Constitutional Assembly, *supra* note 22, at 53 (statement of Ray Radue, Member, National Party).

66. *Id.* at 53.

67. *Id.*

68. See India Const. arts. 36–51 (containing the Directive Principles of State Policy).

69. 2 Debates of the Constitutional Assembly, *supra* note 22, at 53 (statement of Ray Radue, Member, National Party, Senate).

70. *Id.* at 67 (statement of Anthony Leon, Member, Democratic Party, National Assembly) ("No constitution, however good it is, however we embolden it and however permissive it is, can actually deliver a better life for South Africans.").

71. *Id.* at 68 (Anthony Leon, Member, Democratic Party).

The ANC and other proponents of inclusion of enforceable social rights were supported by the Constitutional Assembly's Public Participation Programme, an ambitious (and, by most standards, rather successful) public education and popular involvement program.⁷² The Public Participation Programme gathered more than two million submissions from citizens and domestic groups. These comments were transcribed, translated, and submitted to the relevant committees of the Constitutional Assembly for their consideration. Theme Committee Four, which reviewed Fundamental Rights as part of the drafting process, received numerous petitions and individual comments on social rights-related issues during its discussion of the final Constitution's Bill of Rights.⁷³ According to the Constitutional Assembly, "jobs, houses, the need to end crime and violence and better education" were the main issue of concern to South Africans.⁷⁴

In the end, opposition arguments based on economics, feasibility, or the possibility of changing values were not enough to threaten the dominant desire to "give real hope in legal form to those without hope."⁷⁵ Furthermore, as the two-year drafting period drew to an end, the debates of the full Constitutional Assembly narrowly focused on a limited set of more sharply divisive issues: minority education, provincial power, labor issues, and co-governance.⁷⁶ Inclusion of social rights seems to have been recognized as a foregone

72. Const. Assembl., Rep. of S. Afr., *The Public Participation Programme*, <http://web.archive.org/web/19991003165531/http://www.constitution.org.za/fct22115.html#PART> (last visited Jan. 13, 2007) (recognizing the "fundamental significance of a Constitution in the lives of citizens" and thus seeking to place public participation "at the centre of the Constitution-making process."); see also Ebrahim, *supra* note 57, at 239–50 (detailing the successes of the Public Participation Programme in engaging the public). Additional popular support for social rights was expressed at public hearings, through petitions, and via other informal processes. See Sandra Liebenberg, *The Interpretation of Socio-Economic Rights*, in 2 *Constitutional Law of South Africa* § 33.2(a), n.3 (Matthew Chaskalson et al. eds., 2d ed. 2004).

73. Liebenberg, *supra* note 72, § 33.2(a), n.3.

74. Const. Assembl., Rep. of S. Afr., *The Constitutional Assembly: Annual Report 1996*, at 78 (1996), available at http://www.polity.org.za/html/govdocs/constitution/ca/ANREPORT/Ca95_96.pdf (summarizing reports of an opinion poll about constitutional issues).

75. 2 Debates of the Constitutional Assembly, *supra* note 22, at 36 (ANC member Kader Asmal).

76. Ebrahim, *supra* note 57, at 200–08.

conclusion in this later, more democratic stage of the constitutional drafting process since it had such significant support by South Africa's general population and its largest political party.

b. Final Constitution

The ANC's long-standing support of a rights-based society and the popular need to address the socio-economic legacy of apartheid ultimately yielded a draft final Constitution inclusive of express constitutional rights to housing, food, water, social security, children's welfare, health care, and education, among other social rights. The relevant constitutional provisions are:

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.⁷⁷

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.⁷⁸

28 Children

- (1) Every child has the right—

77. S. Afr. Const. 1996, ch. 2, § 26.

78. *Id.* § 27.

....

(c) to basic nutrition, shelter, basic health care services and social services . . .⁷⁹

29 Education

(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.⁸⁰

It is important to note that the structure of the foregoing social rights provisions is different from traditional civil and political rights clauses. Almost all of the social rights sections have text that identifies judicially cognizable limitations on the scope of the right. For example, with respect to housing and health care, the state's positive obligations listed in subsection (1) are qualified by the language in subsection (2) about "available resources" and "progressive realization." These clauses temper the affirmative obligations of the state and add a level of required analysis for the reviewing court. These limitations are modeled after the language of the United Nations' International Covenant on Economic, Social, and Cultural Rights⁸¹ and are referred to as "internal limitations clauses" to distinguish them from the Section 36 general limitations clause in the Constitution.⁸²

79. *Id.* § 28.

80. *Id.* § 29.

81. International Covenant on Economic, Social and Cultural Rights, *opened for signature*, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR] ("Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."). *See* discussion *infra* Part III.A.1.

82. S. Afr. Const. 1996, ch. 2, § 36:

Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

Even though the Constitutional Assembly agreed on these socio-economic rights provisions, the Constitutional Court still needed to certify the provisions (in conjunction with the entire text of the proposed final Constitution) before they could come into force. In order to determine if the social rights provisions were compatible with the mandatory Thirty-four Principles of the negotiated Interim Constitution, the Court was required to evaluate, among other things, whether or not the proposed rights met the Interim Constitution's requirement of justiciability. Hence, the Constitutional Court had ultimate authority, exercised in its 1996 *In re: Certification of the South African Constitution* opinion, to decide whether or not the South African Constitution would include socio-economic rights.

III. OVERVIEW OF NON-JUSTICIABILITY ARGUMENTS

When the abstract question of the justiciability of social rights reached the Constitutional Court in July 1996, the issue had already been widely debated. Any court would have been aware of the traditional consensus that social rights were not justiciable. This was especially true of the newly appointed justices of the South African Constitutional Court, in light of their international

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- (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Like many constitutions, but notably not the United States Constitution, the South African Constitution has a general limitations clause that identifies criteria for examining whether a particular violation of an enumerated right is nevertheless acceptable under other, broader constitutional principles.

The relationship between the internal and the general limitations clause is an unsettled area of the Court's jurisprudence. See Johan de Waal, Iain Currie & Gerhard Erasmus, *The Bill of Rights Handbook* 451 (4th ed. 2001); Liebenberg, *supra* note 72, § 33.10; Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clause*, 20 S. Afr. J. on Hum. Rts. 448 (2004); see also *Jaftha v Schoeman and Others* 2005 (2) SA 140 (CC) paras. 31–33 (S. Afr.).

experience and broad exposure to human rights jurisprudence.⁸³ Additionally, the text of both the then-effective Interim Constitution and the proposed final Constitution required consideration of international law and encouraged review of comparable foreign law precedents.⁸⁴ For these reasons, it is helpful to review the relevant arguments against justiciability prior to discussing the South African Court's abstract approval of social rights in the *In re: Certification of the South African Constitution* opinion in order to better understand the milieu of its initial social rights jurisprudence.

A. Non-Justiciability Arguments

The arguments typically marshaled in opposition to judicial enforcement of socio-economic rights are manifold and confusing. In the most simplistic presentation of these arguments, the special nature of socio-economic rights and the institutional limitations of courts make adjudication of these rights impossible. To provide an overview of these arguments, this Article focuses first on the difficulties arising from the supposed differences between negative political rights and positive social rights. Many of the alleged distinctions between these two types of rights are historical and descriptive rather than inherent and normative. Second, this Article examines viewpoints opposing adjudication of such rights, that is, arguments about the legitimate and competent enforcement of social rights by judges and courts.

It is not the purpose of this Article to comprehensively challenge the customary arguments against the adjudication of social rights. Rather, it is necessary to identify those arguments which would have been most pressing on the minds of the South African Constitutional Court justices as they formulated their social rights jurisprudence. As will be shown, the arguments that were viewed as legitimate—even though not insurmountable—concerns by the Court are a much smaller subset of the larger population of abstract non-

83. Many of the justices, especially the ANC members, had joined foreign law faculties, human rights organizations, and NGOs, or had participated in meetings or international conferences related to apartheid and human rights. See Const. Ct. of S. Afr., <http://www.constitutionalcourt.org.za> (last visited Jan. 13, 2007) (follow "Judges" hyperlink) (providing biographies of current and former justices).

84. S. Afr. Const. 1996, ch. 2, § 39; S. Afr. (Interim) Const. 1993, ch. 3, § 35.

justiciability arguments. It is those “surviving” justiciability concerns that will be shown to have shaped the contours of the Court.

1. Fundamentally Different Fundamental Rights

The tension between civil and political rights and social and economic rights has a long history—a history that more often burdens rather than aids an understanding of their genuine differences. These differences were presumptively evidenced by the twentieth-century division of the rights in the Universal Declaration of Human Rights (UDHR)⁸⁵ into two distinct binding Covenants⁸⁶—the International Covenant on Civil and Political Rights (ICCPR)⁸⁷ and the International Covenant of Economic, Social and Cultural Rights (ICESCR).⁸⁸

This division is certainly neither an originally-intended nor a necessary separation. The post-war UDHR envisions and expressly identifies the inherent and necessary interrelationship of the two types of rights.⁸⁹ But in the years following the drafting of the UDHR, global politics (most importantly the rise of Cold War tensions) and the formation of the first-generation factions in the United Nations led to a division of the rights promoted in the UDHR into the two distinct Covenants.⁹⁰ Nevertheless, the indivisibility of social and political rights has been repeatedly affirmed by the international community. The 1993 Vienna Declaration reasserts the international law consensus:

85. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess. U.N. Doc. A/810 (1948) (hereinafter UDHR).

86. Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law Politics Morals* 245–48 (2d ed. 2000).

87. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The ICCPR was signed by South Africa on October 3, 1994 and ratified on December 10, 1998.

88. ICESCR, *supra* note 81. The ICESCR was signed by South Africa on October 3, 1994 and has not been ratified as of January 2007. The first few years of democracy in South Africa saw a flurry of treaty acceptance and ratification since the apartheid government had been a pariah state, but the pace has slackened in later years.

89. *Id.* South Africa, along with Saudi Arabia and the nations of the Soviet bloc, abstained from the vote on the UDHR at the time of its adoption.

90. Steiner & Alston, *supra* note 77, at 238; William Felice, *The Global New Deal: Economic and Social Human Rights in World Politics* 7–8 (2003).

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis [I]t is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁹¹

Although the initial distinction between ICCPR rights, so-called “negative rights,” and ICESCR rights, “positive rights,” grew out of post-war political tensions, in more recent decades the division has been presumed to reflect fundamental differences in the nature of the rights themselves. Traditional political rights such as freedom of expression, equal protection, and due process are considered negative rights because they only require that the state refrain from interfering in the individual’s exercise of the right; they are rights to be free from government interference. Socio-economic rights are identified as positive rights because they impose affirmative obligations upon the state to advance particular areas of social welfare. Under the dominant thinking that supports and encourages this separation, negative rights are justiciable because they involve discrete cases, they examine precise rights, and their remedies implicate only a cessation of action by government beyond the scope of judicial authority. Positive rights are merely (and necessarily) hortatory because they are vaguely worded, involve more complex issues, and would assign unacceptable positive obligations to government.

Because the manner in which most academics and practitioners discuss rights and rights adjudication has been fundamentally shaped by systems in which only traditional civil and political rights have been justiciable, it becomes difficult to distinguish between inherent characteristics of social rights and their socially-constructed limitations. In classic arguments against the justiciability of social rights, these distinctions, often presented as a set of inviolable maxims, are coupled with arguments about the political legitimacy and institutional competence of courts in order to reject judicial enforcement of social welfare rights.⁹² For these

91. Vienna Declaration and Programme of Action, June 25, 1993, U.N. Doc. A/CONF. 157/23, 1993, art. 5.

92. See Steiner & Alston, *supra* note 86, at 237–320; Philip Alston, *Economic and Social Rights*, in *Human Rights: An Agenda for the Next Century*

reasons, discussions about the justiciability of social rights are inherently difficult.⁹³

Increasingly, academics and commentators have recognized the invalidity of this positive-negative distinction.⁹⁴ A typical negative right (e.g., freedom of expression) is equally imprecise and gives rise to a comparable need for interpretation (e.g., what limits exist, is there differential treatment for political, commercial, religious, hate-based or pornographic speech, what is the interrelationship with other political rights, etc.) as much as a typical positive right (e.g., right to education). Paradoxically, the argument that social rights are less precise than political rights may primarily rest on their extremely limited history of adjudication.

Similarly, political rights can require assessment of significant factual or social phenomena. Consider, for example, the information reviewed to make a decision about the validity of voting procedures or disparate impact discrimination claims. And, even negative rights impose substantial affirmative obligations on states. After all, a voting rights decision can require expensive new procedures or materials or may vastly increase voter rolls, placing a huge financial burden on the state.

137 (Louis Henkin & John Lawrence Hargrove eds., 1994); Dennis Davis, *The Case against Inclusion of Socio-economic Demands in a Bill of Rights except as Directive Principles*, 8 S. Afr. J. on Hum. Rts. 475 (1992); Jackbeth K. Mapulanga-Hulston, *Examining the Justiciability of Economic, Social and Cultural Rights*, 6 Int'l J. Hum. Rts. 29 (2002).

93. This paper is not specifically concerned with general critiques of the incorporation of social rights into constitutional texts nor with challenges to the value of written Bills of Rights generally—both of which are frequently conflated with critiques of social rights justiciability. The starting point for this inquiry is a country that includes social rights in its written constitution. There are arguments against judicial review of social rights that are distinct from (or more compelling than) traditional majoritarian arguments against judicial review and I will reference those to the extent the South African situation reveals something about them, but I will avoid the well-trod territory of judicial review apologetics.

94. See Cecile Fabre, *Constitutionalising Social Rights*, 6 J. Pol. Phil. 263 (1998); Stephen Holmes & Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (1999); Cass Sunstein, *The Second Bill of Rights: Roosevelt's Unfinished Revolution and Why We Need It Now More than Ever* (2005); 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).

In these ways, an *a priori* distinction between negative and positive rights is inconsistent with a genuine understanding of the rights. This is not to assert that there are no differences between political and social rights. Indeed there are; even at an abstract level, social rights are more frequently related to social policy, a more volatile area of government policy for most nations. In theory, the social rights remedies imposed by a court could be overwhelming to a state, such as if a court were to require the government to provide universal employment, universal education through to the university level, free unlimited health care, etc. But this is the enforcement issue, not the justiciability issue. The nature of the rights themselves is not a legitimate basis for rejecting their justiciability. The South African Court has recognized this as well.⁹⁵ A valid rejection of social rights justiciability must rely on their inability to be properly or effectively adjudicated. Hence, the real area of concern is not the nature of the rights but what some commentators fear judges and courts will do with such rights.

2. Justiciability: The Legitimacy and Competence of Courts

An additional series of contemporary arguments against the justiciability of social rights can loosely be divided into concerns about political legitimacy and concerns about institutional competence.⁹⁶ These critiques are about judicial review *per se* rather than about socio-economic rights *per se*, as discussed in the previous section.

a. Legitimacy: Overreaching Courts?

Legitimacy arguments focus on the inappropriateness of assigning the task of interpreting social values to an unelected judiciary, and, most critically, of allowing judicial interference in the

95. *In re: Certification of the South African Constitution*, *supra* note 7, paras. 78–79.

96. The division presented here is reconfigured from several different schemes for classifying non-justiciability arguments. *See, e.g.*, Fabre, *supra* note 94, at 263; *see also* Mureinik, *supra* note 31, at 464; *see also* Davis, *supra* note 92, at 475 (all providing a helpful analysis of the variety of non-justiciability arguments).

allocation of state monies—a core legislative task. The primary concern is that crafting and assigning a remedy in a social rights case is too similar to the legislature's traditional role of deciding policy and creating and implementing programs. To view such rights as justiciable would necessarily and impermissibly intrude on the province of the legislative branch—most glaringly when a court overrides a legislative act regarding social welfare and asserts a different course of action for the state.

It may be that this argument would carry more weight in countries that have not expressly allocated such authority to the judiciary or where such rights are not enumerated in the nation's constitution; that is not the case in South Africa. Most legitimacy critiques are considerably less persuasive in the South African context because the Court is interpreting enumerated social rights in accordance with its broad institutional mandate from the Constitution.⁹⁷ The Constitutional Assembly explicitly assigned the task of interpreting social rights to the judiciary in the South African Constitution. Moreover, neither the Constitutional text nor the discussion of the Constitutional Assembly reveals or implies that social rights were to be enforced or interpreted in a manner different from the standard of traditional political rights.⁹⁸ The text of the social rights provisions echoes the language of political rights provisions and is placed in the Bill of Rights without distinction based on the kind of rights. Indeed, Section 7(2) requires the state to “respect, protect, promote and fulfill the rights in the Bill of Rights.”⁹⁹

Legitimacy concerns may also reflect a broad-based distrust of judicial review more than a specific concern about social rights adjudication. This distrust is not reflected in the South African Constitution's division of authority among branches of government. Indeed, this viewpoint overlooks the fact that while the Constitution includes the principle of separation of powers, the South African Constitutional Court is first among equals. The Constitutional Court

97. S. Afr. Const. 1996, ch. 2, §§ 8 (Application) and 39 (Interpretation of the Bill of Rights); *see also infra* Part IV.A.

98. The obvious exception here is the internal limitation clause (“within available resources” and “progressive realization”), which is a limitation in the text of the right itself rather than a limitation on the judicial role. *See* S. Afr. Const. 1996, ch. 2, § 36(2).

99. *Id.* § 7(2).

was given powers in the transition to democracy and still retains powers which evidence its role as a uniquely powerful institution—in contrast with other Constitutional courts and in comparison with other South African government entities.¹⁰⁰ In South Africa, the Constitution marked an explicitly moral break from the past and reflected a fundamental choice to form a state with certain social values—including social justice as a means of advancing substantive equality. The Court bears a more significant proportion of the responsibility for policing the newly-entrenched moral precommitments of the constitutional generation; such a distribution of power weakens the claims of judicial illegitimacy in this area. Given the Constitutional Court's unique mandate and express powers, legitimacy arguments are not a significant challenge to social rights justiciability in the South African context.

b. Competency: Appropriately Skilled Courts?

Institutional competence arguments focus on procedural limitations, a court's capacity to attain and assess extensive information, and problematic aspects of a court's potential remedies. These arguments tend to be interrelated and reinforcing. Specifically, the concerns are whether a court or judge has the institutional capability to appropriately adjudicate social rights when confronted with a single complainant or group (the "plaintiff problem"); to access and review all necessary specialized information (the "information problem"); and to adequately remedy any violation of the right in view of the limited scope of the problem before the court—especially when contrasted with the required universality of the solution (the "remedy problem").

According to these critiques, courts typically review specific controversies concerning individual claimants, a procedure that is inappropriate for social rights adjudication because limited deliberation and focused remedies cannot easily account for all similarly situated individuals. The deciding judge is exposed to a single snapshot (e.g., a particular homeless individual as a plaintiff) of the larger issue (inadequate housing) and has only the information presented by the parties upon which to adjudicate. This not only

100. *Id.* ch. 2, §§ 38 (Enforcement of Rights) and 39 (Interpretation of Bill of Rights), and ch. 8, §§ 165 (Judicial Authority) and 167 (Constitutional Court).

compromises the interpretation of the right but it reveals a further reason that this work is inappropriate for judges. An individual common law judge cannot possibly accrue the kind of institutional sophistication to make decisions of the scale required by social rights adjudication since she does not have access to the necessary information resources. Nor can a typical common law judge order (or fund) relevant factual inquiries as a legislature or the executive could. Presumably, either a court will provide a narrow, individualized remedy for the present party only, ignoring the host of absent but similarly situated persons, or it will evaluate all claims based on the limited (and possibly idiosyncratic) information from a single plaintiff.

c. The Plaintiff, Information, and Remedy Problems

Dividing the more general competency-based critiques of social rights adjudication into discrete components—the plaintiff, information, and remedy problems—allows a more thorough analysis of the arguments.¹⁰¹ More importantly, it allows one to identify those elements of the competency critique that are relevant in the South African context—and would therefore need to be addressed by the Constitutional Court as it crafts a social rights jurisprudence.

The plaintiff problem is partially addressed by the broad access provisions of the South African Constitution. Generally speaking, the jurisdiction of the Court is very broad and access to the Court is permissive, allowing discretionary access on appeal, required review for lower court judgments declaring a law unconstitutional, discretionary direct access to the Court, and even abstract review of laws prior to implementation by Parliament.¹⁰² Individuals, classes of complainants, associations, and “anyone acting

101. This division of issues is loosely based on a general discussion of the functional differences between legislatures and courts in David Shapiro, *Courts, Legislatures and Paternalism*, 74 Va. L. Rev. 519, 551–55 (1988).

102. S. Afr. Const. 1996, ch. 2, § 167; see Eric C. Christiansen, Essay: An Appropriately Activist Court: South African Constitutional Court Rights Jurisprudence, 1995–2001, at Part II (unpublished manuscript on file with the author) (discussing the procedural authority of the Court and its effect on the Court’s influence).

in the public interest" can bring a claim before the Court.¹⁰³ This lessens the potential severity of the problem because the Constitution allows all those concerned to join in the claim before the Court. But these broad access provisions only address part of the plaintiff problem because nothing compels all concerned parties, or organizations representing their interests, to join in a pending action. Valid concerns exist that an individual complainant or even a group of complainants will inadequately frame a larger social rights problem.¹⁰⁴ Unlike some of the legitimacy issues discussed previously, the plaintiff problem remains a valid concern that the Court would have recognized as a challenge to be addressed in the formulation of its jurisprudence.

The information problem highlights a fundamental difference between courts and legislatures. If a legislature wishes to implement a new social program, it has the capacity to engage in fact-finding and research and to requisition state funds to ensure those investigations happen. Courts traditionally work exclusively from the record before them and appellate courts work from the factual record of the trial court. As with the plaintiff problem, certain procedures and practices of the South African Constitutional Court partially address this concern. The Court routinely issues orders to the parties prior to the hearing, during the hearing, or even during post-hearing deliberations that invite one or both of the parties to make submissions of reports, studies, or other factual documentation for the justices to review. The broad discretion of the Court to order such filings is based on its constitutional mandate, and the Court has frequently used this practice to solicit additional information or to permit *amici* filings of interested parties.¹⁰⁵ This expands the Court's capacity to gather information even though it does not fully address the concern. It allows the Court to request any information it requires but does not ensure the quality of the information received, nor does it ensure that such investigations have actually happened or that the information is available to be presented to the Court. Ultimately, the Court must still evaluate whether or not the

103. S. Afr. Const. 1996, ch. 2, § 38 and ch. 8, § 172(2)(d).

104. In many ways, this difficulty is similar to the plaintiff problem encountered in class action lawsuits.

105. *Id.* ch 8, § 173 (the Constitutional Court has "inherent power to protect and regulate their own process . . . taking into account the interests of justice.").

information it receives is sufficient for its decision-making requirements. The information problem is also a concern the Court knew it would have to address as it developed its jurisprudence.

Like its procedures and rules regarding access, the remedial powers of the Constitutional Court are very broad—both in initial grant and in their interpretation by the Court itself.¹⁰⁶ The Court must strike down a provision it finds to be unconstitutional and it may make any “just and equitable” remedial order to the successful party.¹⁰⁷ As a consequence, the remedy problem, the third difficulty presented by the adjudication of socio-economic rights, remains significant. How does a court appropriately tailor a social rights remedy so as not to bankrupt the state? The constitutional text of most of the social rights provides guidance through the internal limitations clause (permitting “progressive realization” of the right and only requiring state action “within its available resources”¹⁰⁸), but the text fails to identify how the Court should evaluate the relative speed of realization or the true extent of available resources—a built-in constitutional limit on the remedies. The incapacity of courts to formulate just and appropriate remedies without usurping legislative authority over budgeting is a fundamental argument of justiciability opponents. This is an additional concern the Court knew it would have to address in formulating its jurisprudence.

106. *Id.* § 172 states:

(1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

107. *Id.* § 172.

108. *Id.* ch. 2, § 27(2).

3. Non-Justiciability Arguments Before the South African Constitutional Court

The South African Constitutional Court articulates a jurisprudence that must account not for the numerous historical critiques of social rights adjudication but rather for the limited number of critiques that remain once the Court has set aside the discredited descriptions of social rights and the concerns that are inapt under the specific South African constitutional model.

As discussed above, the traditional critiques start with concerns about social rights *per se*. These arguments are mostly misguided in their unsubstantiated distinctions between (positive) social rights and (negative) political rights. The strongest challenges highlight the novelty of enforcing such rights and the relative dearth of outside guidance with respect to their interpretation and application. Secondly, the justiciability critiques focus on judicial review *per se*—arguments based on the legitimacy and competence of courts. Here, some concerns are partially addressed by the expansive role granted to the Court by the South African Constitution: its generous access provisions, its broad discretion to solicit information, and its mandate to advance constitutional values. The strongest critiques, arguably the only valid critiques in light of the unique constitutional authority of the South African Constitutional Court, are: (1) the potentially insufficient number, diversity, or relevance of its plaintiffs; (2) the difficulty of gathering and considering the relevant factual information; and (3) the appropriateness of the remedial actions available to the Court, especially as related to the fiscal impact of decisions. It is these concerns—the plaintiff problem, the information problem, and the remedy problem—as well as the pure novelty of the adjudication of socio-economic rights that would have occupied the mind of a diligent justice embarking on a novel South African socio-economic rights jurisprudence. As we shall now examine, the manner in which the Court addresses these challenges shapes the jurisprudence of the South African Constitutional Court.

IV. SOCIO-ECONOMIC RIGHTS BEFORE THE CONSTITUTIONAL COURT

A. The Constitutional Court as an Institution

The South African Constitutional Court's socio-economic rights cases and the jurisprudence they embody must be understood in the context of the Court as a uniquely powerful institution with broad constitutional and moral authority to advance the human rights goals of the post-apartheid South Africa. At his retirement, the first President of the Court affirmed its unique role:

What the Constitution demands of [the Court's justices] is that a legal order be established that gives substance to its founding values—democracy, dignity, equality and freedom; a legal order consistent with the constitutional goal of improving the quality of life of all citizens, and freeing the potential of each person. The challenge facing us as a nation is to create such a society; the challenge facing the judiciary is to build a legal framework consistent with this goal.¹⁰⁹

The South African Constitutional Court commenced work in February 1995 without many of the infirmities that typify many new constitutional courts.¹¹⁰ First, there was no uncertainty about the Court's judicial review authority; it had a clear mandate for its duties in the Constitution. Moreover, South Africa did not lack a judicial culture or judicial structures as many new democracies do. It had an established infrastructure for enforcement and adjudication that is typically underdeveloped in fledgling democracies. Also, the Court had extensive political and popular support from its initiation.¹¹¹

109. Arthur Chaskalson, former Chief Justice of the Const. Ct. of S. Afr., Justice Chaskalson's Farewell Speech (June 2, 2005), <http://www.constitutionalcourt.org.za/site/farewell.htm> (last visited Jan. 13, 2007) [hereinafter Justice Chaskalson's Farewell Speech]. Chaskalson's title and role was changed from President of the Constitutional Court to Chief Justice of South Africa during his tenure on the Court.

110. Much of the information in this section draws upon Christiansen, *An Appropriately Activist Court*, *supra* note 102.

111. Although there was significant debate about the form of the Bill of Rights, formation of a constitutional court was a given in the constitutional drafting process, accepted by all of the negotiating parties at the initial constitutional negotiations, and unquestioned in the drafting of the final

As a consequence, the Court was not focused on establishing institutional legitimacy, rule of law, or judicial systems. It was expected to transform the judiciary that had functioned under the apartheid system for decades. The broad authority of the Constitutional Court allowed it to supervise the lower courts and to enforce the new constitutional values. Only a court with very extensive jurisdiction, liberal allowance of access, and broad remedial authority could oversee the reformation, or at least the functional obedience, of the judiciary.¹¹² Granting the Court these capacities reflected a conscious vesting of authority in the Constitutional Court.

Moreover, the power of the Court is only minimally restrained by external forces. As a new institution interpreting a new constitution in a new democracy, the Court is working from a clean slate. At present, it must reconcile its judgments with less than twelve years of precedents.¹¹³ Even the Court's required surveys of foreign and international law do little to constrain the outcome of its cases because of the non-binding and often malleable nature of

Constitution. See Albie Sachs, *A Bill of Rights for South Africa: Areas of Agreement and Disagreement*, 21 Colum. Hum. Rts. L. Rev. 13 (1989–1990); see also e-mail from Albie Sachs, Justice, Const. Ct. of S. Afr., to author (January 6, 2000) (on file with author).

112. Because there was no purge of the civil service or of the judiciary at the birth of the newly democratic South Africa in 1994, the judges filling the courts of South Africa—now empowered to enforce the country's progressive human rights provisions against a host of new laws issued from the first freely-elected, multiracial Parliament—were the judges appointed by and tutored in the apartheid law and parliamentary sovereignty of the previous regime. Broad jurisdiction allowed the Court to address counter-constitutional judgments in all courts whether their judges were reviewing the constitutionality of laws passed by national or provincial legislatures, reviewing executive or administrative action, or hearing appeals from a lower court. This allowed the Court to supervise the new guardians of the Constitution.

113. The Court heard its first case on April 5, 1995 and announced its first judgment on June 6, 1995. *State v Zuma* 1995 (2) SA 642 (CC) at 656 (S. Afr.); *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

foreign precedent.¹¹⁴ Political control over the Court is also extremely limited due to provisions to ensure judicial independence.¹¹⁵

The South African Constitutional Court is centrally involved in the ideological project of the “new South Africa.” As former Chief Justice Chaskalson described it, “[u]nder our Constitution the normative value system and the goal of transformation, are intertwined.”¹¹⁶ This ideology is focused on an image of South Africa as a reformed nation—not just a liberal democracy but a “human rights state”—which is in the process of rising to its great potential to transform itself and to be an example to other nations.¹¹⁷ The Court plays the role of chief architect of a “society based on democratic values, social justice and fundamental human rights.”¹¹⁸ And, with an eye on the international community, the Court’s work helps to build a “united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”¹¹⁹ In pursuit of this project, the Court has boldly advanced traditional political rights—reviewing controversial matters and issuing disfavored rulings related to the death penalty, same-sex marriage, and political amnesty for apartheid crimes, among other issues.¹²⁰ Furthermore,

114. S. Afr. Const. 1996, ch. 2, § 39(1) (when interpreting the Bill of Rights, the Court “must consider international law; and may consider foreign law”). Typically the Court reviews contrary holdings merely to differentiate them from South African circumstances and reviews consistent opinions only as support for its conclusions.

115. *Id.* § 177. (Judges serve non-renewable terms and can be removed only by a declaration by a politically independent commission in conjunction with a super-majority of the Assembly.) Judicial independence was also a frequently discussed issue in the constitutional debates. *See generally* Debates of the Constitutional Assembly, *supra* note 22 (reflecting how judicial independence was a recurring theme in presentations by members of various political parties).

116. Justice Chaskalson’s Farewell Speech, *supra* note 109.

117. S. Afr. Const. 1996, pmbl.

118. *Id.*

119. *Id.*

120. *State v Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.) (holding the death penalty unconstitutional); *National Coalition of Gay and Lesbian Equality (NCGLE) v Minister of Justice* 1999 (1) SA 6 (CC) (S. Afr.) (striking down apartheid-era sodomy laws); *Minister of Home Affairs and Another v Fourie* 2006(1) SA 524 (CC) (S. Afr.) (finding the restriction of civil marriage to heterosexuals to be unconstitutional); and *Azanian People’s Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) (S. Afr.) (upholding post-apartheid amnesty law under the Interim Constitution).

the Court has made full and frequent use of its broad remedial powers—overturning provincial and national laws, invalidating provincial constitutional provisions, “reading in” text to remedy constitutional violations, and postponing enforcement to require executive or legislative action.¹²¹

The development of South Africa’s case law related to socio-economic rights must be understood in the context of an authoritative, respected, and transformation-oriented court—a court that has expansively interpreted political rights and generously applied its remedial powers.

B. Socio-Economic Rights Cases Before the Constitutional Court

1. *In re*: Certification

The Court began hearing substantive cases (under the Interim Constitution) in February 1995. When the Constitutional Assembly finished the official draft of the final Constitution in late 1996, the Court had to adjudicate a singularly important case; it had to “certify” the proposed final Constitution by ensuring that none of its provisions conflicted with the Thirty-four Principles agreed upon by the ANC, the outgoing white minority government, and other political parties at CODESA.¹²² The Thirty-four Principles in the

121. See, e.g., *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para. 19 (S. Afr.) (The Court “may even have to fashion new remedies to secure the protection and enforcement” of the Constitution); *Fraser v Children’s Court, Pretoria North* 1997 (2) SA 261 (CC) (S. Afr.) (suspending enforcement of the court order striking down a portion of the state’s adoption laws to permit Parliament to amend the law without the adverse consequences that would result from an immediate declaration of invalidity); *National Coalition for Gay and Lesbian Equality (NCGLE) v Minister of Home Affairs* 2000 (2) SA 1 (CC) para. 86 (S. Afr.) (The Court “cured” the unconstitutional provision of the immigration law “by reading in, after the word ‘spouse,’ the following words: ‘or partner, in a permanent same-sex life partnership.’”).

122. 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 CA has attained [its] goal.” *Ex Parte Chairperson of the Constitutional Assembly: In re*

Interim Constitution specifically required or prohibited certain provisions in the final Constitution.¹²³ Since the draft included socio-economic rights, the Court had to adjudicate whether socio-economic rights could be properly included in the text of the 1996 Constitution before it considered its first substantive social rights claim.

The challenges to articles 26 (Housing), 27 (Health care, food, water, and social security) and 29 (Education) were based on Constitutional Principle II and Constitutional Principle VI of the Thirty-four Principles. Principle II required:

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this [Interim] Constitution.¹²⁴

And, Principle VI required: "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."¹²⁵ Groups filing arguments in opposition to the inclusion of social rights claimed that the rights violated Principles II and VI in light of the fact that the rights (1) were not "universally accepted fundamental rights," (2) were not justiciable, and, more generally, (3) violated the constitutional separation of powers by impermissibly intruding on the legislative arena.¹²⁶

With respect to Principle II, the Court had already held that "universally accepted fundamental rights" did not constitute the

Certification of the amended text of the Const. of the Rep. of S. Afr. 1996 (4) SA 97 (CC) para. 31 (S. Afr.). 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) para. 205 (S. Afr.).

123. S. Afr. (Interim) Const. 1993, sched. 4; see also *supra* Part II. A.

124. S. Afr. (Interim) Const. 1993, sched. 4, Principle II.

125. *Id.* Principle VI.

126. 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 7, paras. 76–78; Liebenberg, *supra* note 2, at *1, n.11. 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*, *supra* note 25.

ceiling for rights, but rather the floor, and that they could be supplemented by the Constitutional Assembly with "other rights not universally accepted."¹²⁷ It went on to address the other two issues, holding:

[W]e are of the view that [social] rights are, at least to some extent, justiciable . . . many of the civil and political rights entrenched in the [proposed constitutional text] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.¹²⁸

With respect to Principle VI, the Court held simply and with little analysis, "it cannot be said that by including socio-economic rights . . . a task is conferred upon the courts so different from that ordinarily conferred upon them . . . that it results in a breach of the separation of powers."¹²⁹

The threshold importance of the *Certification* judgment is that it permitted inclusion of socio-economic rights in the final text of the South African Constitution. Furthermore, the Court asserted some justiciability of such rights: "At the very minimum, socio-economic rights can be negatively protected from improper invasion."¹³⁰ The Court thereby declared a "floor" of minimum justiciability; it will not permit government interference with access to the social right in question nor discrimination in provision of such rights.

The questions that remained after the *Certification* opinion were many. While the justiciability question (*whether* such rights could be adjudicated) was answered, the enforceability question (*how* such rights would be adjudicated) remained. Two years later, the Court addressed the enforcement question in its first substantive social rights case.

127. *In re: Certification of the South African Constitution*, *supra* note 7, para. 76.

128. *Id.* para. 78.

129. *Id.* para. 77.

130. *Id.* para. 78.

2. Soobramoney

In 1997, the Constitutional Court decided its first substantive socio-economic rights case, *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal*.¹³¹ Mr. Soobramoney was a terminally-ill diabetic man in the final stages of chronic renal failure. Due to limited hospital resources, he was denied dialysis treatment that could have prolonged his life under a state medical policy that restricted dialysis availability to patients whose acute renal failure could be remedied through such treatment or to patients eligible for a kidney transplant. Mr. Soobramoney's kidney failure could not be remedied and he was ineligible for a transplant because of other health issues. The appellant wanted the Court to order the hospital to provide the treatment to extend his life. He relied on Section 27(3) of the Constitution, which states that "[n]o one may be refused emergency medical treatment,"¹³² and Section 11 of the Constitution, which states that "[e]veryone has the right to life,"¹³³ to claim that after significant time without the treatment, his now-imminent death created a medical emergency upon which his life depended.¹³⁴

The Court found that the right to "emergency medical treatment" could not extend to life-prolonging treatment for terminally ill patients. Not only did the ordinary meaning of the words argue against that interpretation, but the consequences of such an interpretation in the circumstance of limited resources would be a functional prioritization of health maintenance of the terminally ill over all other health needs. The Court found that the "context" of the right—usually examined by the Court to justify a generous interpretation¹³⁵—encouraged a narrow reading of this particular right. Additionally, the Court held that the right not to be refused emergency medical treatment was best understood in the context of

131. *Soobramoney*, *supra* note 1.

132. S Afr. Const. 1996, ch. 2, §27(3).

133. *Id.* §11.

134. *Soobramoney*, *supra* note 1, para. 7.

135. See, e.g., *State v Makwanyane* 1995 (3) SA 391 (CC) para. 10 (S. Afr.) (context "includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself, and, in particular, the provisions of [the Bill of Rights] of which [they are] part.").

the Section 27 right to health care rather than in conjunction with the right to life.¹³⁶

Although it was not argued by the appellants, the Court went on to consider whether the Section 27(1) right of access to health care services provided relief for this appellant.¹³⁷ The Court held that Section 27 rights must be read in the context of the state's limited resources as expressly stated in 27(2), the internal limitation clause: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right of access to healthcare]."¹³⁸ The provincial government offered evidence that it had to balance a great number of health priorities with a woefully inadequate budget. The Court concluded that "[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."¹³⁹ Upon examination of the actual medical and financial bases for the policy, the source and enforcement of the policy, and both the health services and general budgets of the KwaZulu-Natal province, the Court rejected Mr. Soobramoney's arguments and ruled for the Minister of Health.¹⁴⁰

The *Soobramoney* decision is important for several reasons. First, the duty of the state in relation to socio-economic rights was affirmed in clear terms.¹⁴¹ This is an important step beyond the mere abstract assertion of justiciability in the *Certification* opinion. The Court expressly finds that the state's affirmative obligation (in conjunction with the previously-asserted justiciability of social rights) yields judicially enforceable socio-economic rights.

Second, the Court identified a standard of qualified deference to the legislature. Reviewing the state health care policies at issue, the Court stressed the existence of established, public guidelines that conform to legitimate medical opinions. The Court implies that the analysis would be different where the guidelines are "unreasonable

136. *Soobramoney*, *supra* note 1, paras. 14–19.

137. *Id.* paras. 19–36.

138. S Afr. Const. 1996, ch. 2, § 27(2).

139. *Soobramoney*, *supra* note 1, para. 29.

140. *Id.* para. 36.

141. *Id.* ("The state has a constitutional duty to comply with the obligations imposed on it by s[ection] 27 of the Constitution.").

or . . . were not applied fairly and rationally.”¹⁴² The Court highlighted that the decisions taken in these circumstances were appropriately divided between politicians and non-political specialists (here, medical experts): “These choices involve difficult decisions to be taken at the *political* level in fixing the health budget, and at the *functional* level in deciding upon the priorities to be met.”¹⁴³ The relative apportionment of decision making between political and functional “levels” is not revealed in this case, and thus little guidance is available for future cases, because here the Court found a fair and rational policy.¹⁴⁴

Third, it is crucial to notice that the Court reviewed the actual evidence of the financial status of the hospital and the KwaZulu Province and confirmed that other practical solutions were considered.¹⁴⁵ This shows that the Court’s holding is deferential to economic limitations, but it is not deferential to the state’s mere assertions of economic limitations. Where reasonable resource limitations diminish the extent of a constitutional right, such limitations must be proven to the Court. The government cannot “toll the bell of lack of resources” and expect the Court to passively defer to the legislative judgment.¹⁴⁶

Fourth, the Court is very concerned with providing a solution for the larger societal problem represented by *Soobramoney*, and not merely solving the appellant’s problem. “If everyone in the same condition as the appellant were to be admitted the carefully tailored programme would collapse and no one would benefit”¹⁴⁷ In this way, the Court acknowledges and at least partially addresses the plaintiff’s problem, the single controversy-based objection to social rights adjudication. Realism and perspective will temper constitutional obligations.

Finally, the Court stressed the connection between the available resources and the extent of the right: “the obligations imposed on the State by [Sections] 26 and 27 in regard to access to

142. *Id.* para. 25.

143. *Id.* para. 29 (emphases added).

144. See discussion of “reasonableness” in *Grootboom* and *TAC* *infra* Part IV.B.3–4.

145. *Soobramoney*, *supra* note 1, paras. 25–28.

146. *Id.* para. 52 (Sachs, J., concurring).

147. *Id.* para. 26.

housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and . . . the corresponding rights themselves are limited by reason of the lack of resources."¹⁴⁸ The Court thus identifies two further aspects of socio-economic rights enforceability. The state bears the burden of proving its actions were reasonable in light of limited resources, rather than, as with political rights adjudication, proving an allowable limitation of the right according to the general limitations clause.¹⁴⁹ Additionally, this formulation means that the state's obligation is dynamic. It will change as circumstances change, and presumptively it will increase over time. Hence, the Court may revisit the reasonableness of static government programs. Even more importantly, to the extent that the scope of the right is delineated by the socio-economic right's internal limitations clause, the Court avoids some of the issues raised by the remedy problem. This is because the size of the remedy depends on the extent of the right, which is partially determined by the availability of resources.

It should also be noted that there were several ways in which *Soobramoney* was an easy first case for the Court. There was no principled way to provide a remedy for this appellant only, and ordering the requested remedy for all similarly-situated patients was a fiscal impossibility that even the judgment's critics recognized. Also, medical matters possess more verifiable evidence regarding cost and the impact of withholding versus providing rights-related treatment. Because relatively precise financial data was available to assess the costs of various options, a somewhat more objective

148. *Id.* para. 11.

149. S. Afr. Const. 1996, ch. 2, § 36 [Limitation of rights]:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

balancing of priorities was possible—at least in comparison to some other socio-economic rights. But after *Soobramoney*, many questions remained. And the death of Mr. Soobramoney two days after the judgment was announced fueled popular concerns that the Court was unwilling to enforce the Constitution's social rights.¹⁵⁰

3. Grootboom

Five years passed between *Soobramoney* and the Constitutional Court's next significant ruling related to a social right—years of very slow progress on economic fronts and increasing crime and violence for many impoverished South Africans. Economic opportunity was still in short supply and vast numbers of South Africans were living in desperate poverty. For those who hoped the Court would take an active role in the advancement of socio-economic opportunity and substantive equality, the Court's jurisprudence—other than the hopeful abstractions in the *Certification* opinion—had been disappointing. In fact, the Court itself acknowledged “the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream.”¹⁵¹

In 2001, the Court returned to the adjudication of socio-economic rights with the housing rights case *Government of Republic of South Africa v Irene Grootboom and Others*.¹⁵² The Court took several months to consider the claims (rather than two weeks as with *Soobramoney*). As a consequence, the Court, in a unanimous judgment, presented a much more detailed and thorough opinion than it had in the previous case.

The case reviewed the obligations of the state as a result of Section 26, Housing: “[e]veryone has the right to have access to adequate housing” and “[t]he state must take reasonable legislative and other measures, within its available resource, to achieve the progressive realisation of this right,”¹⁵³ and Section 28, Children:

150. Albie Sachs, *Social and Economic Rights: Can They be Made Justiciable?*, 53 SMU L. Rev. 1381, 1386 (2000) (“The public was angry with the Court—they felt it should have done something, anything, to save a life.”).

151. *Grootboom*, *supra* note 9, para. 2.

152. *Id.*

153. S. Afr. Const. 1996, ch. 2, §26.

"[e]very child has the right to . . . basic nutrition, shelter, basic health care services and social services" ¹⁵⁴

The facts that gave rise to the *Grootboom* dispute are no less disturbing for being one instance of a common failure of South Africa's housing infrastructure. Irene Grootboom became homeless when she was required to leave a squatter settlement on private land that had been selected for construction of state-sponsored low-income housing. She and the 510 children and 390 adults who joined her suit were then forcibly and inhumanely evicted from their new informal settlement, with their possessions burned and homes destroyed.¹⁵⁵ In *Grootboom*, national, provincial, and local government bodies were challenging an order from the Cape High Court,¹⁵⁶ which required the "appropriate government organ" to provide shelter for the plaintiff children and their parents until the parents could themselves provide shelter for their children.¹⁵⁷

The Constitutional Court conducted a very close reading of the constitutional text and analyzed the social context of its drafting. It recognized that housing was "a constitutional issue of fundamental importance to the development of South Africa's new constitutional order."¹⁵⁸ Yet, despite enormous efforts and notwithstanding significant advancements in the decade following the end of apartheid, adequate housing has remained unavailable to many South Africans.¹⁵⁹ The Court first identified the state's negative obligation, "to desist from preventing or impairing the right of access to adequate housing."¹⁶⁰ In discussing the positive obligations, the

154. *Id.* §28.

155. *Grootboom*, *supra* note 9, paras. 7–11.

156. In the South African judicial system, High Courts are courts of first instance. Although direct application to the Constitutional Court is allowed in the Constitution, most cases begin in the High Courts and are reviewed by the Supreme Court of Appeals prior to reaching the Constitutional Court.

157. The High Court had held that the relevant government bodies had met their constitutional duty under Section 26 (housing) but had failed to meet their duty under Section 28 (minimum services for children). The High Court held that the "spirit" of Section 28 required that the order "should take account of the need of the child to be accompanied by his or her parent" and thus a parent was to accompany the child in the shelter provided. *Grootboom*, *supra* note 9, paras. 14–16.

158. *Id.* para. 2.

159. *Toward 10 Years of Freedom*, *supra* note 28, at 1.

160. *Grootboom*, *supra* note 9, para. 34.

Court focused on three aspects of Section 26: it calls for legislative and other measures, it recognizes the limitations of available resources, and it permits progressive realization. The Court essentially conflates these three elements into a reasonableness analysis: "[T]he real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by [Section] 26 are reasonable."¹⁶¹ The Court requires a broad policy with particular attention paid to those who are most vulnerable and implementation that includes "all reasonable steps necessary to initiate and sustain"¹⁶² the program.

As described in *Grootboom*, reasonableness requires state authorities (at all levels) to "devise, fund, implement, and supervise" measures related to the right of access to housing.¹⁶³ The Court acknowledged that "a wide range of possible measures could be adopted by the State . . . [that] would meet the requirement of reasonableness."¹⁶⁴ Nevertheless, while praising much about the current housing policies of the government, the Court held that the current system unreasonably neglected to consider and address those in most dire need. The current program "fell short of constitutional compliance" because it failed to "devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing."¹⁶⁵ The Court issued a declaratory order requiring the state to remedy this failing and assigned the Human Rights Commission, an independent national body, to monitor and report on the status of the changes. Referencing a new housing plan proposed during the appeals process, the Court indicated that it, or a similar plan of the government's choosing, should be implemented "to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."¹⁶⁶

The Court's *Grootboom* opinion couples its specific application of the Constitution's social rights provisions with an analytical and abstract discussion of the adjudication of socio-

161. *Id.* para. 33.

162. *Id.* paras. 36, 67.

163. *Id.* para. 96.

164. *Id.* para. 41.

165. *Id.* para. 99.

166. *Id.* para. 99.

economic rights. The Court dispensed with the justiciability question early in its opinion: "The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case."¹⁶⁷ Determining the appropriate means of enforcement following *Grootboom* involves a case-by-case assessment. The Court looks at the constitutional provisions themselves, examines the context of the right—the "textual setting" within the Constitution as well as the "social and historical context"—and then applies what is learned to the specific circumstances of the case.¹⁶⁸ No order was issued to directly address the situation of the plaintiffs. Rather summarily, the Court states that neither of the rights in question "entitles the respondents to claim shelter or housing immediately upon demand."¹⁶⁹

By choosing this path, the Court unexpectedly rejects the enforcement of social rights through "minimum core" analysis. Minimum core analysis, used by the United Nations Committee on Economic, Social and Cultural Rights (UN Committee), 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"¹⁷⁰ by state parties to the ICESCR. The minimum core for a particular right is gleaned by the UN Committee after years of extensive review of country reports submitted by state signatories. Every effort must be made by the state to satisfy the identified minimum core obligation. Therefore, it defines a "floor" of socio-economic conditions. While the Court rejects this procedure as unavailable to it because it lacks the extensive information resources of the UN Committee, it agrees with one aspect of the UN Committee's inquiry: the necessity for a determination "having regard to the needs of the most vulnerable group that is entitled to protection of the right in question."¹⁷¹

While *Grootboom* is undoubtedly a victory for those favoring robust enforcement of socio-economic rights, the limits of that

167. *Id.* para. 20.

168. *Id.* para. 22.

169. *Id.* paras. 68, 95.

170. U.N. Off. of the High Comm'r for Hum. Rts. [UNHCHR], Comm. on Econ., Soc., and Cultural Rights [CESR], *General Comment 3: The Nature of States Parties Obligations*, § 10, U.N. Doc. E/1991/23 (Dec. 14, 1990).

171. *Grootboom*, *supra* note 9, para. 31.

enforcement remain unclear. The Court was certainly aware of the import of its judgment and its inevitable impact upon future socio-economic rights jurisprudence. The result was a “cautiously crafted opinion” that could represent the furthest extent of judicial enforceability or a tentative step toward a much more expansive jurisprudence.¹⁷² How far will the Court go in its enforcement of socio-economic rights? Subsequent cases have demonstrated the Court’s willingness to go further, but have not yet delineated the boundaries of the Court’s jurisprudence.

4. Treatment Action Campaign

In 2002, a group of non-governmental organizations, led by the advocacy group Treatment Action Campaign (TAC), challenged the government’s policies related to the prevention of mother-to-child HIV transmission.¹⁷³ A single dosage of the drug Nevirapine was known to dramatically decrease the likelihood that an HIV-positive mother would transmit the virus to her child during childbirth. The drug manufacturer had agreed to provide the drug to the government for free for a period of five years. The government had devised a program for distribution at a limited number of pilot sites (two in each of South Africa’s eleven provinces) but state doctors outside such sites were prohibited from administering the drug, even though it was already tested and approved for use in South Africa and other jurisdictions. Only ten percent of the estimated 70,000 annual affected births were covered by the approved sites. The government’s stated plan was to conduct a multi-year study prior to development of a national program.¹⁷⁴

The TAC claimed that the program violated the state’s constitutional obligation to “respect, protect, promote and fulfill the rights in the Bill of Rights,”¹⁷⁵ especially as such duty applied to the right of access to health care services for pregnant woman and

172. Geoff Budlender & Kgomoane Mathipe, Community Law Centre, Summary of Key Themes of the Colloquium, Realising Socio-Economic Rights in South Africa: Progress and Challenges (2002), http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/conferences/summary_of_key_themes_colloquium.pdf.

173. TAC, *supra* note 10.

174. *Id.* paras. 10–12, 19, 62.

175. S. Afr. Const. 1996, ch. 2, § 7.

children.¹⁷⁶ The TAC asked the Court to lift the prohibition on distribution of Nevirapine outside the pilot program and to issue an order requiring the government to immediately produce a more expansive national program for the prevention of such transmission. In its most far-reaching judgment to date, the Court granted both requests.¹⁷⁷

In a unanimous opinion, the Court referenced a great deal of information “from a variety of specialised perspectives, ranging from paediatrics, pharmacology and epidemiology to public health administration, economics and statistics.”¹⁷⁸ The Court then applied the reasonableness test from *Grootboom*.¹⁷⁹ It held that the government’s goals did not justify the heavy impact the program had on the ninety percent of poor pregnant women and their children for whom the treatment was functionally prohibited. The program’s inflexibility and its failure to account for the needs of a particularly vulnerable group made it unreasonable:

[The] Government policy was an inflexible one that denied mothers and their newborn children . . . [a] potentially lifesaving drug [I]t could have been administered within the available resources of the State without any known harm to mother or child [T]he policy of government . . . constitutes a breach of the State’s obligations under [Section] 27(2) read with [Section] 27(1)(a) of the Constitution.¹⁸⁰

176. *Id.* §§ 27 and 28:

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; . . .

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

28 Children

(1) Every child has the right . . .

(c) to basic nutrition, shelter, basic health care services and social services.

177. *TAC*, *supra* note 10, para. 135.

178. *Id.* para. 6.

179. *Grootboom*, *supra* note 9, paras. 42–44.

180. *TAC*, *supra* note 10, para. 80.

Additionally, the government's research goals did not justify an indefinite postponement of development of a comprehensive national program.¹⁸¹ The Court held that the government was "constitutionally obliged . . . to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country."¹⁸² The Court issued a number of mandatory orders. The government was required to remove the prohibitions on distribution of Nevirapine "without delay" and to facilitate its availability at sites outside the pilot sites so that the drug could be administered where medically indicated. The government was also required, as part of an immediate national program, to extend testing and counseling facilities related to mother-to-child transmission throughout the public health sector.¹⁸³

With its extensive remedy, the TAC judgment either draws closest to the nightmare scenario of judicial overreaching dreaded by opponents of justiciability or approaches the judicial realization of the constitutional text's transformative social values as favored by supporters. But even this ruling evidenced some judicial restraint. First, the Court rejected a request for ongoing judicial supervision of the government's HIV programs, despite a request for such a supervisory order from the complainants.¹⁸⁴ More notably, despite its extensive orders related to Nevirapine, the Court did not carry forward the lower court's order for the state to provide infant formula

181. *Id.* para. 122.

182. *Id.* para. 5.

183. *Id.* para. 135:

Government is ordered without delay to:

(a) Remove the restrictions that prevent Nevirapine from being made available . . . at public hospitals and clinics that are not research and training sites.

(b) Permit and facilitate the use of Nevirapine . . . at hospitals and clinics when . . . medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled.

(c) Make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites

184. But lower courts in South Africa have not been as hesitant to issue supervisory orders. *See Liebenberg, supra* note 72, § 33.12.

to poor mothers—which was, along with client counseling, the most expensive element of the lower court’s order.¹⁸⁵ Instead, the Court found that there was not “sufficient evidence to justify an order that formula feed must be made available by the government on request and without charge in every case.”¹⁸⁶ The clear implication of this finding, however, is that such an order is not beyond the scope of the Court’s authority; the Court was merely unable to obtain the necessary factual basis to make such an order in the context of this case.¹⁸⁷

5. Other Social Rights Cases Before the Court

The previously discussed substantive cases—*Soobramoney*, *Grootboom*, and *TAC*—represent the preponderance of the Court’s socio-economic rights jurisprudence to date. Nevertheless, there are additional cases related to social rights that also contribute to the development of the Court’s jurisprudence. Each of these other cases required the Court to analyze social rights outside the fairly uniform model presented by the three central cases.¹⁸⁸ Two of these cases are examined below. In *Jaftha v Schoeman*, the Court focused on enforcement of the negative rather than positive element of a social right,¹⁸⁹ and in *Khosa v Minister of Social Development* the Court evaluated the merits of a social rights claim in connection with other constitutional rights.¹⁹⁰

In *Jaftha*, the appellants were rendered homeless when their residences were sold to recover purchase money and housing debt fines owed to another private party.¹⁹¹ They claimed a violation of the negative aspects of the right to housing in Section 26. The positive aspect of the right, that the state “must take reasonable legislative

185. *TAC*, *supra* note 10, para. 48.

186. *Id.* para. 128.

187. *Id.* (“Whether it is desirable to use this substitute rather than breastfeeding raises complex issues, particularly when the mother concerned may not have easy access to clean water or the ability to adopt a bottle-feeding regimen because of her personal circumstances.”).

188. See SERP’s Case Reviews, *supra* note 5 (identifying and summarizing other socio-economic rights cases).

189. *Jaftha v Schoeman and Others* 2005 (2) SA 140 (CC) (S. Afr.).

190. *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC) (S. Afr.).

191. *Jaftha* 2005 (2) SA 140, paras. 3–5.

and other measures . . . to achieve . . . realization of" the right to housing, was not relevant because the appellants already had homes prior to their forced sale.¹⁹² As a consequence, this meant that the internal limitations clause was also irrelevant to the case, because the "within available resources" and "progressive realization" qualifications apply only to the government's affirmative duties to advance the right.¹⁹³

Writing for a unanimous Court, Justice Mokgoro affirmed the existence of the negative component to social rights and held:

It is not necessary in this case to delineate all the circumstances in which a measure will constitute a violation of the negative obligations imposed by the Constitution. However, . . . I conclude that, at the very least, any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1).¹⁹⁴

Although the internal limitations clause did not apply, the Court examined a limitation on the negative aspect of a social right under the general limitations clause, the standard for assessing limitations on a civil or political right.¹⁹⁵ The Court concluded that the lack of judicial oversight for the forced sale procedure made the action an unconstitutional violation of Section 26.¹⁹⁶

In *Khosa*, the appellants challenged government denial of social welfare grants to otherwise qualified children and elderly persons because they were permanent residents of South Africa rather than citizens.¹⁹⁷ The Court examined the case under Section 27's right to social security: "Everyone has the right to have access to . . . social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."¹⁹⁸ Because the Court held that use of the word "everyone" in the text of Section 27 differentiated it from provisions granting rights to "citizens," the restrictions on social security in *Khosa* were examined

192. See *id.* paras. 31–33.

193. *Id.*

194. *Id.* para. 34.

195. *Id.*

196. *Id.* paras. 52–55.

197. *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC) (S. Afr.).

198. S. Afr. Const. 1996, § 27.

in conjunction with the rights to equality, life, and dignity for everyone.¹⁹⁹

In reviewing the reasonableness of the limitation, the Court highlighted two issues: (1) that financially-based limitations were permitted because of the Section 27(2) internal limitation clause and (2) that other constitutional rights were clearly implicated in the government's plan. While acknowledging that the State "may be able to justify not paying benefits to everyone," the majority required that once a benefits program was initiated, "the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole."²⁰⁰ After considerable analysis of the purpose and effect of the right to social security,²⁰¹ the validity of differentiation based on citizenship,²⁰² and the actual financial claims made by the government,²⁰³ the Court determined that the restriction was unreasonable and violated the rights to both equality and social security. As a result, non-citizen permanent residents are now eligible for grants where similarly-situated citizens would also receive them.²⁰⁴

It is still too early to tell if the growing number of cases involving social rights, in addition to traditional civil and political rights or enforcement of the negative aspect of social rights, will impact the Court's jurisprudence significantly.²⁰⁵ Such adjudication, however, certainly complements the more direct advancement of social welfare in the primary cases discussed above and expands the reach of the Court's social rights jurisprudence.

199. *Khosa* 2004 (6) SA 505, paras. 40–41.

200. *Id.* para. 44.

201. *Id.* paras. 50–52.

202. *Id.* paras. 53–57.

203. *Id.* paras. 58–62.

204. *Id.* para. 98 (reading in the words "or permanent resident" following "citizens" in the relevant parts of the legislation).

205. See, e.g., *President of the Republic of S. Afr. v Modderklip Boerdery (Pty) Ltd.* 2005 (5) SA 3 (CC) (S. Afr.) (holding that a private landowner was owed compensation for occupation of his land once the government failed to enforce a legal eviction against 40,000 squatters; squatters permitted to remain until alternative sites made available); see also *Minister of Pub. Works and Others v Kyalami Ridge Envtl. Assn. and Others* 2001 (3) SA 1151 (CC) (S. Afr.) (rejecting procedural and property right challenges to the establishment of emergency housing site on government land).

C. An Affirmative Socio-Economic Jurisprudence

The South African Constitutional Court's burgeoning jurisprudence of socio-economic rights is presented in the cases discussed above. The Court addresses the justiciability question directly and delineates its method for addressing both the negative and positive elements of the express social rights into the South African Constitution. Synthesizing what the judgments evidence about the Court's social rights jurisprudence reveals much about how the Court will adjudicate and enforce socio-economic rights in future cases.

1. Justiciability

The question of justiciability is a settled point of law. As was said in *Grootboom*, "[socio-economic rights] are rights, and the Constitution obliges the State to give effect to them. This is an obligation that the Courts can, and in appropriate circumstances, must enforce."²⁰⁶ Ultimately, this issue was easy for the Court to resolve because social rights are enumerated in the text of the Constitution and because the Court had addressed the initial objections to the justiciability of such rights directly in the *Certification* opinion.

2. Negative Enforcement

As a consequence of the "easy" justiciability determination, the heft of the Court's innovative jurisprudence addresses the "how" of adjudication—enforcement—rather than the "if"—justiciability. The Court views each right as having negative and positive aspects.²⁰⁷ However, to date, only one case has formally identified a violation of the negative aspects of the right, what the *Grootboom* case called "a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right"²⁰⁸

206. *Grootboom*, *supra* note 9, para. 94.

207. *In re: Certification of the South African Constitution*, *supra* note 7, para. 78; *Grootboom*, *supra* note 9, paras. 34–38; *TAC*, *supra* note 10, para. 46.

208. *Grootboom*, *supra* note 9, para. 34.

Judicial review of the negative elements of social rights is not subject to the internal limitations clause, although it is subject to review against the Constitution's general limitations clause.²⁰⁹ This is because the "progressive realization" clause and the "within available resources" clause arise from and qualify the positive obligation to "take reasonable legislative and other measures."²¹⁰ The Court's analysis of the negative aspect is a more direct application of traditional South African rights analysis and will often be evaluated in conjunction with a violation of the right to equality or dignity.²¹¹

3. Positive Enforcement

The positive aspects of a right are also enforceable, but they give rise to complications that make them more difficult to enforce judicially. Also, it is the positive aspects of social rights that give rise to most of the traditional justiciability concerns. The most important of these considerations is the connection between the obligation of the state and the state's available resources. In the *Soobramoney* case, the dissent said that the "rights themselves are limited by reason of a lack of resources."²¹² However, the state may not merely assert a lack of available funding as a justification for doing nothing to advance a social right. The burden of evidencing resource limitations is borne by the state and the Court will actively analyze the state's proffered claims. Moreover, the "progressive realization" formulation means that the state's obligation is dynamic: it should increase over time. Hence, the Court maintains the option to revisit previously reviewed but static government programs.

4. Reasonableness

A lack of an affirmative response, or an allegedly inadequate response, to the positive obligation imposed on the government by the Constitution's social rights provisions will result in review by the Constitutional Court. The "obligations imposed on the state . . . are

209. *Jaftha v Schoeman and Others* 2005 (2) SA 140 (CC) paras. 31–33 (S. Afr.).

210. S. Afr. Const. 1996, ch. 2, §§ 26(2), 27(2), and 29(1)(b).

211. See, e.g., *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC) paras. 109, 112–113 (S. Afr.).

212. *Soobramoney*, *supra* note 1, para. 11 (Ngcobo, J., dissenting).

dependent upon the resources available for such purposes,"²¹³ but the fulfillment of such obligations will be examined with a reasonableness inquiry. For this reason, the heart of any adjudication of socio-economic rights is the assessment of the reasonableness of the government action or inaction when the right is viewed in context. The reasonableness standard, which generally encompasses the internal limitations clause, will guide the Courts's analysis and "must be determined on the facts of each case."²¹⁴ Some components of the reasonableness review are evident in the caselaw: is the legislative or other government action comprehensive and well-coordinated; was there appropriate division of political and expert authority in its formulation; can it facilitate realization of the right in question; is it balanced and flexible to the extent necessary; and does it include all significant segments of society and take into account those persons in the most dire need? In essence, the Court requires a broad policy-based program with particular attention paid to those who are most vulnerable and implementation that includes "all reasonable steps necessary to initiate and sustain" a successful program to advance the social right.²¹⁵

5. Remedies

The South African Constitutional Court has broad remedial powers to advance the interests of justice in its rulings. Hence, the remedy chosen and the manner in which the remedy is implemented are particularly important issues. Where the Court enforces a positive state obligation it may make use of declaratory, supervisory, or mandatory orders. The Constitutional Court has not yet made use of supervisory orders, which would provide for ongoing monitoring by the Court, even where not requested to do so. Furthermore, to date, all of its orders relate to the state's programs rather than to an individual's request for relief. Even when enforcing the negative aspect of the right, no individual relief has yet been granted in a socio-economic rights case. Moreover, details of remedial programs are, wherever possible, left to the appropriate governmental body to determine.

213. *Id.*

214. *Grootboom*, *supra* note 9, para. 92.

215. *Id.* para. 67.

D. The Incorporation of Justiciability Concerns

The Court's assessment and enforcement of social rights is a first in the field of constitutional jurisprudence. It has created a viable, comprehensive system of affirmative socio-economic rights adjudication. But analysis of the Court's judgments also evidences a series of limitations that do not arise from the Constitution itself and are not evident in the Court's political rights jurisprudence. These limits are carefully aligned with certain concerns of those who argue that social rights are non-justiciable. The Court that passed so casually over the critique of justiciability in its *Certification* opinion has created a jurisprudence that internalizes this critique through self-imposed limitations. But not all of the traditional critiques of the justiciability of socio-economic rights were legitimate concerns of the Court's first generation of justices as they formulated their affirmative social rights jurisprudence.²¹⁶ The three predominant, extant challenges to justiciability (after accounting for South Africa's particular history and constitution) are the plaintiff problem, the information problem, and the remedy problem.

1. Plaintiff Problem

The Court accommodates the plaintiff problem by focusing its adjudication on the characteristics of the government program rather than on the circumstances of the plaintiff. By focusing on the attributes of the program—its flexibility, impartiality, basis in justifiable policy or verifiable information, etc.—the evidence before the Court is not limited to a snapshot of conditions or the treatment of one individual. This focus addresses the concern that adjudication might apply only to one narrow population within an affected community. For example, adjudication that resulted in meeting the needs of the plaintiff Irene Grootboom only (or even of her and her 900 co-plaintiffs only) would still fail to address the larger issue of the government's obligations related to the right of access to housing.

The Court's approach helps to avoid piecemeal and serial litigation regarding similar circumstances and also allows the Court to request improvement of government programs even if there is no appropriate individual remedy. Moreover, applying a flexible

216. See discussion *supra* Part III.

reasonableness standard to government programs allows more judicial discretion to broadly investigate the failings of the program, even if particular faults are not directly related to the plaintiff.

Focusing on the government program rather than on the aggrieved party, however, raises the possibility that the Court will not provide justice to the individual before it. In the absence of individual remedies, the plaintiff must wait for reform of the government program before her needs are met, i.e., before her constitutional rights are realized. This is a troubling result of the jurisprudence in light of the South African Constitutional dispensation, which seeks to foster a culture of human rights. The best the Court has been able to do in this regard is to require that the government program address those in direst need. Arguably, the declaration of unconstitutionality in the housing program in *Grootboom*, because it failed to take into account those “who are living in intolerable conditions or crisis situations,” demonstrates that the Court is advancing the social justice concerns of the Constitution in its jurisprudence.²¹⁷ But this type of enforcement still causes problems for plaintiffs. Although its requirement to address the neediest of South Africans increases the chance of advancing social transformation to aid all persons similarly situated to the plaintiff, the Court’s accommodation of justiciability concerns—especially the plaintiff problem—has restricted its capacity to address the individual needs of the plaintiffs before it in court.

2. Information Problem

Occasionally, the Court seems acutely aware of justiciability critiques like the information problem. In *TAC*, it stated: “It should be borne in mind that in dealing with [social rights] matters the Courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary”²¹⁸ Despite this, the information problem is not as significant for the South African Constitutional Court as it might be for other courts. The Court has interpreted its control over its own procedures to permit it to request

217. *Grootboom*, *supra* note 9, para. 99; *see also TAC*, *supra* note 10, paras. 79–80 (presenting another example by highlighting the inadequacies of the previous program for Nevirapine distribution in that it impacted most heavily poor women and children).

218. *TAC*, *supra* note 10, para. 37.

additional information from one or both parties, to order counsel to prepare written arguments on issues of interest to the justices (but not initially covered in the pleadings), and to make submissions related to factual disputes or relevant policy decisions.²¹⁹

Nevertheless, only a portion of the information problem is remedied by broad authority to request additional information. Even where a court has substantial authority to require submissions, there are inevitably situations in which the necessary information is unavailable, indeterminate, or otherwise unhelpful. In such circumstances, the Court's discretion must control whether or not it is capable of making a sufficiently informed decision. As the Court said in *Khosa*, "[i]t would not, however, have been in the public interest in this case for this Court to have proceeded with the hearing without the information necessary for a proper determination of the case"²²⁰ For critics of social rights adjudication whose primary concerns are legitimacy-based, this is an additional source of consternation. But such critiques remain ill-suited to the South African situation. Certainly a Court entrusted with determination of the constitutionality of the Constitution itself (as enforcer of the negotiated agreement memorialized in the Interim Constitution) can be expected to appropriately determine whether it has sufficient information to adjudicate a particular issue that is properly before it. Indeed, in at least one circumstance the Court has drawn fairly narrow distinctions between issues for which the amount and quality of information is problematic and for which it is sufficient, i.e., its decision that sufficient studies did not yet exist regarding the formula feeding element of the lower court's order in the *TAC* case.²²¹

In addition to using its broad procedural authority to gather information or, where that is inadequate, its discretion to determine that it lacks the necessary information, the Court has addressed this justiciability challenge by placing the burden of proof upon the

219. A review of the (non-substantive) orders of the Constitutional Court demonstrates the breadth of Constitutional Court capacity of this kind.

220. *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC) para. 23 (S. Afr.).

221. See discussion *supra* Part IV.B.4; accord *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC) para. 23–25 (S. Afr.) ("This Court required further information to enable it to discharge its constitutional duty, and it was in the interests of justice that such information be placed before it.").

government when it claims a lack of available resources—one of the most challenging factual inquiries.²²² Placing the burden on the government addresses the information problem by requiring the state, the only party with that particular (and critical) information, to present it to the Court in order to justify its arguments.

3. Remedy Problem

Although a host of issues are usually highlighted by opponents of socio-economic rights justiciability, there is little doubt that the dominant concern is the impact and potential damage of judicial remedies imposed in social rights cases. Any judicial determination that intrudes upon a traditional legislative area, particularly if it has significant budget implications, highlights the remedy problem. In the extreme circumstance, such remedies are feared to be capable of bankrupting the State or severely disrupting implementation of more politically important or democratically popular programs. The secondary concern is that a court-created remedy will fail to consider the mechanics of enforcement: programmatic details, administrative requirements, and other components commonly devised by the legislative and executive branches of government. The Court itself has acknowledged the problem, saying that courts “are ill-suited to adjudicate upon issues where the Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts”²²³

At an initial level, the solution to the remedy problem lies with the discretion and restraint of the justices of the Constitutional Court. The Court’s capacity to issue “any order that is just and equitable” certainly allows it to promote remedies less than the full reach of the Court’s broad remedial authority. Consistent with this principle, the Court has addressed the remedy problem in at least three recognizable ways: by deferring to the legislature where no clear violation of a right has occurred, by assuming as little traditionally legislative authority as possible regarding remedial

222. See Liebenberg, *supra* note 72, § 33.9.

223. TAC, *supra* note 10, para. 38.

program specifics, and by rejecting any form of unqualified rights that might otherwise call for non-discretionary remedies.

a. Deference to the Legislature

Wherever it can, the Court affirms—perhaps sometimes disingenuously—the deference it shows to the legislative branch in line with the separation of powers: “A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.”²²⁴ Nevertheless, the Court will carefully review the characteristics of allegedly inadequate legislative programs. The professed deference is only for programs within the court-identified range of reasonableness. Similarly, the Court asserts that its remedies intrude as little as possible into other political branches’ territory. “Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets.”²²⁵ In this way the Court’s deference lessens, albeit minimally, the remedy problem and “the judicial, legislative and executive functions achieve appropriate constitutional balance.”²²⁶

b. Programmatic Design and Practicalities

For practical reasons and in order to be consistent with “the deference that courts should show to [policy] decisions taken by the executive,”²²⁷ the Court has attempted to formulate remedies that guide rather than dictate legislative action. Even in the *TAC* case, where it gave its most far-reaching order, the Court insisted that all available constitutionally consistent options be left open to the executive.²²⁸ Indeed, the Court asserts that a reasonableness inquiry is as far as it will go. “The precise contours and context of the measures to be adopted” are the responsibility of the legislature and executive.²²⁹ The Court identifies constitutional failings in a

224. *Grootboom*, *supra* note 9, para. 41.

225. *TAC*, *supra* note 10, para. 38.

226. *Id.*

227. *Id.* para. 22.

228. *Id.* para. 114.

229. *Grootboom*, *supra* note 9, para. 41.

challenged government program and orders a reformulation of it in accordance with the judgment, but the specific solutions must be designed and implemented by the legislature. Hence, the new programs are far more likely to be viable, congruent with other legislative initiatives, and consistent with civil service best practices.

c. The Problem with Absolute Rights

Unqualified or unlimited social rights are the greatest concern of those who argue against the justiciability of socio-economic rights. From a constitutive theory standpoint, inclusion of such a right is a radical statement by the drafters that the right represents a non-negotiable value and it is to be prioritized over all other state concerns (except other enforceable unqualified rights). In the South African Constitution, the right to basic education and the right of children to basic welfare ("basic nutrition, shelter, basic health care services and social services") are not restricted by an internal limitation clause as are all other social rights.²³⁰ Such rights are not subject to progressive realization or the limitations arising from inadequate state resources. Of course, unrestricted rights do not mean rights without any substantive limits; the scope of the right would still be defined by the Court. Rights claims that fall within the judicially determined substantive scope of an unqualified right, however, must be satisfied by the state. Even if interpreted at a minimum, unrestricted rights require *de facto* prioritization and involve the courts in their enforcement despite even valid concerns about legitimacy or judicial capacity. In the traditional critique, absolute social rights represent a lose-lose scenario for the judiciary. Either courts enforce the rights and give them an effective priority even against the wishes of the political branches, or the courts

230. S. Afr. Const. 1996, ch. 2, §§ 28 and 29. Section 28 (1) reads: "Every child has the right . . . (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services . . ." Section 29 (1) reads: "Everyone has the right . . . to a basic education, including adult basic education . . ."

Such rights are still subject to the Constitution's general limitations clause (§ 36), but the natural reading of § 36 in light of the text of these two rights would preclude limitations based on the grounds specifically excluded from only these two social rights. Furthermore, progressive realization and available resources are not common limitations upon any other rights in the Bill of Rights.

disregard the clear text and intent of the constitution, thereby weakening constitutionalism in the state.

Fear of this no-compromise scenario explains the Court's incongruous treatment of the unqualified Section 28 right to basic welfare for children in *Grootboom*.²³¹ If the Court interprets Section 28 in its textual context, as it requires with all rights, it should hold that the internal limitations clauses found in other rights do not apply. This presents the remedy problem at it starkest: even reasonable limitations on such a right, e.g., legitimate financial considerations, would be invalid. Provision for children's basic needs must then be met outside the normal democratic process for determining the allocation of state resources. This right, and all other unqualified constitutional rights, must receive priority in the use of state funds until the need is met. Rejecting this notion of unlimited pre-commitments, the Court ignores the obvious textual differences in order to accommodate remedy problem concerns.

Not only unqualified textual rights give rise to absolute rights. The International Covenant for Economic, Social and Cultural Rights Committee, the preeminent body for defining and evaluating social rights at an international level, assesses state signatory compliance with the rights provisions of the ICESCR through the analysis of "minimum core obligations." Minimum core obligations, as identified by the ICESCR Committee, identify and require a minimum acceptable standard for all persons related to each social right.²³² Minimum core rights analysis yields a low substantive threshold, but mandates it; like enumerated, unqualified rights, it removes certain expenses from the discretionary review of the legislature.

Reflecting the prevalence of the minimum core approach and the Court's obligation to analyze international law, petitioners in each South African social rights case have argued that the support

231. *Grootboom*, *supra* note 9. The Court has not yet had a case relying on the right to basic education.

232. U.N. Econ. & Soc. Council [ECOSOC], 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) ("[A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.").

they sought falls within classic minimum core rights analysis.²³³ The Court, however, rejects minimum core analysis, despite the predominance of such analysis in the work of the ICESCR Committee. Claiming that "even if it were appropriate to [identify a minimum core], it could not be done," because of the Court's inadequate information resources.²³⁴ While a minimum core is "possibly . . . relevant to reasonableness" it is "not . . . a self-standing right conferred on everyone."²³⁵ The Court's fear is that, with minimum core analysis, it would be involved in policy setting and resource allocation in all areas for which it found a minimum core obligation. By using the reasonableness standard instead of minimum core analysis, the Court is able to further evade the remedy problem.

The Court's refusal to acknowledge the unqualified rights for children despite the clear text of Section 28 and the history of the right, as well as the Court's decision not to employ minimum core analysis despite its prevalence in this field and despite a constitutional requirement to consider international law when interpreting rights, can best be explained as the Court's attempt to craft a jurisprudence that avoids the most threatening aspects of the remedy problem. Here, as with the plaintiff problem and the information problem, the Court navigates a jurisprudence that avoids the perceived pitfalls of social rights adjudication. The result is an affirmative jurisprudence, the contours of which are best explained by incorporation of the relevant justiciability critiques.

V. CONCLUSION

*It would be a hollow victory if the people had the right every five or so years to emerge from their forced-removal hovels . . . to go to the [polls], only thereafter to return to their inferior houses, inferior education and inferior jobs.*²³⁶

233. See Liebenberg, *supra* note 72, § 33.5(e) (providing a discussion about the Court's rejection of minimum core obligations analysis and a review of the critiques of that position).

234. *Grootboom*, *supra* note 9, para. 33.

235. *TAC*, *supra* note 10, para. 34.

236. Albie Sachs, *Towards a Bill of Rights in a Democratic South Africa*, 6 S. Afr. J. Hum. Rts. 1, 5 (1980).

The South African Constitutional Court's role in the debate about socio-economic rights justiciability has been described as heroic and revolutionary by one side and as irresponsible and doomed by the other. Neither side gets it quite right. The Court's jurisprudence is both more radical and less so than many commentators have argued. It is less radical, less a departure from the standard concerns regarding the justiciability of socio-economic rights, in that the jurisprudence incorporates the norms implicit in the theoretical critique of such adjudication. And yet, the jurisprudence is also more radical because, by demonstrating a viable model of social rights adjudication that incorporates the concerns of its detractors in a substantive manner, the South African jurisprudence more explicitly challenges their broadly held non-justiciability viewpoints.

This Article presents this dual view of the current South African Constitutional Court jurisprudence related to social rights. It also provides a framework for understanding future decisions of the Court as it either sustains these limitations in an expression of ongoing respect for theoretical justiciability concerns, or it diminishes its reliance on such limits as the Court grows more confident in its role as enforcer of the fundamentally transformative social values in the South African Constitution. Either way, an understanding of the Court's practical integration of theoretical justiciability concerns: (1) introduces a new means of evaluating social rights decision-making by courts;²³⁷ (2) illustrates a novel, coherent model for future drafters of constitutions to address justiciability concerns when incorporating enforceable rights; and (3) highlights a new means of comparing social rights drafting decisions and jurisprudence across countries and historical periods. In the process, it cannot help but honor the work of those persons—activists, drafters, justices, and others—who

237. The South African model may also provide an alternative means for enforcing the socio-economic rights in the ICESCR if progress is made on the proposed Optional Protocol related to individual complaints. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Hum. Rts., *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the [ICESCR] on its first session*, U.N. Doc. E/CN.4/2004/44 (Mar. 15, 2004); see Michael J. Dennis & David P. Stewart, *Justiciability Of Economic, Social, And Cultural Rights: Should There Be An International Complaints Mechanism To Adjudicate The Rights To Food, Water, Housing, And Health?*, 98 Am. J. Int'l L. 462 (2004).

made justiciable social rights a reality in South Africa and in international constitutional jurisprudence.