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Constitutionalizing Economic, Social, and Cultural Rights in the New Millenium

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CONSTITUTIONALIZING ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE NEW MILLENIUM

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With the emergence of recent democracies, scholars engaged in a polemic debate about whether economic, social, and cultural rights should be included in national constitutions. Because economic, social, and cultural rights appeared to require significant political decision-making directly related to resources and economic priorities, critics contended that they were non-justiciable; treating economic, social, and cultural rights as justiciable would infringe on the balance of power among government branches. This thesis argues that constitutional entrenchment of such rights is appropriate to their realization in the twenty-first century because other methods of recognition may not sufficiently address implementation problems. Furthermore, it argues such rights are justiciable, using recent South African jurisprudence to illustrate a pragmatic judicial approach that is sensitive to the balance of power criticism. Hence, constitutionalization of economic, social, and cultural rights is practically achievable in the twenty-first century; although judicially cognizable constitutionalization may take forms different from the South African experience.

Human beings suffer,
they torture one another,
they get hurt and get hard.
No poem or play or song
can fully right a wrong
inflicted and endured.

The innocent in gaols
beat on their bars together.
A hunger-striker's father
stands in the graveyard dumb.
The police widow in veils
faints at the funeral home

History says, Don't hope
on this side of the grave.
But then, once in a lifetime
the longed for tidal wave
of justice can rise up,
and hope and history rhyme.

So hope for a great sea-change
on the far side of revenge.
Believe that a further shore
is reachable from here.
Believe in miracles
and cures and healing wells . . . .

– Seamus Heaney, The Cure at Troy (excerpt)

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I. Introduction

With the adoption of the 1948 Universal Declaration of Human Rights, the United Nations formally recognized the importance of a broad spectrum of human rights. Not only did the document include "traditional" civil and political rights, it also contained economic, social, and cultural rights.[1] These newly recognized rights[2] had their roots in the Socialist thought of the nineteenth and early twentieth centuries[3] and the social reform policies of the New Deal.[4] Yet since the Universal Declaration's unanimous adoption over sixty years ago, economic, social, and cultural rights[5] have not enjoyed the

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[1] Universal Declaration of Human Rights (10 Dec. 1948) U.N. Doc. A/810.

[2] Economic, social, and cultural human rights (as recognized in the Universal Declaration) include the right to social security (in accordance with the organization and resources of the nation-state), the right to work, the right to rest and leisure, the right to an adequate standard of living, the right to education, and the right to participate in the cultural life of the community, among others. Universal Declaration of Human Rights, Articles 22–26.

[3] University of Minnesota Human Rights Resource Center, "Circle of Rights: Economic, Social, and Cultural Rights Activism: An Historical Perspective on ESC Rights," 8 Nov. 2010 <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module2.htm>.

[4] *See* Franklin D. Roosevelt, "The Four Freedoms," Franklin D. Roosevelt's Address to Congress, 6 Jan. 1941 <http://www.wwnorton.com/college/history/ralph/workbook/ralprs36b.htm>.

[5] These rights have also been discussed using several terminologies. International legal treaties and organizations divide human rights between civil and political rights and economic, social, and cultural rights. In addition, Karel Vasak described rights in historical terms, introducing three "generations" of human rights. According to Vasak, the first generation of rights includes "negative" rights "in the sense that their respect requires that the state do nothing to interfere with individual liberties, and they correspond roughly to the civil and political rights." Karel Vasak, "A 30-year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights," Unesco Courier 30.10 (1977): 29. The second generation of rights required "positive action by the state to be implemented, as is the case with most social, economic and cultural rights." Jackson v. Joliet, 715 F.2d 1200, 1203 (7th Cir. Ill. 1983). The third generation of rights, which Vasak called "rights of solidarity," include the right to a healthy environment and the right to peace. Jackson, 1203. These rights are sometimes discussed as liberty rights (civil and political rights) and claim rights (economic, social, and cultural rights). They are also divided by their "negative" or "positive" characteristics. *See also* Alan Gerwirth, The Community of Rights (Chicago: University of Chicago Press, 1996), 33-38. In any event, I shall refer to them by the legal instrument title (economic, social, and cultural rights) for the duration of the paper; although cited authors may refer to them using different terminology.

success or legitimacy of civil and political rights. They have suffered in terms of global attention, advocacy, and practical implementation.

Although nation-states have recognized economic, social, and cultural principles as human rights in international legal documents, western democracies have been reluctant to institutionalize methods for progressively achieving and monitoring those rights. In this thesis, I focus on the practical implementation of economic, social, and cultural rights, and I argue that such principles can be recognized as justiciable rights in national constitutions.[6] To understand the modern rights framework, I first analyze why the realization of economic, social, and cultural rights is justified, including a brief overview of the historical and philosophical role of rights. Second, I argue that other types of recognition inadequately address implementation problems, and constitutional recognition provides unique advantages not present in other alternatives. Third, I address a significant objection to the constitutionalization of economic, social, and cultural rights—whether such rights can be justiciable.

Justiciability concerns—concerns about whether such rights can have adequate and appropriate remedies—are probably the greatest barrier to the practical implementation of economic, social, and cultural rights. A study of recent South African jurisprudence (specifically, the cases of the Government of the Republic of South Africa v. Grootboom[7] and Minister of Health v. Treatment Action Campaign[8]), however, provides a preliminary model for other countries to follow. By analyzing this approach, I argue that such rights can be practically achievable through constitutionalization.

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[6] Throughout the thesis, I use "constitution" to refer to both constitutions and (stand-alone) national bills of rights.

[7] Gov. of the Republic of S. Afr. v. Grootboom 2001 (1) SA 46 (CC).

[8] Minister of Health v. Treatment Action Campaign, 2002 (5) SA 721 (CC).

Specifically, the new South African Constitution protects several economic, social, and cultural rights; and its Constitutional Court has been willing to provide citizens with limited redressability. Under its approach, rather than asking if the right, itself, was violated, the South African Constitutional Court evaluates whether government action was reasonable in relation to the right at issue. This approach maintains the balance of powers within government, and it also provides practical value to economic, social, and cultural rights for individual citizens by giving them a means of redressability.

Because the South African example demonstrates that justiciably cognizable constitutionalization of economic, social, and cultural rights is feasible, it provides other nations with a preliminary model to follow in crafting the best practical method of implementing these rights, thereby providing citizens with a means of redress at the domestic level and directing governments to prioritize these fundamental principles.

Lastly, I note that the South African example is not the only possibility. Rather, scholars should continue to consider new options and evaluate alternative constitutionalization schemes for progressively achieving these rights in the twenty-first century.

II. Theoretical Background

The position that economic, social, and cultural rights should be constitutionalized rests upon the contention that practical implementation of economic, social, and cultural rights principles is justified. From a purely practical standpoint, 160 nation-states are parties (i.e. domestic ratification has been completed in those countries) to the 1966

International Covenant on Economic, Social, and Cultural Rights (ICESCR).[9] Unlike the Universal Declaration, which is an aspirational document, ICESCR is a binding multilateral treaty under which states assume specific obligations, including the "progressive[e] . . . realization of the rights recognized in the present Covenant by all appropriate means."[10] Hence, each of those 160 nation-states has legally committed itself to the realization of economic, social, and cultural principles enshrined in ICESCR, and another 69 countries which have signed the treaty, but not yet domestically ratified it, have signaled their political support of its principles. From this standpoint, parties to ICESCR have a legal obligation to pursue practical implementation methods of these principles; from a legal perspective, states have a compelling reason to pursue practical implementation of economic, social, and cultural rights.

Outside of international legal concerns, the nature of human rights can help shed light on why economic, social, and cultural principles are moral imperatives; and therefore, why they should be protected in national constitutions—which enshrine some of the deepest values of societies. Today, rights are generally understood as theoretical constructs that confer entitlements to right-holders and duties to the corresponding duty-bearers.[11] Duties may include obligations of non-interference (such as in the case of some civil and political rights), positive burdens to adequately provide certain basic human entitlements (such as in the case of some economic, social, and cultural rights), or

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[9] United Nations, "Chapter IV: Human Rights" 29 Nov. 2010, United Nations Treaty Collection, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en>.
[10] International Covenant on Economic, Social and Cultural Rights Preamble (3 Jan. 1976), 993 U.N.T.S. 3.
[11] Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, ed. Walter Cook (New Haven: Yale University Press, 1919) 38.

both. Human rights are properly considered a subset of rights, which grant particular entitlements to all humans based upon their humanity.

As Louis Henkin has observed, "international human rights are not the work of philosophers, but of politicians and citizens, and philosophers have only begun to try to build conceptual justifications for them."[12] Nevertheless, rights conceptions can help explain why such rights are moral imperatives.

In the 16th century, the Protestant Reformation swept Europe, creating Protestant denominations, separate from the Roman Catholic Church. The Roman Catholic Church's schism allowed Europeans to exercise a measure of religious choice, and the division eventually helped to secularize Europe.[13] In its 17th century aftermath, Europe was forced to reconcile a newly pluralistic religious society. The fall of the Roman Catholic Church's religious monopoly and corresponding political power gave rise to new political concepts such as the "divine right of kings."[14] Recognizing problems posed by religious diversity, philosophers such as Thomas Hobbes and John Locke began to conceptualize new political theories on the limits of state power framed in terms of "rights."[15] Since then, rights have been understood as particular political demands against the state which mediate the relationship between the collective and the individual

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[12] Philip Harvey, "Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously," Columbia Human Rights Law Review 33 (2002): 390–401, 390.
[13] Steven Kreis, "Lecture 3: The Protestant Reformation," The History Guide: Lectures on Early Modern European History. 19 Dec. 2010 <http://www.historyguide.org/earlymod/lecture3c.html>.
[14] Richard Hooker, "Divine Right of Kings," The European Enlightenment Glossary. 19 Dec. 2010 < http://www.wsu.edu/~dee/GLOSSARY/DIVRIGHT.HTM>.
[15] Thomas Hobbes, "Leviathan," The English Works of Thomas Hobbes (London: John Bohn, 1839); John Locke, "The Second Treatise of Government," The Philosophy of Human Rights (St. Paul: Paragon, 2001) 72.

(either alone or as part of a distinct—usually minority—group).[16] As such, these foundational rights recognized by a society express a society's core beliefs and values regarding the relationship between the individual and the state.[17]

As one of the 17th century's central thinkers, John Locke introduced a theory of natural rights. He appealed to an "omnipotent and infinitely wise Maker"[18] as the creator "of natural equality."[19] For Locke, humans are born into a pre-political "state of nature," where each individual enjoys "perfect freedom."[20] Individuals in this state are limited only by the "law of Nature" which treats all humans as equal and independent.[21] The law of Nature prescribes that no individual can harm the life, health, liberty, and possessions of any other individual,[22] thereby giving individuals certain inalienable natural rights.[23] This law is equally accessible to individuals because it only can be discovered through reason, endowed to all humans.[24] Because of disorder in the state of nature, humans form a social contract consenting to transfer their rights to governments to mutually protect their life, liberty, and property.[25] Yet this transfer of power to the government is not

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[16] Jeanne M. Woods, "Rights as Slogans: A Theory of Human Rights Based on African Humanism," National Black Law Journal 17 (2002–2004): 52–66, 52.
[17] Woods, 52.
[18] Locke, 72–73.
[19] Andrew Reeve, "John Locke," Oxford Concise Dictionary of Politics, eds. Iain McLean and Alistair McMillan, 3rd ed. (New York: Oxford University Press, 2009) 316.
[20] Locke, 72.
[21] Locke, 72–73.
[22] Locke, 72–73.
[23] Constitutional Rights Foundation, "Natural Rights," Constitutional Rights Foundation 19 Dec. 2010 <http://www.crf-usa.org/foundations-of-our-constitution/natural-rights.html>.
[24] "Locke's Political Philosophy," Stanford Encyclopedia of Philosophy 29 July 2010 <http://plato.stanford.edu/entries/locke-political/>.
[25] Locke, 75.

absolute; it is recognized as valid only as long as the government uses the power to protect individual, natural rights.[26]

Locke used the idea of natural rights to express "the idea that there were certain moral truths that applied to all people, regardless of the particular place where they lived or the agreements they had made."[27] This approach embraced pluralism by requiring the state to recognize liberty of conscience, including religious tolerance.[28] Inherent in this approach is a commitment to liberty through freedom of conscience.

In the 18th century during the Scottish Enlightenment, thinkers such as David Hume took a more optimistic view of human nature. Hume embraced a natural "moral sense" or "sentiment" which was "more properly felt than judg'd" as the core of morality.[29] As the Enlightenment spread across Europe to America, humanitarianism would become one of its trademarks.[30] The Enlightenment expanded upon the importance of freedom of conscience inherent in Locke's philosophy. The Enlightenment view held that if humans were free to exercise their reason, they would naturally act with respect to the welfare of others, for they were essentially moral, rational beings.[31] Furthermore, they had unique inherent qualities and abilities.[32]

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[26] Patrick Hayden, The Philosophy of Human Rights (St. Paul: Paragon, 2001) 71.
[27] "Locke's Political Philosophy," <http://plato.stanford.edu/entries/locke-political/>.
[28] *See* John Locke, A Letter Concerning Toleration (Huddersfield: J. Brook, 1796). This religious tolerance did not extend to atheists (who would not swear legally binding oaths) and Catholics (who were loyal to a foreign power). Jim Powell, "John Locke Natural Rights to Life, Liberty and Property," The Freeman: Ideas on Liberty,20 Dec 2010 <http://www.thefreemanonline.org/featured/john-locke-natural-rights-to-life-liberty-and-property/>.
[29] David Hume, A Treatise of Human Nature, ed. L.A. Selby-Bigge, vol. III (Oxford: Clarendon Press, 1888) 470.
[30] Hackett Lewis, "The Age of Enlightenment," International World History Project 20 Dec. 2010 <http://history-world.org/age_of_enlightenment.htm>.
[31] Lewis, <http://history-world.org/age_of_enlightenment.htm>.
[32] Paul Gingrich, "Notes on the Enlightenment and Liberalism," University of Regina Department of Sociology and Social Studies 20 Dec. 2010 <http://uregina.ca/~gingrich/en318f02.htm>.

Accordingly, moral conduct "required freedom from needless restraints."[33] Because one's humanness relies on one's moral sense and rational thought (which, in turn, requires autonomy and intrinsic freedom), a core measure of liberty is essential for its realization. Conversely, without liberty and autonomy, rational beings could not flourish; therefore state power must be limited to ensure freedom for individuals to thrive and realize their humanness. This fundamental optimism concerning human nature was reflected in the thought of Americans Thomas Jefferson, James Madison, Thomas Paine, and George Mason,[34] and consequently in the United States' founding documents and its Bill of Rights.[35]

In the 19th century, Karl Marx and other socialist thinkers would contemplate how capitalism economically and socially exploited wage laborers to create profit. Marx would argue that capitalism created a segmented society marked by vast inequalities of wealth and power, where the working class experienced oppressive working and social conditions.[36] Natural rights had focused on restricting government power, but these types of rights were insufficient to "achiev[e] positive human emancipation" from the problems of capitalism.[37] These ideas were also reflected in the United States in both the Progressive Era and the New Deal social welfare policies that were designed to address the inequities and unfairness of industrial capitalism.[38] Because of the thinking of Marx and other socialists, the list of rights expanded "well beyond those proposed by the early

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[33] Lewis, <http://history-world.org/age_of_enlightenment.htm>.
[34] *E.g.* Charles B. Sanford, The Religious Life of Thomas Jefferson (Charlottesville: University of Virginia Press, 1984) 20–21.
[35] *See* U.S. Constitution; *see also* U.S. Declaration of Independence.
[36] Patrick Hayden, "Karl Marx," The Philosophy of Human Rights (St. Paul: Paragon, 2001) 126.
[37] Hayden, 126–127.
[38] "Social Legislation," Gale Encylopedia of US History, 20 Dec. 2010 <http://www.answers.com/topic/social-legislation>.

social contact theorists."[39] Because the abuse of power by private, economic entities could be as dangerous as the state's abuse of power, this line of thought found historical civil and political rights were insufficient because they only limited state action. Rather than merely restricting government action, the government also had to proactively protect individuals from the perils inherent in capitalism.

Trends in rights thought would change significant with the rise of the social sciences; contemporary philosophers would reject a hallmark idea of the Enlightenment—that the moral sense inherent in all individuals could reveal moral truth through free and open discussion.[40] Rather, 19th and 20th century philosophers increasingly recognized that humans were socially constructed.[41] Because contemporary philosophy views individuals as historical and social constructs, there is no longer agreement about human nature and the natural, moral sense. This broke "the link between truth and justifiability."[42]

Modern philosophers have dealt with this lack of objective moral foundation in various ways. For instance, among important contemporary philosophers, John Rawls accepts that "as a practical political matter no general moral conception can provide the basis for a public conception of justice in a modern democratic society."[43] Rather than searching for an objective moral foundation, he believes a liberal democracy may thrive

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[39] Hayden, 127.
[40] Richard Rorty, "The Priority of Democracy to Philosophy," The Virginia Statute for Religious Freedom eds. Merrill D. Peterson and Robert C. Vaughan (Cambridge: Cambridge University Press, 1988), 258.
[41] Rorty, 258.
[42] Rorty, 258.
[43] John Rawls, "Justice as Fairness: Political not Metaphysical," Philosophy and Public Affairs 14 (1985): 225.

using an "overlapping consensus."[44] This avoids disagreements regarding religion and philosophy by forming a consensus among diverse citizens on a core of commitments. Thus, Rawls believes, pluralistic societies can find pragmatic solutions to disagreements; rather than arguing about justifications, the justification simply becomes the consensus. Under this view, rights become instrumentally important for a multitude of reasons.

In the same manner that Rawls discussed, the 1948 Declaration of Human Rights served as a signal that the international community had agreed pragmatically that economic, social, and cultural rights were important. Under the contemporary view, a shared objective foundation is unnecessary; the Universal Declaration signifies a consensus that diverse people, regardless of their moral commitments and their social construction, could agree that economic, social, and cultural rights were important enough, normatively, to be designated as core political commitments.

Finally, in addition to pragmatic justifications, the concurrent realization of civil and political rights and economic, social, and cultural rights is crucial to the functional fulfillment of both types of rights because they are fundamentally interdependent. From the time of the Universal Declaration, both types of human rights have been recognized by the international community as interrelated and interdependent. Sandra Fredman notes:

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[44] Rawls, 225–226.

> Without basic socio-economic entitlements, civil and political rights cannot be fully exercised. Freedom of speech or assembly are of little use to a starving or homeless person. Equally problematically, those without resources will find it hard to access the legal system to redress breaches of their rights . . . . The interaction also works in the other direction . . . . As Sen has argued . . . . [f]reedom of the press, a free opposition, and freedom of information 'spread the penalty of famine to the ruling groups.'[45]

In effect, civil and political rights have little practical meaning without the support of basic economic, social, and cultural rights. The realization of economic, social, and cultural rights affects the realization of civil and political rights, and this makes them instrumentally valuable in attaining civil and political rights, and the reverse is also true. Promoting one type of right can enhance and promote the other type. Because civil and political rights are intimately tied to the enjoyment of social, economic, and cultural rights (and vice versa), the concurrent realization of both types of rights is important.

Although this thesis is not designed to defend a particular theoretical view of rights because it focuses on the *normative function* of economic, social, and cultural rights, it is based upon the premise that such rights are imperatives because 1) they are international legal commitments; 2) the international community has pragmatically agreed that they are moral imperatives; and 3) they are instrumentally important for the fulfillment of civil and political rights. Thus, finding achievable methods of practical realization is important for all governments.

II. Forms of Recognition

There are many modes of recognizing economic, social, and, cultural rights. This section examines strategies for recognizing economic, social, and cultural rights. It

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[45] Sandra Fredman, Human Rights Transformed (Oxford: Oxford University Press, 2008), 67.

argues that although strategies which do not involve constitutionalization may provide certain practical benefits, they insufficiently address problems with the implementation of such rights. In effect, full realization of these rights may include other means of practical recognition, but justiciable constitutionalization can effectively address many practical concerns. Constitutionalization is an important method of practical implementation. Although these other means of recognition can fill in some of the gaps not addressed by constitutionalization, they cannot fully replace the constitutionalization of economic, social, and cultural rights.

a. Informal Recognition

Recognition of economic, social, and cultural rights may be either informal (non-legal) or formal (legal). Informal recognition includes work encompassed by non-governmental organizations (NGOs) and advocates, in both domestic and international contexts. Even though such work is necessary to the realization of economic, social, and cultural rights, it is not satisfactory. Informal actors intervene only when local, state, national, and international governments are unable or unwilling to provide basic economic, social, and cultural rights. As such, they are temporary "fixes" to governmental inaction.

Informal recognition includes many drawbacks when used as an exclusive strategy to address economic, social, and cultural rights. Informal actors are often solely funded through private donations; consequently, their resources are far more limited than government entities. Moreover, they may support specific agendas, antithetical to the diversity of liberal democracies, or favor specific groups, limiting equal access to resources. Hence, informal recognition does not ensure equal fulfillment of economic,

social, and cultural rights nor does it guarantee such rights at all; it merely helps address some temporary economic, social, and cultural concerns.

In this situation, informal recognition does not help establish the primacy of such rights *because* it is informal; in the next section I will argue that only formal legal recognition can help re-order societal values, establishing the primacy and urgency of economic, social, and cultural rights and helping ensure the necessary foundation for the concurrent realization of civil and political rights. Furthermore, formal legal recognition prioritizes these rights as legitimate government concerns.

b. Formal Recognition

i. International Recognition

Formal recognition can happen on both the international and domestic levels. As pointed out in the introduction, economic, social, and cultural rights have already gained international recognition. Such rights were first recognized as global aspirations in the Universal Declaration of Human Rights, adopted unanimously by the United Nations on December 10, 1948.[46] Eighteen years later, the United Nations adopted two treaties to implement the various aspects of the Universal Declaration—the International Covenant on Civil and Political Rights (ICCPR) and the International covenant on Economic, Social, and Cultural Rights (ICESCR).[47] Since then, there have been numerous international treaties dealing with different aspects of economic, social, and cultural rights. Yet, as discussed below, international recognition is insufficient for two reasons:

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[46] There were, however, eight abstentions. Jack Donnelly, Universal Human Rights, 2nd ed. (Johannesburg: Witwatersrand University Press; Ithaca: Cornell University Press, 2003) 22.
[47] Paul G. Lauren, The Evolution of International Human Rights, 2nd ed. (Philadelphia: University of Pennsylvania Press, 2003) 244.

first, international implementation for *all* rights is relatively weak; second, international recognition of economic, social, and cultural rights is even weaker than international recognition of civil and political rights.

International recognition is important because it helps emphasize the universal nature of such rights across cultures, and it provides states with legal commitments to pursue them. Furthermore, it enables states to use the weight of international consensus as a political argument to pressure other states into specific practices. Thus, international recognition works for the realization of rights in key ways.

However, although traditional international legal structures can provide some remedies, such as international condemnation against rights violators, in many cases, it cannot adequately rectify internal human rights violations—this is true for both civil and political rights and economic, social, and cultural rights. Regrettably, international bodies are notoriously weak enforcement entities, and the principle of state sovereignty often protects violator states. For instance, the United Nations Assembly defined South Africa's program of apartheid as a danger to international peace and security in a resolution in 1961.[48] In 1985, the Security Council urged members to participate in sports and cultural embargoes, suspend loans, prohibit certain trade with South Africa, and suspend new investment.[49] Yet apartheid did not formally end until 1994, largely as a result of both internal and external pressure. Because sovereignty often dominates international relations, states may claim reservations to international treaties, refuse to

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[48] "The UN and Apartheid: A Chronology," UN Chronicle, 1 Sept. 1994, United Nations Publications, <http://www.highbeam.com/doc/1G1-16435074.html>.
[49] "The UN and Apartheid," <http://www.highbeam.com/doc/1G1-16435074.html>.

acknowledge the authority of international monitoring bodies, or assert exemptions based on emergency circumstances.

Even where there is international implementation of economic, social, and cultural rights, it has been much weaker and less effective than the international implementation of civil and political rights. For instance, the implementation structure of ICCPR (which protects civil and political rights) provided for the creation of the Human Rights Committee, an independent U.N. body which oversees a reporting procedure.[50] ICESCR (which protects economic, social, and cultural rights), on the other hand, originally provided for implementation by the United Nations' Economic and Social Council.[51] Hence, although ICCPR was overseen by an independent body, ICESCR was overseen by a political body of the United Nations.[52] The importance of an independent review body cannot be over-emphasized. Independent bodies have the freedom to criticize violator practices, regardless of which state is doing the violating, the nature of the violations, or the political ramifications of such criticism. Political bodies, on the other hand, are constrained by government policies and political agendas. An independent body has the duty to report fairly and accurately on violations, whenever and wherever they occur, but political bodies are made of political actors constrained by their national interests. Such political interests are often at odds with reporting on states' internal violations, and politics may preclude state actors from reporting on violations of other states. Because of these considerations, political bodies are unsuited to the role of a

[50] International Covenant on Civil and Political Rights, Part IV.
[51] International Covenant on Economic, Social, and Cultural Rights, Part IV.
[52] *See* International Covenant on Economic, Social, and Cultural Rights, Part IV.

transparent review body. Transparency requires independence, and politically constrained bodies simply are not independent because they are harnessed to politics.[53]

Furthermore, ICCPR's implementation structure provides for reporting procedures and inter-state grievance petitions,[54] but ICESCR only provides for a reporting procedure.[55] Because ICESCR does not provide for an inter-state grievance process, it is much weaker than ICCPR. Reporting procedures are content-neutral procedural requirements. In effect, ICESCR mandates a procedure—periodic reporting—but does not review substantive content for violations. The procedural requirement of progress reports does not mandate any specific progressive realization of economic, social, and cultural rights, nor does it address new violations by states. If such a progress report read "not applicable" or "no progress," there is little the Economic and Social Council can do because only the report itself is required under the Covenant.

On the other hand, ICCPR allows an inter-state grievance procedure. This enables the Human Rights Committee to review whether the substantive actions of a state are in accord with the covenant. Unfortunately, only states can bring civil and political complaints before the Human Rights Committee, which relegates even these grievances to the political process. However, although ICCPR's implementation procedures could also be stronger, at least its supervisory body can review substantive violations in some capacity.

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[53] Fortunately, this has largely been addressed with the 1985 creation of the permanent Committee on Economic, Social, and Cultural Rights (CESCR), where members serve in their own personal capacities, rather than as political representatives, but it illustrates some of the difficulties in instituting these rights on an international level. See Lauren, 249.

[54] International Covenant on Civil and Political Rights, Part IV.

[55] *See* International Covenant on Economic, Social, and Cultural Rights, Part IV.

This dualistic approach to these two types of rights, which allows a means of substantive redressability for political and civil rights but which relegates economic, social, and cultural rights entirely to the political realm, treats civil and political rights as justiciable and economic, social, and cultural rights as merely aspirational.[56] The idea of justiciability is a complex one, and the next section will discuss it in more detail. Laying aside a detailed discussion of justiciability for the moment, the discrepancies between ICESCR and ICCPR allow a generalized means of redressability on the nation-state level for civil and political rights; but economic, social, and cultural rights rely solely on a reporting procedure.

Even noting the disparity between ICESCR and ICCPR, neither covenant adequately rectifies internal human rights violations of nation-states on the international level; both covenants could go farther in protecting such rights. Neither covenant currently allows individuals or non governmental entities to report substantive violations. Thus, there is no apparatus to review substantive violations without the political support of a state, which can report it on behalf of a body or individual, subject to its political will. Even if the covenants did allow individuals to report significant violations, however, state sovereignty significantly curtails any means of redressability beyond international condemnation. Although international condemnation can be a useful tool, it cannot adequately address rights violations in many circumstances. This is true of all rights, both civil and political rights[57] and economic, social, and cultural rights.

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[56] *See* Sandra Fredman, Human Rights Transformed (Oxford: Oxford University Press, 2008), 66.
[57] Civil and political rights have enjoyed greater global success, primarily, because they have been addressed on the domestic level.

In short, international enforcement efforts of economic, social, and cultural rights have failed to secure such rights for global citizens. In the future, even if there will be an enforceable international instrument[58] to help address violations of such rights, it will still be subject to domestic remedy processes. Although international enforcement efforts remain important, they are not sufficient for the practical implementation of economic, social, and cultural rights. Because most international instruments require domestic remedies to be exhausted before an international claim can be made, addressing human rights at a domestic level is the quickest route to redress for individuals, and it is undoubtedly the most effective method of enforcing these rights.

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[58] Such an instrument could include the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, once it comes into effect. In 2008, the United Nations adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which does establish a complaint mechanism for individuals. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (10 Dec. 2008), A/RES/63/117. Unfortunately, the optional protocol has not yet become enforceable; although it has 35 signatories, it requires ten ratifications to come into effect; as of November, 2010, it only has three ratifications. United Nations, "Chapter IV: Human Rights" 9 Nov. 2010, United Nations Treaty Collection, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en>. Still, under the Optional Protocol, individuals must first exhaust domestic remedies. Protocol to the International Covenant on Economic, Social and Cultural Rights, Article 3(1). Another instrument that could provide international redressability is the World Court, a proposed international organ. The Working Group on Implementation, a subcommittee of the Commission on Human Rights, in 1947 (prior to the adoption of the Universal Declaration) recommended the creation of an International Court of Human Rights which would be able to hear and decide human rights cases brought before it as part of the implementation of the proposed Universal Declaration. United Nations, Economic and Social Council, Official Records: Third Year: Sixth Session Supplement No. 1 E/600 (New York: United Nations, 1948) 48–58. This idea is still attracting interest today. For instance, in 2009, sponsored by Switzerland, Austria, and Norway, Manfred Nowak and Julia Kozma of the University of Vienna published a research project (including a draft statute) on a world court of human rights. Manfred Nowak and Julia Kozma, "A World Court of Human Rights," June 2009 <http://www.udhr60.ch/report/hrCourt-Nowak0609.pdf>. Nowak, the United Nations Special Rapporteur on Torture, continues to actively advocate for the adoption of the World Court on Human Rights, and it has attracted the support of Switzerland, Norway, Brazil and Qatar. Siegenbeek Van Heukelom, <http://lowyinterpreter.org/post/2010/05/28/A-World-Court-of-Human-Rights.aspx>. Even if such a court were created, it would require that all domestic remedies of the relevant state be exhausted before it could hear the case, much like other international courts. Siegenbeek Van Heukelom, <http://lowyinterpreter.org/post/2010/05/28/A-World-Court-of-Human-Rights.aspx>.

ii. Domestic Recognition

Even though international implementation is crucial, domestic implementation is more effective for individuals whose rights have been violated. As Claire Archbold notes, "a human rights culture will only really be created in a particular society if human rights are incorporated into its national law."[59] Domestic implementation is critical to the progressive realization of economic, social, and cultural rights because only governments have the national structure, resources, and power to help realize such rights. Eric Posner has noted that "law without government exists at the international level, law normally requires courts to interpret and enforce it, effective courts cannot exist without supporting government institutions, no such institutions exist at the international level. In the absence of effective international courts, the next best thing is the domestic court, which can at least apply the law and enforce it—and maybe advance it."[60]

In addition, unlike international protection, domestic protection can proactively protect and fulfill economic, social, and cultural rights. Constitutional provisions and statutory implementation can ensure positive action toward fulfilling such rights. Furthermore, unlike international apparatuses that are subject to extensive bureaucracy, the protective shroud of national sovereignty, and few substantial remedies, domestic protection can offer efficient and (comparatively) timely remedies for individuals whose rights have been violated.

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[59] Claire Archbold, "The Incorporation of Civic and Social Rights in Domestic Law." The Globalization of Human Rights. Eds. Coicaud, Jean-Marc et al. (New York: United Nations Press, 2003), 56–86.
[60] Eric A. Posner, The Perils of Global Legalism (Chicago: University of Chicago Press, 2009) 207.

There are two main types of domestic solution: first, through adoption into ordinary law (statutes); or second, through national constitutions. I argue below that even though statutory protection can be an effective method of ensuring economic, social, and cultural rights, this is not the best method. Rather, express constitutional provisions offer a much better fit for economic, social, and cultural rights because it does not subject them to political whims. It enshrines such rights as broad principles which can be shaped to a variety of circumstances; it properly counterbalances the autonomous side of human nature as conceived in civil and political rights; it serves to awaken national human rights consciousness; and it can provide a method of redress for citizens.

1. Statutory Protection

Statutory protection is relatively easily implemented by states and can adequately ensure proactive protection of rights. However, the ease of enacting ordinary law is also its drawback—for it is just as easily changed and modified.[61] Ordinary law is subject to political whims and changing political majorities. Those who lack the most basic economic, social, and cultural concerns usually also lack political power.[62] Conversely, those who have political power may lack the urgent need to address economic, social, and cultural rights. Implementation of rights in ordinary law is entirely subject to political will which may be entirely lacking. This is contrary to the notion of a human right; for rights should not be dependent on political will for their realization. Politically enacted privileges, such as tax cuts, can freely be given or taken away by political majorities in

[61] However, there are some notable counterexamples which have gained such a strong foothold in the public's consciousness that they could not easily be modified, such as the U.S. Civil Rights Act of 1964.
[62] Cass Sunstein, Designing Democracy: What Constitutions Do (New York: Oxford University Press, 2002).

response to current economics, politics, customs, or other societal concerns. Because human rights, as I have defined them above, are moral entitlements based on an agreement, they should not be subject to such political trends. Thus, there is a marked difference between politically enacted privileges and human rights, where the latter requires firmer establishment.

There is also a marked difference between statutory implementation and constitutional implementation in terms of the language of the right. Constitutions enshrine broad principles whereas statutes address particular problems. Writer James McClellan notes that a "constitution should be concerned with first principles of government; it should not be an endeavor to provide rules of administration for a multitude of concerns.[63] Constitutions are meant to protect generally applicable principles which allow the branches of government the necessary leeway to interpret those principles in view of particular situations. Thus, constitutions enshrine "thin" or universally applicable principles, which allows the branches of government to "thicken" or contour the constitutional principles to particular situations. Statutory implementation, on the other hand, is already "thickened" through the political process. Ordinary laws have already been contoured to the political and economic atmosphere at the time. In this sense, ordinary law is reactionary; it lags behind changing situations, whereas constitutional recognition fully encompasses the right by defining it in broad language. Statutory implementation, therefore, can be subject to reactionary gaps where aspects of

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[63] James McClellan, "Liberty Order and Justice: An Introduction to the Constitutional Principles of American Government [1989]," The Online Library of Liberty, 3rd ed., 2000, Liberty Fund, 10 Nov. 2010 <http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=679&chapter=68301&layout=html&Itemid=27>.

the right are not, in fact, protected. In such an instance, an individual has no opportunity for redress and instead falls prey to a gap created by changing circumstances.

Lastly, with regard to statutory legislation, there is a disconnect in the approach of many western countries, which relegate economic, social, and cultural rights entirely to ordinary law while protecting civil and political rights in their constitutions. This approach treats economic, social, and cultural rights as second-class rights, yet rights (of any kind) have "never been fully achievable in the absence of laws which do establish them as constitutional rights available to individual citizens."[64] For all of these reasons, economic, social, and cultural rights should be enshrined as constitutional provisions.

2. Constitutional Recognition

a. Aspirational Recognition

Within constitutional documents, there are two types of cognizable recognition—aspirational (partial) recognition and justiciable (full) recognition. Constitutions may distinguish between principles that are purely aspirational and those which are redressable through judicial action. Some countries, such as India and Ireland, have chosen to treat economic, social, and cultural rights as purely directive principles for political action.[65] Even in this capacity, such recognition is important, because it may help shape government priorities. However, if political majorities completely disregard aspirational principles, there is no recourse against the government or the state, other than

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[64] Rob Robertson, "Social and Economic Rights and the Charter of Rights and Freedoms," Aug. 1991: 3, International Development Research Centre, 10 Nov. 2010 < http://idl-bnc.idrc.ca/dspace/bitstream/10625/12009/1/88655.pdf >.

[65] Fredman, 93; Sojit Choudhry, "After the Rights Revolution: Bills of Rights in the Post-Conflict State," Annual Review of Law and Social Science, 6 (2010), 301-322 (forthcoming).

democratically changing the majority through elections. Although partial constitutional recognition is better than simply disregarding economic, social, and cultural rights, it is relatively ineffective method for the practical realization of such rights.

Whether principles in constitutions are fully or partially recognized, they can play a pivotal role in national consciousness, and their provisions can generate significant public endorsement. In other words, constitutional recognition has "myth-making potential."[66] In this capacity, they can help build a national human rights consciousness. They can serve as guiding principles which help awaken human rights consciousness within the nation. They also may serve as educational tools, instilling the importance of foundational ethical principles in all citizens. Used in this way, the memorialization of human rights in constitutional documents helps cement the importance of protecting rights and fosters greater human rights awareness and sensitivity. People value principles enshrined in their constitution, and they talk about their constitutional rights with a deep gravity. Principles enshrined in a constitution can form "a statement of how a country imagines itself."[67] This statement can and should include recognition of the foundational principles of human nature, both the human need for liberty and autonomy and human social obligations. However, without full recognition, people may be more ambivalent about constitutional principles. As stated at the beginning of the thesis, rights are entitlements that have corresponding duties, but when duties become optional, they are no longer properly considered "duties;" therefore economic, social, and cultural rights are reduced to mere guiding principles, rather than rights. Certainly, there seems to be a marked difference in the gravity with which individuals might talk about their "right to

[66] Archbold, 73.
[67] Archbold, 73.

free speech" (a justiciable right in the U.S. Constitution) as opposed to "ensuring domestic tranquility" (part of the aspirational preamble of the U.S. Constitution). Even though both may have some myth-making value, the redressability of the former lends it credence and weight lacking from the latter. In other words, fully recognized rights can serve as educational tools and help build human rights consciousness, like aspirational goals, but fully recognized rights are more effective as educational tools and consciousness-builders because they are taken more seriously on account of their redressability. Although enshrining economic, social, and cultural rights in constitutions can serve important purposes even without enforcement mechanisms, this approach does not realize their potential because it robs such rights of their gravity.

As French jurist Karel Vasak noted, many economic, social, and cultural rights "can only be implemented by the combined efforts of everyone: individuals, states and other bodies, as well as public and private institutions."[68] Although all of the methods of recognition discussed in this section are desirable on some level, none of them can adequately protect economic, social, and cultural rights without full constitutional protection. Informal recognition only serves as a reactionary—and often imbalanced—response to the gravest violations (such as a lack of food in emergency situations). Formal recognition on the international level has failed to secure these rights because of a lack of political willpower to make them priorities and because of the very structure of the nation-state system, which protects countries from interference in their domestic activities through the idea of national sovereignty. Partial recognition on the domestic level which deprives economic, social, and cultural principles of the status of a "right" by

[68] Karel Vasak, "A 30-year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights," Unesco Courier 30.10 (1977): 29.

making duties optional fails to protect them adequately and fails to maximize their human rights consciousness-building potential. Thus, the real success of these rights lies in full constitutional recognition and implementation.

III. Justiciable Constitutional Recognition

In the preceding sections, I discussed why other methods of implementation are not adequate alternatives to the constitutionalization of economic, social, and cultural rights. As noted in the previous section, there are excellent reasons to memorialize economic, social, and cultural rights in constitutions apart from their justiciability. As guiding principles which can awaken human rights consciousness, they can serve important purposes even without enforcement mechanisms. This approach nonetheless does not realize the promise of equalizing economic, social, and cultural rights with political and civil rights. Full justiciable constitutionalization[69] provides the most effective method for ensuring such rights because it addresses a critical need for implementation at the domestic level. Constitutional rights are much more difficult to change than ordinary legislation, so they are not liable to political trends. They serve both as principles which build human rights consciousness in a nation as well as—importantly—rights able to be judicially protected, thereby giving such rights functional meaning to individuals.

This type of constitutional recognition of economic, social, and cultural rights acknowledges that such rights impose real world obligations on all members of the human race. These real world obligations are important because they stabilize the

[69] In this section, I refer to constitutionalization as justiciable constitutionalization, rather than aspirational constitutionalization.

community and provide a network of basic support which ensures that individuals have the freedom to realize the autonomous part of their nature. Furthermore, they provide an aspirational and an actionable framework, balancing both human freedom and human duties to others.

The justiciable entrenchment of economic, social, and cultural rights is also important because courts are charged with upholding the rule of law, including equality, fairness, and justice. They ground their decisions in constitutional principles because the constitution represents a social compact between citizens on which government is founded. Placing economic, social, and cultural rights in constitutions directs all branches of the government—including courts—to weigh the values inherent in these rights when applying the law to particular situations. By constitutionalizing them, society directs courts to take these rights into account when balancing other needs of the community.

Lastly, judicial protection of economic, social, and cultural rights is critical because it gives individuals a remedy when the government fails to honor those rights. As the Economic and Social Council of the United Nations commented, "[i]n relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is made in relation to economic, social, and cultural rights."[70] Enforcement gives effect to rights, and it ensures their adherence by governments. Because the public-at-large has a means of redressability. the government is forced to prioritize economic, social, and cultural rights,

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[70] United Nations Economic and Social Council, "General Comment No. 9," Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights, 3 Dec. 1998 < http://www.unhchr.ch/tbs/doc.nsf/0/4ceb75c5492497d9802566d500516036?Opendocument>.

and citizens have a method of realizing these rights when the government does not live up to its responsibility. Rights require corresponding duties and obligations; otherwise, they are mere goals. Without adequate redressability, these rights lose their practical value for individuals in the real world.

Yet, as the Economist noted in 2001, "[u]p to now Western human-rights campaigners have left economic and social concerns to humanitarians and philanthropists. When they have taken an interest in economic and social conditions, it has been merely to strengthen the case for political crusading."[71] So why have these types of rights eluded practical implementation? In part, they fell victim to political realities and historical circumstances of the twentieth century. These rights also differed in significant ways from the more traditional civil and political rights, and these differences created great practical challenges. For instance, economic, social, and cultural rights may require significant economic investment for their realization. Indeed, some objectors note, a resource-scarce country may have to ignore some rights as a matter of economic necessity.[72]

Those who recognize the value of economic, social, and cultural rights yet who still protest constitutionalization do so for one overarching reason: they believe the liberal political state's judicial branch is not designed to protect rights which appear to require significant political decision-making, as this would infringe on the balance of powers among government branches. To enforce such rights and provide adequate remedies, critics argue, judiciaries would be forced to make political decisions, such as how to

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[71] "Righting Wrongs," Economist.com, 16 Aug. 2001 <http://www.economist.com/node/739385>.
[72] "The Politics of Human Rights," Economist.com, 16 Aug. 2001 <http://www.economist.com/node/739475>.

allocate scarce resources between ideological goods. If the judiciary encroaches on legislative power by making political decisions, it threatens to upset the balance of power among government branches. Because modern governance models rely on the balance of power among branches, the separation of power is vital to the harmony of the entire governmental system. In effect, opponents of constitutionalization argue that if courts have the power to offer means of redressability concerning economic, social, and cultural rights, they will have an "an overriding veto power" against the legislative branch.[73] Indeed, even when such rights have been constitutionalized, "courts have generally been unwilling to get into social policy."[74] For instance, the New Zealand Court of Appeals noted that it would be '"less inclined to intervene" in social and economic rights because "complex social and economic considerations and trade-offs were involved."'[75] How then can courts adequately address economic, social, and cultural rights?

The answer lies in the "reasonable" approach adopted by the South African Constitutional Court. The Court treats economic, social, and cultural rights much as it would review administrative decisions, evaluating whether government action was reasonable in relation to the right at issue. This administrative approach to economic, social, and cultural rights maintains the balance of power among governmental branches because it does not dictate redressability for the actual right; rather the court can adjudicate only the government's rational pursuit of that right. Thus, the legislative branch retains the power to craft any implementation of the right that it sees fit, as long as

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[73] Fredman, 100.
[74] Chong, 190 (citing Chisanga Puta-Chekwe and Nora Flood, "From Diversion to Integration: Economic, Social, and Cultural Rights as Basic Human Rights," Giving Meaning to Economic, Social and Cultural Rights eds. Ishafan Merali and Valerie Oosterveld, (Philadelphia: University of Pennsylvania Press, 2001) 44).
[75] Chong, 190.

it is *reasonable*. If the legislative branch fails to implement the right at all or if it does so in an unreasonable manner, the court can force it to revisit the issue and craft a new, reasonable solution. The court may decide what factors the legislative branch must address for the solution to be "reasonable," but it will not dictate a particular approach; rather, it will allow the legislative branch to construct any reasonable method for ensuring the implementation of the right. This thesis will show, below, that this approach addresses the central concern of critics because it ensures the balance of power among governmental branches is preserved. Using such a method, courts do not dictate a particular method or action to the legislative branch, but they do force the legislative branch to pursue these rights in a rational manner.

a. The South African Experience

The same year of the Universal Declaration of Human Rights,[76] a coalition composed of the Reunified National Party and the Afrikaner Party of South Africa enacted the apartheid laws, which institutionalized a system of racial discrimination in South Africa.[77] Reinforcing decades of informal racism, the 1948 government systematized the separation of the races in the economic, political, social, and educational sectors.[78] White dominance was solidified by depriving blacks and coloureds of land,

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[76] South Africa was one of only eight abstentions to the Universal Declaration. Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting, and Intent (Philadelphia: University of Pennsylvania Press, 1999) 26-28.
[77] "South Africa: 1900–1976: From the Union to the Republic," South African History Online, 10 Nov 2010 <http://www.sahistory.org.za/pages/governence-projects/SA-1948-1976/1948-election.htm>.
[78] "South Africa: 1900–1976: From the Union to the Republic," <http://www.sahistory.org.za/pages/governence-projects/SA-1948-1976/1948-election.htm>.

education, and resources.[79] The South African Constitutional Court noted that during apartheid, "[r]ace was the basic, all-pervading and inescapable criterion for participation by a person in aspects of political and social life."[80] Grave and systematic government–sanctioned human rights violations would occur from 1948 until the dismantling of apartheid in 1994.[81] Indeed, "apartheid was . . . chiefly a matter of . . . concrete and material violence and exploitation."[82] This included detention without trial, restriction of movement, torture, killings, and other repressive tactics, violating both civil and political human rights and economic, social, and cultural human rights.[83]

After decades of apartheid and following an interim 1994 constitution, South Africa adopted a new constitution in 1996. This constitution later included several fundamental economic, social, and cultural rights.[84] In arguing for the inclusion of economic, social, and cultural rights, the chair of the African National Congress' Constitutional Committee, Zola Skweylya, stated that "[w]e do not want freedom without bread, nor do we want bread without freedom."[85] Albie Sachs, later a Constitutional Court Justice, would also argue for a broader vision of rights, promoting the idea that

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[79] Sandra Liebenberg, Socio-Economic Rights: Adjudication Under a Transformative Constitution, (Claremont: Juta & Co., 2010) 2.
[80] Sandra Liebenberg, "Human Development and Human Rights: South African Country Study," 3 Human Development Occasional Papers 2000 <http://hdr.undp.org/en/reports/global/hdr2000/papers/sandra%20liebenberg.pdf>.
[81] Antjie Krog, Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa (New York: Three Rivers Press, 2000); Truth and Reconciliation Commission, "Truth and Reconciliation Commission of South Africa Report," South African Government 21 March 2003 <http://www.info.gov.za/otherdocs/2003/trc/>.
[82] Anthony Lowstedt, Apartheid: Ancient, Past, Present, 6th ed. (Vienna: Gesellschaft für Phänomenologie und Kritische Anthropologie, 2010) 7.
[83] Liebenberg, "Human Development and Human Rights: South African Country Study," 3–4 <http://hdr.undp.org/en/reports/global/hdr2000/papers/sandra%20liebenberg.pdf>.
[84] "Constitution of the Republic of South Africa, 1996," South African Government Information, 21 July 2009 <http://www.info.gov.za/documents/constitution/index.htm>.
[85] Anton J. Steenkamp, "The South African Constitution of 1993 and the Bill of Rights: An Evaluationin Light of International Human Rights Norms," Human Rights Quarterly 17 (1995): 101–126, 113.

rights are mechanisms for "orderly, progressive, and rapid change in the direction of real equality" rather than mere checks against government powers.[86]

The new South African Constitution has been credited with helping build South Africa's "rainbow nation"[87] (a colloquial South African expression reflecting the plurality of the country's ethnic makeup), and it was heavily influenced by the Universal Declaration, ICCPR, and ICESCR.[88] The South African Constitution includes economic, social, and cultural rights such as the right of access to adequate housing;[89] the right to have access to health care services, sufficient food and water, and social security;[90] the right to a basic education;[91] the right to use the language of one's choice and participate in the cultural life of one's choice;[92] and the right to an environment which is not harmful to one's health or well-being.[93] Many of these rights were direct responses to abuses of power during the apartheid era.[94] In addition to the backward looking provisions designed to address apartheid-era transgressions, the Constitution also looks toward the future. Labeled a "transformative constitution," Karl Klare called the South African Constitution "an enterprise of inducing large-scale social change through nonviolent

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[86] Dennis Davis, "Deconstructing and Reconstructing the Argument for a Bill of Rights Within the Context of South African Nationalism," The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law, eds. Penelope Andrews and Stephen Ellmann, (Athens: Ohio University Press, 2001), 194–223, 203–206.
[87] Gary Baines, "The Rainbow Nation? Identity and Nation Building in Post-Apartheid South Africa," Mots Pluriels 1998 <http://motspluriels.arts.uwa.edu.au/MP798gb.html#tb>.
[88] Liebenberg, "Human Development and Human Rights: South African Country Study," 12 <http://hdr.undp.org/en/reports/global/hdr2000/papers/sandra%20liebenberg.pdf>.
[89] South African Constitution, chapter 2, § 26.
[90] South African Constitution, chapter 2, § 27.
[91] South African Constitution, chapter 2, § 29.
[92] South African Constitution, chapter 2, § 30.
[93] South African Constitution, chapter 2, § 24.
[94] Liebenberg, Socio-Economic Rights, 25–27.

political processes grounded in law."[95] The South African Constitution is the result of "the first deliberate and calculated effort in history to craft a human rights state—a polity that is primarily animated by human rights norms."[96]

This constitutional experiment by South Africa has created a new vision of how such rights can be implemented. The South African Constitutional Court's decisions can help guide other countries in the implementation and redressability of economic, social, and cultural rights. The Court's decisions address the lack of precedent in the area of redressability of social, economic, and cultural rights. In addition, the South African experience provides a helpful roadmap for other countries that wish to give these rights real meaning in constitutional settings.

i. The Grootboom Decision: Adjudicating Reasonableness

Segregation of land started long before formal apartheid. In 1913, the Native Land Act became law, creating territorial segregation.[97] It created land reserves for blacks and prohibited the sale of land by whites to blacks who could only live outside the land reserves if they could prove that they were in white employment.[98] The segregation policies were expanded under the 1936 Native Trust and Land Act, which implemented mechanisms for the removal of black landowners outside the reserves.[99] In the 1950s,

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[95] Liebenberg, Socio-Economic Rights, 24 (*citing* Karl Klare, "Legal Culture and Transformative Constitutionalism," South African Journal of Human Rights 14 (1998): 146–188, 150).
[96] Makau Mutua, Human Rights: A Political and Cultural Critique (Philadelphia: University of Pennsylvania Press, 2002) 126.
[97] "19 June 1913: The Native Land Act Was Passed," This Day in History, 10 Nov. 2010 <http://www.sahistory.org.za/pages/chronology/thisday/1913-06-19.htm>.
[98] "19 June 1913: The Native Land Act Was Passed," <http://www.sahistory.org.za/pages/chronology/thisday/1913-06-19.htm>.
[99] "Legislation from 1930–1939," South African History Online, 10 Nov. 2010 <http://www.sahistory.org.za/pages/governence-projects/apartheid-repression/legislation-1930s.htm>.

segregation again expanded as black South Africans were subdivided ethnically and linguistically, and then they were placed on separate homelands.[100] In the years that followed, the government practiced "influx control" in urban areas, granting employment and housing preferences to coloureds (individuals of mixed white and black heritage) and excluding black people.[101] In spite of housing freezes for blacks in the Western Cape, blacks continued to move into the area in search of employment, and they were forced to move into squatter settlements characterized by inadequate housing, overcrowding, and government harassment.[102] By the time the Interim Constitution was adopted in 1994, there was a shortage of more than 100,000 housing units in the Cape Metro.[103] In addition, hundreds of thousands of others occupied rudimentary shelters.[104]

In 1999, Irene Grootboom and others were evicted from their "informal homes" on private land which had been earmarked for formal low-cost housing.[105] Previously, Grootboom and others had lived in Wallacedene, one of the informal squatter settlements on the fringe of the Cape Metro.[106] A quarter of Wallacedene's residents had no income, and more than two-thirds of the residents earned less than 500 rand per month.[107] Half the individuals living in Wallacedene were children, and all individuals in Wallacedene lived in sub-standard housing.[108] Wallacedene was partially flooded during seasonal

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[100] Elisabeth Wickeri, "Grootboom's Legacy: Securing the Right to Access to Adequate Housing in South Africa?" Center for Human Rights and Global Justice: Economic, Social, and Cultural Rights Series (2004) 7.
[101] Gov. of the Republic of S. Afr. at ¶ 6.
[102] Gov. of the Republic of S. Afr. at ¶ 6.
[103] Gov. of the Republic of S. Afr. at ¶ 6.
[104] Gov. of the Republic of S. Afr. at ¶ 6.
[105] Gov. of the Republic of S. Afr. at ¶ 4.
[106] Gov. of the Republic of S. Afr. at ¶¶ 4, 7.
[107] Gov. of the Republic of S. Afr. at ¶ 7. At an average of 4.6 rand to the U.S. dollar in the year 2000, this would be approximately $108. *See* "Tables of Historical Exchange Rates to the USD," Wikipedia 12 Nov. 2010 <http://en.wikipedia.org/wiki/Tables_of_historical_exchange_rates_to_the_USD>.
[108] Gov. of the Republic of S. Afr. at ¶ 7.

rains, and it had no refuse, sewage, or water services.[109] Only five percent of Wallacedene's shacks had electricity.[110] Grootboom and her extended family lived together in a shack "about twenty metres square."[111] Many individuals living in Wallacedene had applied for subsidized, low-cost housing, and some had been on the waiting list for up to seven years.[112] Receiving no response from local authorities about when low-cost housing might be provided, Grootboom and others moved out of Wallacedene to privately owned, vacant land which was slated to be used for low-cost housing.[113] They did not have the consent of the owner, and he obtained an ejectment order against them in municipal court; yet their former sites in Wallacedene had been filled by others.[114] At the beginning of winter in 1999, much like government practices under apartheid, the respondents were forcibly removed, their homes were burnt and their possessions were destroyed.[115] Facing winter rains, the litigants sheltered on a nearby sports field under plastic sheeting.[116] Grootboom and the other litigants requested relief from the Cape of Good Hope High Court to provide adequate basic shelter or housing until they could obtain permanent housing.[117] A settlement agreement with the government[118] was reached but the government failed to comply with it.[119] At the time of

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[109] Gov. of the Republic of S. Afr. at ¶ 7.
[110] Gov. of the Republic of S. Afr. at ¶ 7.
[111] Gov. of the Republic of S. Afr. at ¶ 7.
[112] Gov. of the Republic of S. Afr. at ¶ 8.
[113] Gov. of the Republic of S. Afr. at ¶ 8.
[114] Gov. of the Republic of S. Afr. at ¶ 9.
[115] Gov. of the Republic of S. Afr. at ¶ 10.
[116] Gov. of the Republic of S. Afr. at ¶ 11.
[117] Gov. of the Republic of S. Afr. at ¶ 4.
[118] Interestingly, in 1994 at the end of apartheid, the African National Congress (ANC), which would later win the elections and form the new ruling government, ran on a political platform of "housing for all." Wickeri, iii.
[119] Gov. of the Republic of S. Afr. at ¶ 5.

the decision, the Constitutional Court noted that the case reminded it "of the intolerable conditions under which many of our people are still living."[120]

Grounding its decision in Section 26 of the Constitution, which provides the right of access to adequate housing, the Constitutional Court of South Africa found that the government was not meeting its constitutional obligations in regards to housing.[121] The Court noted that the Constitution required the government to take positive action to ameliorate shelter for its citizens.[122] It directly addressed the justiciability of economic, social, and cultural rights, noting that they "are expressly included in the Bill of Rights; they cannot be said to exist on paper only."[123] Previously, when certifying the new Constitution, the Court had noted that such rights "are, at least to some extent, justiciable . . . . [M]any of the civil and political rights entrenched in the [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. At the very minimum, socio-economic rights can be negatively protected from improper invasion."[124] In Grootboom, the Court added that "[t]he question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case."[125]

Taking into account the special apartheid circumstances responsible for the current situation, it found that economic, social, and cultural rights must be understood in

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[120] Gov. of the Republic of S. Afr. at ¶ 2.
[121] Gov. of the Republic of S. Afr. at ¶ 69.
[122] Gov. of the Republic of S. Afr. at ¶ 93.
[123] Gov. of the Republic of S. Afr. at ¶ 20.
[124] Gov. of the Republic of S. Afr. at ¶ 20.
[125] Gov. of the Republic of S. Afr. at ¶ 20.

their social and historical contexts.[126] Further noting the clear relationship of the right of access to housing with other rights and grounding the right in the "foundational values" of South African society, it stated that the constitutional provision required the state to take reasonable legislative and other measures within the state's available resources and to achieve the progressive realization of the right to access to housing.[127] Hence, the government had an affirmative obligation to "give effect" to the rights enshrined in it, rights that could appropriately be enforced by the judicial branch.[128] Specifically, the Court stated that "[t]he state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing."[129]

Although there was legislation in place, the Court found no coherent public housing program.[130] The Court found that the housing program in effect was not "reasonable" in light of the state's obligation because it failed to give relief to a significant portion of the population—specifically "those desperately in need of access to housing"—either in the short term or the long term.[131] The Court ordered the government to meet its obligations by devising, funding, implementing and supervising measures to provide relief to those in "desperate need."[132] Writing for the Court, Justice Zak Yacoob expounded on the "reasonableness" requirement of the governments duties:

> [e]ach sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations . . . . The measures must

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[126] Gov. of the Republic of S. Afr. at ¶ 22.
[127] Gov. of the Republic of S. Afr. at ¶¶ 21, 23–24.
[128] Gov. of the Republic of S. Afr. at ¶ 95.
[129] Gov. of the Republic of S. Afr. at ¶¶ 23–24.
[130] Gov. of the Republic of S. Afr. at ¶¶ 40–47.
[131] Gov. of the Republic of S. Afr. at ¶¶ 65–95.
[132] Gov. of the Republic of S. Afr. at ¶96.

> establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. 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. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.[133]

Here, the Court retains judicial review power over legislative decisions relating to economic, social, and cultural rights but notes that it will only review legislative decisions for their reasonableness. Although clearly deferring to the legislative branch regarding the particulars of implementing standards, the Court also stated that:

> [l]egislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.[134]

In this particular case, the Court noted that a solution must provide for short, medium, and long-term needs.[135] In effect, it noted that a reasonable solution must address each of these factors; failure to address each factor would make a solution unreasonable. Thus,

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[133] Gov. of the Republic of S. Afr. at ¶¶ 40–41.
[134] Gov. of the Republic of S. Afr. at ¶ 42.
[135] Gov. of the Republic of S. Afr. at ¶ 43.

the Court outlined specific government duties while specifying those requirements broadly enough to preserve the balance of power.

In this landmark decision, the South African Constitutional Court assumed judicial review over economic, social, and cultural rights, giving them a means of redressability; and it clarified the role of the judicial branch in determining the government's duties in regard to such rights. A court reviews whether government measures reasonably facilitate the progression realization of the economic, social, or cultural right in question. If the court determines the measures are not reasonable, it can order the legislative branch to craft a new, reasonable solution. It will not substitute its judgment regarding the details inherent in a particular solution, however; such decisions are left to the political process. Thus, the reasonableness requirement demands certain government duties toward economic, social, and cultural rights, but it limits the judicial review of those government duties to reasonableness, thereby preserving and respecting the balance of power among government structures. Legislative powers, then, are free to exercise a measure of political autonomy in crafting solutions, as long as they are within the bounds of "reasonableness," as determined by the judicial branch.

The Constitutional Court's application of social, economic, and cultural rights in Grootboom illustrates that such rights can be justiciable while also addressing the fundamental concerns of those who object to their practical implementation. Rather than confirming critics' fears that such rights are inherently non-justiciable, the South African Constitutional Court approached economic, social, and cultural rights in an innovative manner, melding traditional constitutional law with an administrative law approach based on the reasonability requirement. The Constitutional Court carefully walked a tightrope

between the enforcement of economic, social, and cultural rights and observing the balance of powers among government branches. This careful balance illustrates that courts can provide violations of economic, social, and cultural rights with remedies. Although those remedies may not be as strong as the remedies provided for civil and political rights, such an approach addresses both the concerns of critics and the importance of economic, social, and cultural rights.

In addition, the Grootboom case recognized the nuances of providing remedies for economic, social, and cultural rights. Even though the full enjoyment of an economic, social, or cultural right relies on—to some extent—the availability of resources, a weak application of this right still necessitates governmental duties based on the circumstances of the state in question and the facts of the case. Thus, the Grootboom decision acknowledged that political decisions must be left up to the political branches of government, yet it directed the political branches to provide an adequate remedy. Although the judicial branch may determine certain factors that the legislative branch must consider for any solution to be "reasonable," the legislative branch retains the power to craft any reasonable solution it wishes through its political process. This innovative approach provides a workable model for other countries to implement economic, social, and cultural rights as constitutionally protected rights.

ii. **Further Development under the Treatment Action Campaign Decision**

Today, between 15 and 20 percent of adults in South Africa are currently infected with HIV.[136] In 2004, South Africa had 5.3 million HIV-positive people, including 1.7 million people who needed treatment.[137] An additional 300,000 South African children had been orphaned by the AIDS pandemic. [138] Aarthi Belani notes that "[i]t is no accident: HIV/AIDS is widespread in South Africa largely because apartheid enforced a migrant labor system that destabilized family life and conjugal fidelity."[139] In the sixteen years since apartheid, the government has had to address deep system inequities—under apartheid, blacks did not have equal access to medical care; hospitals were segregated; and blacks were allocated significantly less health funding.[140] Because health risks such as HIV/AIDS were not adequately addressed in the black population under apartheid, its effects have grown exponentially. In 2003, the Economist noted that "in the absence of AIDS, there would be modest economic growth and universal education within three generations. If nothing is done to combat the epidemic, however, the model predicts a complete economic collapse within four generations."[141] The second President of South Africa, Thabo Mbeki, did not help the plight against this disease. Although an international consensus shows that AIDS is caused by HIV, Mbeki doubted that

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[136] "HIV and AIDS in Africa," Avert, 10 Nov. 2010 <http://www.avert.org/hiv-aids-africa.htm>.
[137] Aarthi Belani, "The South African Constitution Court's Decision in TAC: A "Reasonable" Choice?" Center for Human Rights and Global Justice, 6, 10 Nov. 2010 <http://www.chrgj.org/publications/docs/wp/Belani%20The%20South%20African%20Constitutional%20Court's%20Decisions%20in%20TAC.pdf>.
[138] Belani, 6.
[139] Belani, 6.
[140] Belani, 6.
[141] Belani, 6 (*citing* "Epidemics and Economics," Economist 10 Apr. 2003).

antiretroviral drugs were effective in treating the disease and emphasized their toxicity.[142] Denials by leading African National Congress leaders such as Mbeki have "undoubtedly delayed and frustrated an effective response to the pandemic there."[143]

In the Minister of Health v. Treatment Action Campaign, colloquially known as "TAC," the Constitutional Court of South Africa reviewed a ruling by the High Court of Pretoria finding that the government had acted unreasonably in (1) refusing to make nevirapine (an antiretroviral drug used for HIV/AIDS treatment) accessible to the public where medically indicated and (2) in not setting a national program timeframe to prevent mother-to-child transmissions of HIV.[144] The Constitutional Court confirmed that the government had not fulfilled its constitutional mandate to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of the "right to access" to "health care services."[145]

Prior to the TAC litigation, the government had created a strategic five-year plan to deal with mother-to-child transmission, using the drug nevirapine.[146] Nevirapine had been deemed safe and was recommended to mothers and newborn children to combat HIV by several organizations, including the World Health Organization.[147] The South African government made nevirapine available at a limited number of pilot sites (two per province); although the manufacturer had offered to make it available for free to the South African government for five years to reduce mother-to-child transmission of

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[142] Belani, 7.
[143] Belani, 7.
[144] Minister of Health, ¶ 2.
[145] South African Constitution, chapter 8, § 1; chapter 27, § 1.
[146] Minister of Health, ¶¶ 4, 40.
[147] Minister of Health, ¶ 12.

HIV.[148] Because it was not made available elsewhere, doctors in the public sector who were not located at one of the pilot sites could not prescribe it for their patients.[149]

Treatment Action Campaign and others filed suit against the government, claiming that the government had failed to fulfill its obligations under the Constitution in relation to providing health care services for HIV-positive mothers and their newborn babies.[150] They argued that the government failed its constitutional mandate by prohibiting the administration of nevirapine at public sites other than the pilot sites.[151] Further, they argued, the government violated its constitutional duties by failing to implement a comprehensive program for the prevention of mother-to-child HIV.[152]

The Court found that the policy confining the supply of nevirapine was not reasonable under the circumstances, rejecting the government's arguments about safety, efficacy, and resistance.[153] Nevirapine was being provided to the government for free, so cost was not a factor.[154] The Court found that the South African government had already determined the drug was safe.[155] The government's policy being challenged even prohibited facilities with the requisite testing and counseling capacities from administering the drug.[156] Administration of the drug was "simple," and its administration was a potentially lifesaving intervention in the life of a young child.[157]

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[148] Minister of Health, ¶ 22.
[149] Minister of Health, ¶ 22.
[150] Minister of Health, ¶ 25.
[151] Minister of Health, ¶ 44.
[152] Minister of Health, ¶ 44.
[153] Minister of Health, ¶¶ 69, 80.
[154] Minister of Health, ¶ 48.
[155] Minister of Health, ¶ 60–61.
[156] Minister of Health, ¶ 66.
[157] Minister of Health, ¶ 73, 78.

Thus, the Court found the children's needs were "most urgent" and their rights were "most in peril" as a result of the government's policy.[158]

The Court reasoned that after the decision not to make nevirapine available at other hospitals and clinics was reversed, the government "will be able to devise and implement a more comprehensive policy that will give access to health care services to HIV-positive mothers and their newborn children, and will include the administration of nevirapine where it is appropriate."[159] However, the Court noted, "[t]hat does not mean that everyone can immediately claim access to such treatment . . . . Every effort must, however, be made to do so as soon as reasonably possible."[160]

The Court rejected the government's claim that adjudication of the issue would violate the separation of powers.[161] Notably, the government did not raise the issue of justiciability, although it did cite potential balance of power violations if the court did not show deference to the executive "concerning the formulation of its policies" or by issuing an order which found that the executive failed to comply with its constitutional obligations.[162] The Court rejected a government argument that the separation of powers precluded an order other than a declaration of rights because any other order would "have the effect of requiring the executive to pursue a particular policy."[163] The Court pointed out that there are "certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others," and that "[a]ll arms of government

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[158] Minister of Health, ¶ 78.
[159] Minister of Health, ¶ 122.
[160] Minister of Health, ¶ 125.
[161] Minister of Health, ¶ 22.
[162] Minister of Health, ¶ 22.
[163] Minister of Health, ¶¶ 96–97.

should be sensitive to and respect this separation."[164] However, it found that "[t]his does not mean . . . that courts cannot or should not make orders that have an impact on policy."[165] Because the South African Constitution requires the government to "respect, protect, promote, and fulfill the rights in the Bill of Rights," courts that find state policies which are inconsistent with the Constitution must ensure "appropriate relief is afforded to those who have suffered infringement of their constitutional rights."[166] "In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself."[167] The Court stated it would take into account the nature of the right infringed and the nature of the infringement in crafting a judicial remedy, and remedies could include supervisory jurisdiction.[168] The Court noted that the U.S. Supreme Court had used a structural injunction to address educational equality issues in the landmark decisions Brown v. Board of Education.[169] Hence, the Court would apply remedies that it deemed proper under the circumstances.

The Court, nevertheless, declined to create a justiciable private right for citizens apart from the reasonableness limitation on the government.[170] This differentiation allowed the Court to remedy governmental action based on a reasonableness standard but limited the Court's ability to remedy violations specific to particular individuals. In its opinion, the Court noted that "courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core

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[164] Minister of Health, ¶ 98.
[165] Minister of Health, ¶ 98.
[166] Minister of Health, ¶¶ 99, 103.
[167] Minister of Health, ¶ 99.
[168] Minister of Health, ¶106.
[169] Minister of Health, ¶ 107.
[170] Minister of Health, ¶ 39.

standards . . . should be, nor for deciding how public revenues should most effectively spent."[171] The Court further stated:

> [c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative, and executive functions achieve appropriate balance.[172]

It stressed that the Constitution did not "expect more of the State than is achievable within its available resources."[173] Hence, the "corresponding rights themselves are limited by reason of the lack of resources."[174]

The Court found that the overarching policy of the government had failed; thus because of the pressing need to ensure the prevention of the loss of life and because of the circumstances surrounding the nevirapine disagreement, the Court ordered the government to devise a "comprehensive and co-ordinated programme" to progressively realize the rights of pregnant women and newborn children to have access to health services.[175] It ordered specific relief, requiring the government to remove restrictions that prevented nevirapine from being made available at hospitals and clinics not included in the pilot program, to permit and facilitate the use of nevirapine to reduce mother-to-child transmissions of HIV where medically indicated, to make provision for nevirapine counselors at other locations, and to take reasonable measures to extend the testing and

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[171] Minister of Health, ¶ 37.
[172] Minister of Health, ¶ 38.
[173] Minister of Health, ¶ 32.
[174] Minister of Health, ¶ 31 (emphasis in original) (*citing* Soobramoney v. Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC), ¶ 11).
[175] Minister of Health, ¶¶ 95, 131, 135.

counseling facilities at other sites.[176] In doing so, it noted that its orders did "not preclude [the] government from adapting its policy in a manner consistent with the Constitution."[177]

In this decision, the Court used the Grootboom framework of reasonableness, but developed its jurisprudence to encompass important national policy decisions, where those policy decisions violated the South African Constitution's Bill of Rights. Even in the midst of this revolutionary economic, social, and cultural human rights jurisprudence, however, the Court crafted a narrow role for itself—to maintain the proper balance of power among governmental spheres. Far from overstepping its judicial bounds, the South African Constitutional Court has paved a new vision of the Court's role in adjudicating economic, social, and cultural rights.

iii. The Effect of South African Jurisprudence in the Area of Economic, Social, and Cultural Rights

Both the Grootboom and the TAC decisions show that nations can develop new modes of addressing economic, social, and cultural rights. Such modes recognize that true protection requires enforcement and redressability, although the type of protection may vary based on the nature of the right at issue.

Furthermore, South African jurisprudence has shown that its courts properly respect the governmental balance of powers. While enabling enforcement of economic, social, and cultural rights, the South African Constitutional Court maintained a

[176] Minister of Health, ¶ 135.
[177] Minister of Health, ¶ 135.

conservative judicial role.[178] Because of the balance of powers concern inherent in adjudicating economic, social, and cultural rights, this approach has been entirely proper. Indeed, Cass Sunstein described the South African Constitutional Court's decisions as "restrained," "respectful," and "deferential" to the state and legislative branch.[179] The Court has not endorsed the view that the judicial branch can or will review budgeting decisions regarding social, economic, and cultural rights; although some decisions may have budgetary implications.[180] It has restrained itself from infringing upon the proper sphere of legislative and executive powers, yet it retains its proper role in reviewing decisions for their constitutionality. As Mark Kende notes, "[t]he striking feature in these cases is the Court's pragmatic balancing of its transformative role and separation of powers concerns."[181] By using a reasonability standard, the Court shields itself from political decisions, thereby preserving the balance of powers.

In effect, through the reasonableness requirement, the Court has given meaning to economic, social, and cultural rights by providing citizens with positive albeit somewhat weak claims against the government.[182] These claims are weaker than some positive rights because they require courts to review only the reasonableness of the government's efforts to address such rights, much like an administrative decision, rather than providing direct relief. Stronger positive rights are rights that demand specific state behaviors.

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[178] Courtney Jung and Lauren Paremoer, "The Role of Social and Economic Rights in Supporting Opposition and Accountability in Post-Apartheid South Africa," After Apartheid: The Second Decade Apr. 2007: 12 <http://www.yale.edu/macmillan/apartheid/jungparemoerp2.pdf>.
[179] Jung and Paremoer, <http://www.yale.edu/macmillan/apartheid/jungparemoerp2.pdf> (*citing* Sunstein).
[180] Jung and Paremoer, <http://www.yale.edu/macmillan/apartheid/jungparemoerp2.pdf>.
[181] Mark S. Kende, Constitutional Rights in Two Worlds (New York: Cambridge University Press, 2009) 260.
[182] *See* Ross R. Kriel, "Education," Constitutional Law of South Africa § 38 (Kenwyn: Juta & Co., 1996) § 38.1.

Weaker positive rights "do not support a right to [that thing] *per se*, but a right to reasonable state measures that make [that thing] progressively available and accessible . . . . The core value achieved through the formulation is a process one: government must be deliberative and rational. It must formulate considered and appropriate response to the social and welfare needs of its people."[183]

Using the reasonability approach, the South African Constitutional Court has assumed review powers over government efforts to implement economic, social, and cultural rights. This method allows political branches a large amount of autonomy to craft particular solutions, as long as any particular solution is "reasonable," as determined by the judicial branch. This approach effectively responds to concerns about the role of the judiciary in adjudicating such rights; but it also provides a method of redressability for economic, social, and cultural rights, properly safeguarding them as justiciable constitutional rights for citizens.

iv. Understanding Economic, Social, and Cultural Rights in Context

In the South African context, the Constitutional Court determined that government efforts to fulfill economic, social, and cultural rights must be "reasonable." If other countries adopt the South African approach, they might wonder how "reasonable" should be interpreted by judicial officers, politicians, and others because applying a reasonability standard only works if there is a general consensus about what it means. How should its definition be interpreted in other socio-historical communities

[183] Kriel, § 31.1.

when the underlying moral justification for these rights is based on a pragmatic agreement (the Universal Declaration) rather than substantive moral content? In particular, how can political judgments be divorced from judicial determinations of reasonability?

There are a number of ways "reasonable" can be understood. Because the underlying moral justification may vary from community to community, there may well be different approaches to the determination of reasonability and, more generally, the role of these rights in a particular society. The particular determination of the role of economic, social, and cultural rights will rely, to a large extent, on particular socio-historical conditions. In South Africa, for instance, many of the country's conditions are a direct result of government and private abuses of power during apartheid. The application of economic, social, and cultural rights in the South African context is an attempt to correct those abuses and re-distribute power equally across South African society. Other countries may be dealing with very different socio-historical circumstances; therefore, their understanding of the role of economic, social, and cultural rights may also be different. Certainly, the application of these rights across societies should reflect their particular socio-historical circumstances, whether it is correcting institutionalized power imbalances or latent social, cultural, and economic inequities.

Philosophers can and should help clarify the role of economic, social, and cultural rights within communities, and some of this work has already begun. For instance, Martha Nussbaum argues that individuals need a minimum threshold of human

capabilities. [184] These capabilities provide an essential basis for realizing one's humanness, including bodily health, bodily integrity, emotions, practical reason, and social interaction, among others.[185] Hence, it becomes incumbent upon the state to ensure the fulfillment of these basic capabilities. Under this approach, economic, social, and cultural rights are important because they help contributes to the protection and development of Nussbaum's conception of human "capabilities," which leads to human flourishing (ευδαιμονία). In this instance, then, such rights functionally ensure the actualization of a minimum threshold for human capabilities across a society.

There are also other possible approaches to understanding the role of such rights, and philosophers should continue to help address the role these rights play. Without a basic understanding of how these rights function within a community, a judicial decision could be reduced to a political decision. Fortunately, judges are themselves products of their socio-historical circumstances; as such, they reflect their communities' ideals and values. However, a deeper understanding of the role of these rights is crucial to their equitable applicability across a nation, and thus, this area of philosophical understanding is crucial for the long-term success of economic, social, and cultural rights. Such understandings of rights can be pragmatically useful to courts as they interpret these rights in their socio-historical contexts, and philosophers should continue to develop understanding in this area.

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[184] Martha Nussbaum, Women and Human Development: The Capabilities Approach, (Cambridge: Cambridge University Press: 2000).
[185] *Ibid*.

IV. Conclusion

Economic, social, and cultural rights have suffered for decades as the "poor relations"[186] in the international human rights family. Although people, governments, and entities generally recognize that economic, social, and cultural rights are important, their potential as rights has not been actualized. In the modern age, governments have looked to historical precedent when forming the boundaries of their constitutional social compacts, and this has limited the content of constitutions to the protection of civil and political rights. Constitutions generally have not recognized economic, social, and cultural rights until now because of their unique nature as rights that often require significant resource allocation and corresponding concerns about their role in liberal political systems. The South African example has dramatically illustrated that such rights can be constitutionalized without upsetting a government's balance of power, and it has provided a preliminary roadmap for other countries to follow. Using a visionary constitution, the South African example provides clear insights into how countries can institute such rights as constitutionally protected principles, giving them real, cognizable value for everyday citizens.

However, the South African experience is only one model for the practical implementation of economic, social, and cultural rights. It is based on the current implementation structure of civil and political rights in many western constitutions. Certainly, there are other possibilities for the implementation of economic, social, and cultural rights that may better fit the unique nature of such rights or the particular ethno-

[186] Deprose Muchena, "The Place of Economic and Social Rights in Human Rights and Development Discourse," Open Space 2.4 (2009): 10–17, 11.

historical context of a country while also preserving the redressability of such rights for citizens. Under the South African model, for instance, a grievance generally must be widespread before a court can act (otherwise, a plaintiff would be unable to prove that the government's action were unreasonable). This approach to economic, social, and cultural rights allows people a means of redressability, but it is a very limited redressability. Thus, in the South African context, isolated economic, social, and cultural rights violations may not have a remedy. Furthermore, under the South African model, there is little redress if the political branch ignores the judicial branches' opinion in an economic, social, and cultural rights case. Such an approach relies on each branch respecting its sphere of power, but likewise, this approach breaks down if any government branch disregards its proper boundaries of power or ignores its proper functional role. While the South African model illustrates a possible treatment of economic, social, and cultural rights, it is not the *only* approach. Philosophers, politicians, activists, concerned citizens, constitution-writers, and others should not neglect other possibilities that will also help realize economic, social, and cultural rights—possibly even more effectively than the South African model. In the future, other models, both constitutional treatments of rights and non-constitutional treatments, should be evaluated for their effectiveness, including looking at the traditions of other nation-states and civil societies.

In addition, this thesis has not addressed an inherent tension between civil and political rights and economic, social, and cultural rights. The separation of political and civil rights from economic, social, and cultural rights is largely a historical construct:

> The right to work, for example, is a right to economic participation that is instrumentally and intrinsically valuable in ways very much like the right to political participation. Cultural rights are perhaps most closely related to individual civil liberties, given the integral place of religion, public speech, and mass media in the cultural life of most communities. The social or cultural right to education is intimately connected with the civil or political right to freedom of speech, belief, and opinion, and so forth.[187]

While there are many similarities between the two types of rights and while they are often interrelated and interdependent, they may also conflict. For example, while most cultural practices are healthy celebrations of culture, there are also troubling situations concerning some cultural practices. Cultural practices are meant to bind a community together, but in some situations, such as female genital mutilation, group identity is constructed at the expense of a population's least politically, socially, or economically powerful members. Those practicing female genital mutilation claim that it is an expression of their cultural right, yet individual civil and political rights to bodily integrity are in direct conflict with this cultural right.[188] Philosophers and others should continue to consider the unique challenges presented by all of these rights, including when and how they should be properly protected.[189]

Although this thesis has shown that economic, social, and cultural rights can be judicially cognizable as constitutional provisions, truly securing such rights in any society requires a much broader approach. The law is only the "tip of a social iceberg."[190] Legal effectiveness and redressability depend both upon the law's formal provisions and

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[187] Donnelly, 32.
[188] For a contemporary example, *see* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
[189] *See e.g.* Will Kymlikca, Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship, (Oxford: Oxford University Press, 2001); Will Kymlicka and Magda Opalski, eds., Can Liberalism Be Exported, (Oxford: Oxford University Press, 2001).
[190] Daniel P.L. Chong, "Five Challenges to Legalizing Economic and Social Rights," Human Rights Review 10 (2009) 183–204, 201.

complex social relations.[191] Certainly any right may be frustrated by cultural practices.[192] However, justiciability should no longer be considered as a persuasive reason not to include economic, social, and cultural rights in constitutions. Although the enforcement mechanism for these rights may differ from that of civil and political rights, it is no less valid; nor should these rights continue to be treated as second-class rights.

Memorializing rights in constitutions is one way to give economic, social, and cultural rights practical meaning for citizens. A transformative constitution and visionary justices in South Africa have taken a long leap forward toward realizing these important rights, and now is the time for other liberal democracies to contemplate how they can actualize these rights for their citizens in the twenty-first century.

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[191] Chong, 201.

[192] University of Minnesota Human Rights Resource Center, "Post-World War II Developments," 8 Nov. 2010 <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module2b.htm>.