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EXPORTING SOUTH AFRICA'S SOCIAL RIGHTS JURISPRUDENCE

Eric C. Christiansen[†]

I. Introduction

The South African Constitution and its early jurisprudence have been discussed extensively among comparative constitutional law scholars and other academics. Frequently, the Constitution has been described as a model document for the domestic protection of human rights, and the South African Constitutional Court, the highest court in post-apartheid South Africa, has often been lauded by political progressives and human rights activists for advancing the cause of equality and justice.

One of the most distinctive elements of South Africa's jurisprudence has been its willingness to adjudicate socio-economic rights in addition to traditional civil and political rights. While the advancement of social welfare as a whole has clearly proceeded at a far slower pace than political equality, the Constitutional protection of social rights and its enforcement by the Court continues to inspire social justice advocates in their work within South Africa and abroad. Indeed, despite the as-yet inadequate advancement of substantive socio-economic equality, much can be praised about the South African Constitutional project—and much can be learned from it.

Particularly, much benefit will result from closer examination of the process through which the South African Constitutional Court decided how to adjudicate social rights cases—a jurisprudential investigation of the manner of enforcement rather than of the substantive rights. These are not the normal comparative law questions of similarity, difference, and connection, but rather the more pragmatic inquiries into functional adaptability and transnational applicability. Can the lessons of the South African Court's first generation aid a nation adopting, amending, or newly interpreting its national constitution's commitment to social justice? Specifically, can the Court's unique approach to formulating socio-economic rights jurisprudence be exported to other countries? In this essay, I assert that the unique but adaptable manner in which the Court's social rights jurisprudence accommodates classic non-justiciability arguments, what I call “differentiated incorporation,” advances social justice within South Africa and creates an exportable model of social rights enforcement.

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II. An Affirmative Social Right Jurisprudence

Alone among constitutional democracies, the Republic of South Africa has developed a comprehensive socio-economic rights jurisprudence that enforces an array of enumerated social welfare protections including rights to housing, healthcare, and education.¹ This jurisprudence arose in direct refutation of the commonly held view among constitutional scholars that socio-economic rights are incapable of legitimate judicial determination.² Nevertheless, the South African Constitutional Court chose to adjudicate such rights as a means of advancing the transformative purpose of the South African Constitution.

Because of the well-established arguments against judicial enforceability of social rights, the South African jurisprudence has been described as revolutionary and heroic by advocates of constitutional social welfare rights and as irresponsible and doomed by their opponents. As I have argued in a previous work, the Court has in fact been both less revolutionary and less irresponsible than commentators claim.³ This is because the South African Court has crafted an affirmative social rights jurisprudence that is tempered by internalized justiciability concerns. It has incorporated the concerns of jurists opposed to enforceable socio-economic rights into its manner of adjudicating and remedying such rights. Part III of this essay will focus on how this restrained formulation of a social rights jurisprudence results in exportability, but prior to such a discussion, it is helpful to understand the nature of South Africa's social rights provisions and its core case law.

A. Enumerated Socio-economic Rights

Socio-economic rights had long been advocated by the African National Congress ("ANC") and other groups fighting to end apartheid in South Africa. At the core of such "social rights" are rights to adequate housing, healthcare, food, water, social security, and education.⁴ Each of these rights is expressly included

¹ See Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 527-28 (1992). South Africa is exceptional for its comprehensive list of enumerated, enforceable social rights. See also Eric C. Christiansen, *Survey of Socio-Economic Rights in National Constitutions: Healthcare, Education, Social Security, Housing, Food and Water* (December 2005) (unpublished manuscript, on file with author).

² See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS*, 237-320 (2d ed. 2000); Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137 (Louis Henkin & John Lawrence Hargrove eds., 1994); Dennis Davis, *The Case Against Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. HUM. RTS. 475 (1992).

³ Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007) [hereinafter *Non-Justiciable Rights*]. The present essay relies heavily on the historical background and additional discussion made at greater length in the earlier *Non-Justiciable Rights* article.

⁴ There is no set list of which rights are properly defined as "socio-economic" rights. For purposes of this essay, I include those rights in the South African Constitution that are traditionally and consistently identified as socio-economic rights by commentators, have been so identified by the South African Constitutional Court, or have as their evident purpose the improvement of society through an impact on individuals' social welfare. Similarly, I use the terms "social" and "socio-economic" to describe the

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in the 1996 South African Constitution.⁵ The right to housing presents the typical textual formulation of such rights in that the declaration of the right is accompanied by textual limitations related to "available resources" and "progressive realization". It states:

§ 26. Housing

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.⁶

The impetus (if not necessity) to include such rights in South Africa's first democratic constitution was a result of the role socio-economic oppression played within the larger context of apartheid's system of political and social subjugation. As the Court acknowledged in its first social rights case:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions in great poverty. . . . These conditions already existed when the Constitution was adopted and a commitment to address them, and transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.⁷

Nevertheless, inclusion of these rights in the post-apartheid constitution was contentious and thus, in accordance with the negotiated political compromise between the constitutional drafting parties, the new Constitutional Court had to "certify" that the socio-economic rights provisions were compatible with the pre-

same collection of rights; I have avoided "red" rights, "second-generation" rights, and "positive" rights as less helpful descriptors for the same rights.

⁵ S. AFR. CONST. 1996, ch. 2. The other core social rights included in the South African Bill of Rights include:

§ 27. Health care, food, water and social security

- (1) Everyone has the right to have access to
 - a. health care services, including reproductive health care;
 - b. sufficient food and water; and
 - c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

§ 28. Children

- (1) Every child has the right. . .
 - c. to basic nutrition, shelter, basic health care services and social services;

§ 29. Education

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

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

⁶ S. AFR. CONST. 1996, ch. 2, § 26.

⁷ *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para. 8 (S. Afr.). This and all South African Constitutional Court cases are available online at the Court's official website, <http://www.constitutionalcourt.org.za>.

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Constitutional agreement between the ANC and the white-minority government.⁸ A denial of certification would have resulted in removal of such rights from the text of the proposed constitution.⁹

B. Social Rights at the Constitutional Court

1. Threshold Adjudication Question

The Court's *In re Certification* judgment addressed multiple challenges to the inclusion of social rights in the Constitution. The challenges were based on arguments that socio-economic rights were not "universally recognized fundamental rights" and that they violated the constitutional principle of separation of powers.¹⁰ The Court rejected both challenges.¹¹ It asserted that the "universally recognized fundamental rights" requirement merely established a minimum threshold that placed no limit on the inclusion of additional rights.¹² The Court also stated that the adjudication of socio-economic rights did not inevitably violate the separation of powers requirement.¹³ The threshold importance of the *Certification* judgment is that it permitted inclusion of socio-economic rights in the final text of the South African Constitution. However, while the justiciability question (*whether* such rights could be adjudicated) was answered, the enforceability question (*how* such rights would be adjudicated) remained. Two years later, the Court addressed the enforcement question in its first substantive social rights case.

⁸ For a general discussion of the required constitutional certification process, see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) paras. 1–19, 76–78 (S. Afr.); for a discussion focused on the controversy regarding inclusion of social rights, see *Non-Justiciable Rights*, *supra* note 3, at 324–42.

⁹ The Constitution discussed in this essay is actually the second post-apartheid constitution. S. AFR. CONST. 1996. The first, or Interim Constitution, was a temporary measure to support the transition to democracy. Schedule 4 of the Interim Constitution formalized the pre-constitutional negotiated agreements—required elements of the final Constitution—in its "Thirty-four Principles." S. AFR. (INTERIM) CONST. 1993.

¹⁰ S. AFR. (INTERIM) CONST. 1993, sched. 4, Principles II ("Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution. . .") and Principle VI ("There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances. . .").

¹¹ The initial review of the proposed final constitution by the Constitutional Court held "we ultimately come to the conclusion that the [proposed text] cannot be certified as it stands because there are several respects in which there has been non-compliance with the [Thirty-four Principles]," but also noted that, "in general and in respect of the overwhelming majority of its provisions, [it] has attained [its] goal." *Ex parte Chairperson of the Constitutional Assembly*, *supra* note 8, at para. 31. Certification of the subsequently amended text was granted by the full court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the amended text of the Constitution of the Republic of South Africa* 1996 1997 (2) SA 97 (CC) para. 205 (S. Afr.). There were no changes to the social rights provisions between the two drafts.

¹² *Ex parte Chairperson of the Constitutional Assembly*, *supra* note 8, at para. 76.

¹³ *Id.* at para. 77. ("[I]t cannot be said that by including socio-economic rights . . . a task is conferred upon the courts so different from that ordinarily conferred upon them . . . that it results in a breach of the separation of powers.").

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2. Enforcement of Substantive Social Rights

Since its 1996 *Certification* opinion, the Court has addressed the Constitution's social rights provisions in numerous cases, but the core of its substantive jurisprudence is evident in three fundamental cases: *Soobramoney*, *Grootboom*, and *Treatment Action Campaign (TAC)*.

In *Soobramoney*, the Court affirmed the enforceability of social rights but held that neither the right of access to healthcare nor the right to emergency medical treatment required the Court to overturn the otherwise reasonable medical decisions of doctors and administrators faced with limited financial resources.¹⁴ The *Grootboom* case addressed the right to housing for squatters in an informal settlement and concluded that governmental housing programs violated the Constitution where they failed to develop and implement a "comprehensive and coordinated program" to advance the right, particularly if the programs failed to address the housing needs of the poorest South Africans.¹⁵ In the *TAC* case, the Court declared unconstitutional a government program which significantly restricted distribution of medication that dramatically decreased the likelihood of mother-to-child transmission of HIV.¹⁶

In general, these and other social rights cases¹⁷ affirm that, although the "obligations imposed on the state . . . are dependent upon the resources available for such purposes,"¹⁸ the Court will require creation of a broad policy-based program with particular attention paid to those who are most vulnerable.¹⁹ Also, it requires implementation by including "all reasonable steps necessary to initiate and sustain" a successful program to advance the asserted right.²⁰

However, while the Court's case law may be studied by foreign courts, it is neither the specific textual provisions nor the interpretation of the rights themselves that are most readily exportable. Instead, it is the manner in which the South African Constitutional Court has chosen to formulate its approach to enforcement that may assist other nations to advance social welfare through their constitutions.

¹⁴ *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC) (S. Afr.), available at [http://www.constitutionalcourt.org.za/Archimages/\[1234\].PDF](http://www.constitutionalcourt.org.za/Archimages/[1234].PDF).

¹⁵ *Gov't of Republic of S. Afr. v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/2798.PDF>.

¹⁶ *Minister of Health v Treatment Action Campaign* (No. 2) 2002 (5) SA 721 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/2378.PDF> [hereinafter *TAC*].

¹⁷ See, e.g., *Jaftha v Schoeman* 2004 (2) SA 140 (CC) (S. Afr.) (concluding a lack of judicial oversight for a debt-related forced home sale was an unconstitutional violation of Section 26); *Khosa v Minister of Soc. Dev.* 2004 (6) SA 505 (CC) (S. Afr.) (denial of social welfare benefits to non-citizen permanent residents was unreasonable and violated the rights to both equality and social security). For a discussion of the most judgments (including lower court judgments) related to socio-economic rights, see the Socio-Economic Rights Project of the Community Law Centre's Case Reviews, available at <http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/case-reviews-1/south-african-cases>.

¹⁸ *Soobramoney*, *supra* note 14, para. 11 (Ngcobo dissent).

¹⁹ *Grootboom*, *supra* note 15, para. 67.

²⁰ *Id.*

C. Crafting a Social Rights Jurisprudence

In order to reach its judgments in the cases discussed above, the South African Constitutional Court needed to determine how a judicial body can best interpret and enforce such rights—an assessment that required the Court to confront long-standing arguments against the justiciability of socio-economic rights. The Court did this by implicitly and explicitly evaluating the varied arguments against social rights adjudication, discarding the analyses that were inapt under its unique Constitution and then crafting a jurisprudence that accounts for and incorporates the surviving criticisms in its enforcement. This differentiated incorporation model, which allows each country to evaluate general adjudication critiques against its specific judicial culture and constitutional text, is what makes the South African approach an exportable commodity.

1. *Adjudication of Non-Justiciable Rights*

There are a significant number of traditional arguments against the justiciability of socio-economic rights but they fall into two general categories of concerns: those focused on democratic legitimacy issues and those related to the competency of courts to address socio-economic controversies.²¹ Since such arguments were crafted in the abstract—in the absence of a court that was actually adjudicating such rights and without a single country enforcing expansive, enumerated constitutional social welfare provisions—several of the traditional critiques were inapplicable as applied in the particular South Africa Constitutional setting. Arguably, it would be true of any country that only some of the theoretical concerns will remain valid when examined in the specific context of its history, culture, and government.

Legitimacy critiques are mostly focused on the anti-democratic nature of judicial decision-making; it is the anti-majoritarian critique of judicial review exacerbated by the intrinsically policy-related nature of decisions regarding social welfare and budgeting. Nevertheless, such critiques were generally out of place in the South African context because the Constitutional text expressly grants unusually expansive powers of judicial review to the South African judiciary—powers meant to enable the Court to advance the fundamentally transformative purpose of the post-apartheid constitution.

The second category of traditional concerns about judicial enforcement of social rights is more problematic, even in South Africa. Competency concerns focus on the inadequacy of the judiciary and of the adjudicative process to appropriately resolve social rights complaints. These failings include (1) procedural limitations, especially concerns about the general suitability of any particular plaintiff; (2) informational problems, including the absence of specialized, unbiased fact-finding; and (3) remedy-related difficulties, particularly where judicial remedies would be inadequate or politically inappropriate. While some of these alleged failings are addressed by the procedures and capabilities of the

²¹ See *Non-Justiciable Rights*, *supra* note 3, at 347-52.

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Constitutional Court,²² these plaintiff, information, and remedial problems (unlike most of the legitimacy-based concerns) remained genuine concerns as the Court began crafting its social rights jurisprudence. Hence, for the South African Court—as would be true of any nation's court wishing to enforce social rights but cognizant of the traditional concerns—only a small subset (rather than the full panoply) of non-justiciability arguments needed to be addressed in its formulation of a jurisprudence.

2. *A Prudent Jurisprudence*

The South African Court has created a jurisprudence that accounts for the justiciability concerns that survived its differentiation process, i.e., the plaintiff, information, and remedial problems discussed above. Whether consciously or not, the current South African social rights jurisprudence recognizes this smaller set of critiques as legitimate and adjusts its standard approach to rights adjudication in ways that account for those existing justiciability concerns. The peculiarities of the Court's jurisprudence in this area and some of its otherwise inexplicable adjudicatory decisions make sense if we understand that the Court is crafting the most expansive possible affirmative social rights jurisprudence while tailoring it to account for the traditional theoretical challenges.

As a consequence, the South African jurisprudence exhibits greater legislative deference in the area of social rights than in its comparable civil and political rights cases.²³ Additionally, the Court has repeatedly focused its assessment on the compliance of the governmental program at issue with Constitutional requirements, rather than on the rights of the particular plaintiffs before it.²⁴ Both of these strategies have lessened the impact of the plaintiff problem. Furthermore, in deference to the potential information problem, the Court has regularly requested additional information prior to and following oral argument, has been hesitant to resolve issues where it lacks sufficient essential data, and has defined, as necessary, its substantive decision-making areas fairly narrowly. For example, the Court navigates among sub-issues and makes determinations only in precise areas where it concludes it has sufficient information to adjudicate.²⁵

Moreover, the Court has avoided the most egregious elements of the remedial problem by refusing to fully enforce (or recognize) absolute rights, rights not limited by the "progressive realization" and "within available means" language

²² S. AFR. CONST. 1996 ch. 8, § 173 (the Constitutional Court has "inherent power to protect and regulate their own process . . . taking into account the interests of justice.") and § 172 ("When deciding a constitutional matter within its power, a court . . . may make any order that is just and equitable. . . .").

²³ *Grootboom*, *supra* note 15, para. 41 ("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."); *TAC*, *supra* note 16, para. 22 (tailoring its orders in order to be consistent with "the deference that courts should show to [policy] decisions taken by the executive").

²⁴ All of the Constitutional Court's orders to date relate to the state's programs rather than to an individual's request for relief. No individual relief has yet been granted in a socio-economic rights case.

²⁵ *Khosa*, *supra* note 17 ("[i]t would not, however, have been in the public interest in this case for this Court to have proceeded . . . without the information necessary for a proper determination of the case. . . ."); *TAC*, *supra* note 16, para. 128 (refusing to address formula feeding issue because there was not "sufficient evidence to justify an order").

of most social rights.²⁶ Unqualified or absolute rights are a significant problem for any social rights jurisprudence because they illustrate the worst fears of the critics of social rights enforcement. On their face, such rights are not subject to implementation over time nor to concerns about inadequate state resources. If enforceable as written, they would grant extensive authority for the Court to insist upon their full implementation as a first-tier priority unhindered by other factors; even valid concerns of the legislature or executive.

In its adjudication, the South African Constitution Court's jurisprudence has ignored the unlimited language of the right to basic education and to the basic welfare for all children. Section 29 states "[e]veryone has the right. . . (a) to a basic education, including adult basic education"²⁷, while section 28 states "[e]very child has the right. . . (c) to basic nutrition, shelter, basic health care services and social services."²⁸ Instead it has interpreted these textually unlimited rights as if they were no different from the other, limited social rights in the Constitution.²⁹

Additionally, the Court has expressly rejected the application of a minimum core rights analysis in its interpretation of social rights under the Constitution. Minimum core analysis is the legal procedure used by the United Nations Committee on Economic, Social and Cultural Rights in its analysis of mandatory country reports under the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁰ The Committee analyzes information supplied by the reporting country and non-governmental organizations to identify a minimum core, which is a mandatory minimum standard to be provided by each reporting country to its citizens in relation to each right protected by the ICESCR.³¹ It is particularly surprising that the South African Constitutional Court would reject such analysis (as it does for both standard and unlimited social rights) because the Constitution requires the Court to consider international law in its adjudication of rights.³² Moreover, the text of the social rights in the South African Constitution is based on the wording in the ICESCR.³³ These counter-textual

²⁶ Absolute rights are those rights without in-text limitations on the rights. They lack the standard internal limitation: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." S. AFR. CONST. 1996, ch. 2, § 26. Similar language is included in the text of other rights; see *supra* note 5.

²⁷ S. AFR. CONST. 1996, ch. 2, § 29.

²⁸ S. AFR. CONST. 1996, ch. 2, § 28.

²⁹ See *Non-Justiciable Rights*, *supra* note 3, at 382-84; *Grootboom*, *supra* note 15. The Court has not yet had a case relying on the right to basic education.

³⁰ International Covenant on Economic, Social and Cultural Rights (ICESCR), *opened for signature*, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

³¹ U.N. Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, General Comment 3: The Nature of States Parties Obligations, § 10, U.N. Doc. E/1991/23 (Dec. 14, 1990) ("[A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.").

³² S. AFR. CONST. 1996, ch. 2, § 39 ("When interpreting the Bill of Rights, a court. . . must consider international law; and. . . may consider foreign law.").

³³ ICESCR, *supra* note 30, art. 2(1). ("Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full

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elements of its jurisprudence provide strong evidence that the Court is crafting a jurisprudence that deftly navigates around the surviving concerns of those opposed to social rights adjudication.

This process of differentiated incorporation is what makes the South African model exportable. Other countries' judiciaries can do the same as the South African Court has done: after distinguishing between the valid and invalid components of the traditional non-justiciability critiques in their domestic setting, they can adjudicate in a manner that incorporates the extant concerns.

D. Two Exportability Challenges

Effectively examining the potential exportability of the South African model described above requires appraisal of at least two preliminary challenges: the unique character and purpose of the South African Constitution and the question of its success in actually advancing social justice. These challenges raise questions an "importing" country might consider: whether the South African model will be viable elsewhere and whether it has been successful enough in South Africa to merit adoption by another country.

1. *Addressing Distinctiveness*

The first challenge is the distinctiveness of the South African Constitution. It is certainly true that the modern South African Constitution is unlike any other. It is a reaction to the particular outrages of the system of government that preceded it. In its rights provisions and in its structural provisions the Constitution signals and effectuates a radical repudiation of apartheid. The Preamble states in part:

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

- 1.) Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- 2.) Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- 3.) Improve the quality of life of all citizens and free the potential of each person; and
- 4.) Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.³⁴

Some may argue that its exceptional character limits the Constitution's usefulness to other countries and disallows any transnational applicability.

However, the South African Constitution is unique in precisely the same way that all other constitutions are unique. Like all constitutions, the South African

realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.").

³⁴ S. AFR. CONST. 1996, pmb.

Constitution is fundamentally reactive. With its expansive protections of civil and political rights, the Constitution responds to the panoply of restrictions placed on all non-white South Africans—most forcefully upon black South Africans—under apartheid. The primacy of the fundamental rights in the Constitution and the particular pre-eminence of the rights to dignity and equality reflect the desired reversal of the previous political morality.

Of course, apartheid was much more than just a political system of forced segregation and disfavor against black South Africans. Apartheid also established and sustained a scheme of crippling socio-economic inequality; apartheid-era South Africa was “among the world’s most unequal economies.”³⁵ The South African Constitution includes provisions addressing socio-economic rights in reaction to the effect of apartheid. For many South Africans, the end of apartheid required an end to the radical economic disparity of the past. Political equality was both an end itself, as well as a means to equality of access, advantage and opportunity.³⁶ To the extent it is true that the radical socio-economic inequality of apartheid resulted in inclusion of enumerated and enforceable social rights in the final South African Constitution, it could be argued that such rights cannot effectively be exported to countries with a different history.

Indeed, historical need and popular expectations applied substantial pressure on the drafters of the Constitution. However, that is the nature of the constitutional drafting process generally, not just in South Africa. There is no reason to assume similar pressures for improved socio-economic conditions will not be (or have not been) frequent motivations for political change through constitutional processes in many countries. Indeed there is every reason to believe that constitutional drafting procedures that result in enumerated and ostensibly enforceable social rights are in fact motivated by very similar popular, political, or moral concerns. Similar constitutional goals may grow out of distinctive histories.

Furthermore, we are not discussing the adoption of South Africa’s textual rights provisions or its case law by other countries. Rather what South Africa offers is a method of formulating a country-specific approach to domestic enforcement of social rights. It is the particular strength of the Constitutional Court’s social rights jurisprudence that it is procedurally adaptable to different circumstances in different countries under different constitutions. Distinctiveness encourages adoption of a method of adjudication that tailors to the particular milieu of the adopting country, as the South African method does. The textual

³⁵ Julian May, Talking to the Finance Minister about Poverty: Pro-Poor Policy and the Political Economy of Information 10, University of Manchester (April 7-9, 2003), *available at* <http://www.chronicpoverty.org/pdfs/2003conferencepapers/May.pdf> (citing the World Bank’s description of South Africa’s economic inequality). Statistics for all individual aspects of the South African economy evidence dramatic racial inequality during the transitional period. While just one percent of whites fell below the national poverty line, over 60% of blacks did. *Id.* 65% of whites had completed secondary education compared to 24% of blacks and 24% of blacks had no formal schooling (compared to one percent of whites) at the time of the transition. A.J. Christopher, *ATLAS OF CHANGING SOUTH AFRICA*, 233 (2000).

³⁶ 3 Debates of the Constitutional Assembly, Rep. of S. Afr., 122-23 (1996) (ANC member Kader Asmal said, “The struggle for liberation in South Africa was not only a struggle for the right to vote, to move, to marry, or to love. It has always been a struggle for freedom from hunger, poverty, landlessness, and homelessness.”); *Soobramoney*, *supra* note 7, para. 8.

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provisions of the South African Constitution are similar to those that many countries may include in their constitutions, but it is the manner of enforcement through differentiated incorporation that exhibits adaptability to historical settings and political realities in other countries.

2. *Assessing Success*

The second challenge that could be raised against the exportability of the South African social rights jurisprudence is its capacity for success. Does the South African model succeed in increasing social justice through advancement of socio-economic rights? Specifically, is life better for those South Africans who experienced wide-ranging oppression of their social rights during the apartheid regime? Presumably, if the social welfare has not improved of the people for whom the constitutional inclusions of such rights were meant to protect, there is little impetus to adopt such a system.³⁷

Assessing the success of the Court's jurisprudence on such a level is challenging. What determines success and how can it be reliably measured? One gauge is overall improvement in the substantive areas enumerated in South African social rights provisions, e.g., housing, healthcare, basic education, social services for children, etc.

Unfortunately, it is challenging to answer even such a relatively straightforward inquiry. In attempting to find reliable socio-economic data, the normal difficulties—especially when researching conditions among the poorest South Africans—are dramatically compounded by the unreliability (and occasionally the outright falsity) of apartheid-era statistics. According to current reports, conditions have improved for the poorest South Africans. The available and most reliable data shows an increase in the amount of available housing, the number of medical clinics, and school enrollment but, the stark socio-economic legacy of apartheid will haunt South Africa for many more decades.³⁸

The slow pace of change has justifiably disappointed many concerned individuals within and outside South Africa. The real question is not whether there has been some evident improvement, but whether socio-economic indicators have improved as much as they realistically could have. And, what is the contribution of the constitutional provisions? For our purposes, the concern is about the con-

³⁷ It should also be noted that there is a certain irrationality to the "ineffectual" challenge from opponents of social rights since it contradicts the well-established legitimacy arguments social rights adjudication. The traditional legitimacy complaint asserts that the monies spent on social programs—as required by an empowered court interpreting enumerated rights—are a violation of the necessary separation of powers because the legislative branch is responsible for all budgeting. This critique presumes—as do other traditional critiques—that allocation of money to social programs will occur. That alone may be presumptive evidence of a potential for success.

³⁸ See Gov't Comm'n and Info. Sys., Rep. of S. Afr., *Toward Ten Years of Freedom: Progress in the First Decade, Challenges in the Second Decade* (2004), available at <http://www.gcis.gov.za/docs/publications/10yrstab.pdf>. The housing situation illustrates the continuing challenge. Even though 1.46 million subsidized houses were built in the decade prior to 2004, 36% of households still do not reside in formal housing. *Id.* Similar statistics are available for other socio-economic indicators. *Id.* See SouthAfrica.Info, *The Poor Must Also Benefit: Mbeki*, (Feb. 6, 2006), http://www.southafrica.info/ess_info/sa_glance/government/stateofnation2006-social.htm (last visited Jan. 10, 2008).

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tribution of the Constitution and the Court to the advancement of social equality—an even more elusive component of the assessment of success. Has the presence of enumerated social rights provisions in the Constitution improved the lived reality of South Africans? In the absence of any improvement, it could be reasonably asserted that the Court had failed in its appointed task. But where, as here, there is evidence of improvement, responsible assessment of judicial success may remain difficult.³⁹

Ultimately, in what must be an incomplete assessment, I believe that there has been clear success in one area, moderate successes in other areas, and additional indeterminate positive effects. At the very least, the Court's jurisprudence has been clearly successful on an inspirational level. By hearing claims and evaluating government actions against constitutional social welfare protections, the Court reminds South Africans of the vision of substantive equality contained in their Constitution. "The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved."⁴⁰

Moderate success has been evident in the Court's judgments in the specific substantive areas brought before it. Official responses to *Soobramoney* and *TAC* asserted a willingness to comply with the Court's orders but implementation has been inconsistent and incomplete.⁴¹ The unknowable element of the "success" determination is the impact the threat of judicial review has had in promoting social welfare legislation at a national and provincial level. Hopefully, the combination of enumerated social rights with potential enforceability by the Court has successfully reinforced the government's early commitment to social transformation.

At the present stage, thirteen years after the Court began hearing cases under the post-apartheid Constitution, there is reasonable evidence of modest success on the part of the Court at openly reaffirming the nation's commitment to transformation, actively identifying specific areas of governmental failings, and passively pressuring the government to advance the social goals of the constitutional text. The result may be, problematically, more pleasing and meaningful to comparative constitutional law scholars than to needy South Africans, but it is nevertheless a genuine advance in contrast to constitutional silence on such matters.

³⁹ This is not to assert that the social benefit of individual judgments is not possible. Although beyond the scope of this essay, an assessment of the pragmatic consequences of *Grootboom* or *TAC* would at least reveal whether the South African judiciary needs to re-assess its individual rulings, e.g., to question whether the courts should take on a more participatory post-judgment role. The most obvious (and clearly constitutionally permissible) option would be the use of supervisory orders in connection with its judgments.

⁴⁰ *President of RSA and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC), at 36 (S. Afr.).

⁴¹ Siri Gloppen, *Social Rights Litigation as Transformation: A South African Perspective* (CMI Working Papers 2005) 16-17; available at <http://www.cmi.no/publications/2005/wp/wp2005-3.pdf>.

III. An Exportable Social Rights Jurisprudence Model

What does the South African social rights jurisprudence model offer to the constitutional courts of other nations? It is exportable to other nations seeking to enforce enumerated socio-economic rights because South Africa has created its affirmative social rights jurisprudence that internalizes country-specific justiciability concerns. Its process consists of (1) differentiating between legitimate and illegitimate critiques of social rights adjudication; and (2) incorporating the genuine justiciability issues into the procedures and standards followed by the court. The result is a country-specific jurisprudence that accommodates valid justiciability concerns through indigenous processes, and provides the missing element for social rights adjudication. When coupled with evidence of successful enforcement by South African courts, it permits enforcement without ignoring the potentially valid concerns that arise in the context of socio-economic rights.

A. Differentiated Incorporation

It is critical to remember we are evaluating export of the South African model for determination of an appropriate jurisprudence, rather than export of the South African rights and case law. This should not be surprising. On the one hand, this distinction merely restates the earlier point that each constitution and thus each nation's jurisprudence is, out of necessity, reflective of local conditions. But there is more to this declaration. The model is exportable because the court of other nations can explicitly follow the process followed by the South African Constitutional Court. A court interpreting a new constitution or a newly amended constitution that includes socio-economic rights as enforceable provisions, can evaluate the historical arguments against adjudication of socio-economic rights, discard those arguments that are invalid or inapt in their particular constitutional culture, and then craft a social rights jurisprudence that expressly addresses the remaining, legitimate concerns.

Each step of this process must be tailored to the particular country by its courts. While a similar collection of theoretical opposition arguments will generally be considered at the start of the differentiation stage, there will inevitably be concerns or emphases unique to the adopting country, derivative of its particular history or legal culture. The judiciary must examine each non-justiciability argument in relation to its own constitutional text and culture. Issues that will impact this analysis include the text of the constitution (especially the claimed social rights provisions), the approach to rights adjudication generally, separation of power issues, federalism issues (where applicable), legal culture, the capability and credibility of the judiciary, procedural issues that impact the courts' capacity to solicit information, and the breadth and flexibility of the courts' remedial powers.

In the latter stage the courts will develop—through the normal adjudicative process—a jurisprudence that incorporates the subset of non-justiciability concerns that it determined to be valid in the differentiation stage. Certain elements are likely to be consistent in comparative perspective, e.g. significant legislative deference, but most will reflect the distinctive features of the country in question.

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Hence, the particular South African conclusions about differentiation or incorporation may not be appropriate or helpful in other countries.

Moreover, this procedure benefits from being self-improving. Now that the South African model is developing, further and more precise critiques of social rights adjudication can be expected. That insight, in tandem with the developing jurisprudence in the Constitutional Court and the lower courts of South Africa, will highlight additional concerns and evidence the absurdity of others. Through the process of repeatedly adjudicating the same textual rights, courts will re-evaluate their own initial self-imposed limitations. I expect that on-going adjudication of such rights will slowly but continually diminish many of the limits placed uniquely on social rights jurisprudence.

Similarly, the South Africa model is a proactive guide for constitutive bodies drafting enforceable socio-economic clauses for new or amended national constitutions. Until recently, the socio-economic rights debate has primarily focused on the options of exclusion (rejecting such rights on the basis of the non-judiciability arguments), inclusion as unenforceable (typically in countries with little or no genuine judicial review), or inclusion as mere "directive principles" for policy making (unenforceable policy statements).⁴² Now, an additional viable option is available: judicial enforceability subject to differentiated incorporation.

B. The South African Social Rights Innovation

The burgeoning socio-economic rights jurisprudence of the South African Constitutional Court has been transformative in the field of comparative constitutionalism. The debate about inclusion and enforcement of social rights will continue, but it has been radically changed by the development of an affirmative jurisprudence of the South African Constitutional Court.

The most persuasive historical argument against comprehensive social rights adjudication was its radical novelty. A plethora of justifications for opposition were routinely proposed, without a significant counterexample to examine. Without a viable example of adjudication, critics were able to argue that adoption of inherently unenforceable rights would fatally warp the constitutional separation of powers, destroy the rule of law, or bankrupt the nation to pay for its textual social welfare commitments—among other assertions of disaster.⁴³ Of course, such arguments ignored the harm worked on nations and the rule of law by unaddressed socio-economic inequality. The South Africa case law is a direct refutation of these dire claims. It exhibits modest but real enforcement of social rights and supports limited but genuine socio-economic change.

⁴² See Christiansen, *Survey of Socio-economic Rights in National Constitutions*, *supra* note 1; see, e.g., INDIA CONST. art. 37 ("The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.").

⁴³ See, e.g., Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS? POST-COMMUNIST APPLICATION, 225, 225–32 (András Sajó ed., 1996) (arguing against the inclusion of socio-economic rights in the new post-communist constitutions of Eastern Europe).

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Moreover, the restraint demonstrated by the South African Court—most of it self-imposed—belies these fears.⁴⁴ Even without clear constitutional guidance, the Court chose a middle position for its jurisprudence, encompassing legislative deference, a reasonableness standard, and rejection of the unrestricted enforcement of unlimited textual rights. To the extent one trusts judicial review generally, similar results seem likely in most countries following the South African model.

IV. Conclusion

In its process of formulating a domestic jurisprudence of social rights enforcement, the South African Court had little guidance. The majority of academic commentators opposed the enforcement of social rights by the judiciary. Hence, the Court's task at least implicitly involved a review and evaluation of the reasonableness and applicability of those traditional critiques. The result in South Africa was an affirmative jurisprudence that internalized jurisprudential limits that correspond to those justiciability critiques not otherwise addressed by the Constitutional text or other particular elements of the South African milieu. This process for development of an adapted, affirmative jurisprudence of socio-economic rights enforceability is a novel and potentially fruitful contribution to comparative constitutionalism. The resulting case law may be of some value to other nations as a guidepost and model, but it is the process of differentiated incorporation, by which the Court formulated its internalized limits, that is clearly exportable to and adaptable by other countries desiring judicial enforcement of socio-economic rights.

⁴⁴ The South African example puts this dramatic fear of a "Godzilla jurisprudence" to rest. (A "Godzilla jurisprudence" because it envisions the judiciary running roughshod over the system of separated powers and raining destruction down on the carefully crafted budget decision of the democratically elected legislature—causing damage and destruction like Godzilla on one of his famed visits to Tokyo.)