Justice and Transformation: Examining the Value of Socio-Economic Rights in Transformative Constitutions

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This paper sets out to assess the value of socio-economic rights in the transformative constitutions of resource rich, post-trauma nations. In the interest of revealing assumptions and biases at the outset, the question itself requires some explication, particularly because the definition and usage of many words in the question alone are subject to sufficient academic debate as to warrant papers of their own. "Socio-economic rights" can here be understood to countenance many of the rights enumerated in the International Covenant on Economic, Social and Cultural Rights[1] as understood through the lens of General Comments adopted by the Committee on Economic, Social, and Cultural Rights,[2] the Limburg Principles on the Implementation of Economic, Social, and Cultural Rights,[3] and Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.[4] This should not be construed as an assertion that the list or interpretation of these rights is exhaustive or somehow "correct;" the

[1] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966. United Nations, Treaty Series, vol. 993, p. 3 (available at: http://www.unhcr.org/refworld/docid/3ae6b36c0.html accessed 4 March 2009).

[2] *See* United Nations International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty, 8-105 12 May 2003. HRI/GEN/1/Rev.6 (available at: http://www.unhcr.org/refworld/docid/403f2a344.html accessed 25 February 2009)

[3] UN Commission on Human Rights, Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), 8 January 1987. E/CN.4/1987/17 (available at: http://www.unhcr.org/refworld/docid/48abd5790.html accessed 25 February 2009) (hereinafter "Limburg Principles"). *See also* David L. Martin, The Limburg Principles Turn Ten: An Impact Assessment in SIM Special No. 20, The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Theo C. van Boven,. Cees Flinterman, Ingrid Westendrop eds., SIM:Utrecht 1996).

[4] International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997 (available at: http://www.unhcr.org/refworld/docid/48abd5730.html accessed 25 February 2009) (Hereinafter "The Maastricht Guidelines"). *See also* Victor Dankwa, C. Flinterman and Scott Leckie, Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 20 Human Rights Quarterly 705 (1998).

Covenant here is used to provide substantive examples when needed, not to demarcate the bounds or content of a set of rights.[5]

The nature and definition of a "transformative constitution" is also subject of vigorous and voluminous discussion. While this paper does seek to make a modest contribution to that debate, this purpose is best served by dispensing with some questions of definition at the outset. While there is a distinct lack of a consensus formulation,[6] this paper adopts the basic framework put forth by Lawrence Lessig, which has since been embraced by Cass Sunstein[7] and Pius Langa:[8] a transformative constitution is one which "tries to change something essential in the constitutional or legal culture in which it is enacted – to make life different in the future, to remake some part of the culture."[9] Two other points regarding transformative constitutions bear mentioning along with the definition. First, transformative constitutions are defined in opposition to "preservative"[10] or "codifying"[11] constitutions,[12] which "attempt to protect longstanding

[5] Use of the Covenant also allows the paper to avoid the very heated debate as to the valence of any given right; i.e. whether said right is "positive" and thus properly labeled "socio-economic" or "negative" and thus "civil" or "political." While this paper does skirt the shoals of whether such distinctions (and method of distinction) are necessary, it does not intend to take the topic full on. Insofar only as it absolutely must, this paper should be seen as rejecting the necessity of this distinction. *See* Henry Shue, Basic Rights: Subsistence, Affluence and U.S. Foreign Policy, (Princeton University Press, 1980; Second Edition, with new Afterword, 1996).

[6] Pius Langa, CJ (Constitutional Court of South Africa). 'Transformative Constitutionalism,' Prestige Lecture Delivered at Stellenbosch University, 9 October 2006 (available at http://www.mymaties.com/portal/page/portal/law/index.english/news/2006/Pius%20Langa%20Speech.pdf)("It is perhaps in keeping with the spirit of transformation that there is no single stable understanding of transformative constitutionalism"). [NOTE: FIND A MORE DIGNIFIED URL]

[7] Cass Sunstein, Designing Democracy: What Constitutions Do, 67 (Oxford University Press, 2001) (hereinafter Designing Democracy).

[8] Langa, Transformative Constitutionalism,

[9] Lawrence Lessig, Code and Other Laws of Cyberspace, 214 (Basic Books, 1999) (hereinafter Code and Other Laws of Cyberspace)

[10] Sunstein's term and the preferred term in this paper, from Sunstein, Designing Democracy, 67.

[11] Lessig's term, from Lessig, Code and Other Laws of Cyberspace, 214.

[12] *See* Rates Action Group v City of Cape Town 2004 (12) BCLR 1328 (C) at para 100 (Ours is a transformative constitution. Justice Scalia of the US Supreme Court has said that "the whole purpose of a constitution, old or new . . . is to impede change or pejoratively put "to obstruct modernity" ... that is not the purpose of our Constitution. Our Constitution provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity." citing Antonin Scalia, "Modernity and the Constitution" in E Smith (ed) Constitutional Justice under Old Constitutions (Kluwer Law International, 1995)).

practices that, it is feared, will be endangered by momentary passions."[13] Second, a single document can be both transformative and preservative either simultaneously[14] or over the life of its application.[15] Thus, the appellation "transformative" is used in this paper to denote a location on a spectrum rather than membership to some hard and fast classification.[16]

The nations examined in this paper have two specific attributes, both of which bear explanation. First, this paper focuses on nations which are "resource rich," a term which can have either broad or very technical meaning. For the purposes of this paper, a "resource rich" nation is defined simply as on which has a large stock of natural capital.[17] The term has been used by economists to describe nations for which natural capital comprises a disproportionately high percentage of overall wealth; this paper avoids such a definition partially on account of the recognized negative effects on development often associated with resource abundance,[18] which may skew percentages. Exact statistics are unnecessary for the term to fulfill its role here; the purpose of the designation is simply to limit the scope of the debate. One of the arguments leveled against the inclusion or enforcement of socio-economic rights is that the results are

[13] Sunstein, Designing Democracy, 68.
[14] *See* Id.
[15] *See* Lessig, Code and Other Laws of Cyberspace, 215 (discussing the United States Constitution as preservative and the Civil War Amendments as transformative).
[16] It is worth noting here that the descriptor "transformative" is content neutral; while many constitutions laying claim to this label (and the majority of those examined in this paper) embrace a very specific set of rights and goals, the status of "transformative" alone does not necessitate a specific conception of justice or set of rights.
[17] World Bank, Where is the Wealth of Nations? Measuring Capital for the 21st Century, 23, International Bank for Reconstruction and Development/World Bank, Washington, D.C. (2006) ("Natural capital is the sum of nonrenewable resources (including oil, natural gas, coal, and mineral resources), cropland, pastureland, forested areas (including areas used for timber extraction and nontimber forest products), and protected areas")
[18] *See* Frederick van der Ploeg, Challenges and Opportunities for Resource Rich Economies, 12, OxCarre Research Paper No. 2008-05 (2007) (available at http://www.oxcarre.ox.ac.uk/wp-content/uploads/resource%20curse%20survey.pdf) (citing Thorvaldur Gylfason and Gylfi Zoega, Inequality and Economic Growth: Do Natural Resources Matter?, Ch. 9 in T. Eicher and S.J. Turnovsky (eds.), Growth and Inequality: Theory and Policy Implications, (MIT Press, 2003), Thorvaldur Gylfason , Natural resources and economic growth: From dependence to diversification, Discussion Paper No. 4804, (CEPR, 2004), Elissaios Papyrakis and Reyer Gerlagh, The resource curse hypothesis and its transmission channels, 32 Journal of Comparative Economics 181 (2004), and Jann Lay and Toman Omar Mahmoud, Bananas, Oil, and Development: Examining the Resource Curse and Its Transmission Channels by Resource Type, Kiel Working Paper No. 1218 (2004)).

economically untenable in many nations. As many of the nations which enshrine these rights are considered "developing," questions regarding the economic feasibility of these rights are particularly salient. In order to avoid undue attention to the practicality of actualizing socio-economic rights in the long term, this paper assumes that a nation rich in natural resources could, were it "developed," afford the actualization of these rights in some form. While hardly an uncontested assumption, it is a useful one in that it limits the scope of discussion.

The second attribute of the nations examined is that of "post-trauma." The term "post-trauma" is deliberately amorphous; it is used to avoid entanglement in whether a given nation fits into the category of post-conflict,[19] post-colonial,[20] post-crisis, or any other specifically articulated status. Post-trauma includes these categories as well as others; the principle characteristic of a post-trauma nation is that some event or series of events has rendered the previous constitutional or legal culture either unviable or untenable. Whether the event which precipitated the end of the previous legal culture was the end of colonial power, the conclusion of prolonged occupation, the cessation of a civil war, extra-constitutional regime change (either internally or externally initiated), the success of a separatist insurgency or similar events is not of great import; the key condition is that large scale constitutional change is both necessary and abrupt.

Last and most important, the rubric of evaluation requires some explication. Theories of justice come in several varieties and find application through their instantiation in legal and political systems, often in constitutional documents. The language of modern constitutions has been, for the most part, egalitarian in that it sets out to eliminate some form of inequality. The

[19] *See generally* Governance Strategies for Post Conflict Reconstruction, Sustainable Peace and Development, UN DESA Discussion Paper (2007) (available at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan028332.pdf)
[20] *See generally* Bill Ashcroft, Gareth Griffiths, Helen Tiffin, Post-Colonial Studies: The Key Concepts, (Routledge, 2000).

major distinction between constitutions arises from the currency[21] or space[22] of this equality; put more simply, the question to be answered now is "equality of what?"[23] Three broadly defined schools of thought have emerged to answer this query; welfarism,[24] resourcism,[25] and the capabilities approach.[26] This paper uses the latter two approaches, resourcism and capabilities, as means of answering questions of substantive justice. On a more concrete level, a secondary criterion for evaluation is the consistency of socio-economic jurisprudence with the constitutionally envisioned role of the judiciary; while the inclusion of socio-economic rights may be transformative, their application by courts should remain within the bounds set out in the constitution.

II. Constitutions and the Transformational Process

In many ways, constitutions by their very nature are transformative: they arrive at a critical juncture in the history of a nation or a people and they and mark the birth (or rebirth) of a government and society. A "transformative constitution," however, goes beyond being "a milestone in [a] nation's history" or "a historical landmark;"[27] they are progressive documents which embrace "a long-term project of constitutional enactment, interpretation, and enforcement

[21] *See* G.A. Cohen, On the Currency of Egalitarian Justice, 99 Ethics 906 (1989). *Compare* note 27 below.
[22] Thomas Pogge, in his recent work, has put forth the term "space" as a replacement for "currency," asserting that a multidimensional conception of goods allows for a more accurate assessment, as access to goods can be seen as "vector[s] within the same dimensionality." The effect of this change is two-fold. First, it asserts a heterogeneous set of goods rather than a homogeneous, fungible "currency." Second, it asserts a more relational or contextual conception of goods and the justice of their distribution.
[23] *See* Amartya Sen, Equality of What?, The Tanner Lecture on Human Values, Stanford University, May 22, 1979.
[24] This school of thought places a primacy on the maximization of aggregate welfare; perhaps the most widely known example of this school is the utilitarianism of Mill, Bentham, and the early work of Richard Arneson.
[25] This school of thought is embodied most fully by the works of John Rawls. The resourcist position can be roughly stated as the assertion that the individual shares of consequence are "bundles of goods" which are comprised of those things needed by humanity generally, without regard to individual preferences or the outcome generated by the use of those goods. Recently, Thomas Pogge has closed some of the ideological ground between the resourcist or Rawlsian approach (to which Pogge himself is an adherent) and that of Sen and the capability theorists.
[26] The capabilities approach is most strongly associated with the works of Amartya Sen and Martha Nussbaum and, at its core, asserts the importance of the individual's ability to convert her bundle of goods into "well being" or happiness in the calculation of distributive justice.
[27] Justice Pius Langa, The Vision of the Constitution, 120 S. African L.J. 671, 671 (2003).

committed to…transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction."[28] Such constitutions arise from a nation or people recognizing the imperative of change;[29] they are mechanisms for both healing the wounds and charting the course of the future.[30] This assumes, of course, that there are wounds to be healed and that the wounded have found a means of ending their victimization; similarly, it assumes that the previous regime has become untenable. While these conditions can come about through a variety of ways,[31] this paper focuses on those states emerging from traumatic events which render the previous political and social institutions unsustainable.

Two aspects of the transformative constitution which distinguish it from a classical constitution; first is the amount of attention paid to the resources available as affecting the contours of a protected right,[32] second is the increased importance of the constitution's expressive content, rather than pragmatic effects.[33] The traditional wisdom on the first point is

that only the implementation of so-called "positive" rights should be subject to questions of

[28] Karl E. Klare, Legal Culture and Transformative Constitutionalism, 14 S. Afr. J. on Hum. Rts. 146, 149 (1998).
[29] Langa, J, Prestige Lecture ("this is the core idea of transformative constitutionalism: that we must change").
[30] Id., ("[t]his is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future"). *See also* The Constitution of the Republic of South Africa, Preamble ("We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights"), *and* Kim Lane Scheppele, A Constitution Between Past and Future, 49 Wm. & Mary L. Rev. 1377, 1377 ("New constitutions are often envisioned not only as devices to get a state through a crisis but also as great opportunities for progress, which generally means that these legal governing documents are portrayed as platforms for launching new futures").
[31] Transformative change implies something more than "reform" or the gradual amendment of a system and thus requires a radical restructuring of social and political institutions, though this need not necessarily be revolutionary.
[32] Cass Sunstein, American Advice and New Constitutions, 1 Chi. J. Int'l L. 173, 177-178 (2000)("The first clear lesson [learned by American advisors] has to do with the dependence of rights-protection on resources, and the absence of a sharp distinction, along this dimension, between so-called negative rights and so-called positive rights. In Eastern Europe, and South Africa as well, it was clear to all that compliance with constitutional commands would require money… This point was entirely clear in Eastern Europe and South Africa, and it draws much of conventional American wisdom into grave doubt").
[33] Id., at 178 ("A second lesson is the limited importance of the constitutional text and the overriding importance of cultural support for constitutional institutions. In retrospect, the precise text of constitutional provisions could increase probabilities of various sorts, and reduce risks; but, it could do little more").

availability; this dichotomy is neither necessary nor helpful.[34] All rights are costly to enforce,[35] even "the most negative of negative rights"[36] require resources and a well organized judiciary (which is seldom a cheap proposition in itself). The dichotomy is enforced by the presence of a well oiled (or at least functional) judicial machine, as is found in many "First World" nations; it is significantly less clear in nations which must begin from little or nothing.

The second point illustrates a shift in the balance between the expressivist and consequentialist perspectives on the law. Transformative constitutions often reflect the troubled history of a people and set out to be more than a mechanical and organizational document; they intend to be statements of and about the people adopting them.[37] These statements, however, are seldom intended to be "merely" statements; they are often aimed at expressing norms and values which a society wishes to adopt and live by.[38] Transformative constitutions then can be judged on two criteria related to their unique aspects: first, a "good" transformative constitution is one which strikes an adequate balance[39] between the resources available and the rights it purports to

[34] *See* Stephen Holmes, Cass R. Sunstein, The Cost of Rights: Why Liberty Depends on Taxes, 37 (W. W. Norton & Company, 2000).
[35] Id., at 39.
[36] Cass Sunstein, American Advice and New Constitutions, 1 Chi. J. Int'l L. 173, 178 (2000) ("Even the most negative of negative rights could not exist without public support, and hence negative rights, as they are misleadingly called, require the expenditure of public resources).
[37] Id., at 176 ("In Eastern Europe, by contrast, one of the central points of constitution-making was emphatically expressive --to make a statement about what was being accomplished and to articulate national commitments or goals. It is easy to overlook what was entirely visible at the time: the struggle, on the part of many nations, to reassert national identity, or more simply nationhood, in the aftermath of what had been seen by many as a form of Soviet occupation").
[38] *See* Cass R. Sunstein, On the Expressive Function of Law, 144 University of Pennsylvania Law Review 2021, 2045 (1996) ("at least for the purposes of the law, any support for 'statements' should be rooted not simply in the intrinsic value of the statement, but also in plausible judgments about its effects on social norms and hence in 'on balance' judgments about its consequences") .
[39] Defining an 'adequate balance' is, of course, an incredibly difficult task and one which will take up the bulk of this paper. For the moment, an 'adequate balance' would be one which provides for the maximum number of rights (lexically ordered by collective social preference) possible based on the available resources. A lexical ordering of rights is not uncontroversial; it does, however, square with both the resourcist and welfarist approach and is therefore of use for the purposes of this paper.

guarantee; second, a "good" transformative constitution must be capable of application in such a way as to further the normative content it purports to express.[40]

III. Transformative Models

While national trauma comes in many forms, since the Second World War, there have been three basic typologies of post traumatic constitutions;[41] those which are near instantaneous (such as the constitutions imposed by occupational forces or revolutionaries),[42] those which evolve incrementally over an extended period of time,[43] and those which actively set out to produce radical change in a short period of time.[44]

The first typology, instantaneous transformation, has considerable advantages, such as efficiency and ideological clarity, but also comes with considerable dangers. Instantaneous transformation most often comes as the result of revolution or occupation and therefore the constitution which emerges is imposed on a sizable portion of the population.[45] A regime instituted as the result of a "liberating"[46] invasion and occupation is not necessarily any better;[47]

[40] This furtherance need not be wholly within the realm of legally cognizable progress. The criteria here can be met simply by successful norm management (which is difficult to measure in the short term) or by the continued and repeated expression of the norms in political and social valuing by the nation. This paper, however, does place a premium on the legal and pragmatic consequences of an expressive statement as they are more easily measured.
[41] *See* Vicki C. Jackson, Timing, Naming, and Constitution Making, 49 Wm. & Mary L. Rev. 1249, 1260 (2008).
[42] Examples of this typology include the post-War Germany and Japan as well as Iraq.
[43] These constitutions are typified by post-Soviet states such as Poland and Hungary, though India may be included in this category.
[44] The Constitution of the Republic of South Africa is paradigmatic of this typology.
[45] Ulrich K. Preuss, Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization, 51 N.Y.L. Sch. L. Rev. 467, 470 ("After a revolution--the most intense kind of internal social conflict--the triumphant forces lay out their principles of how society should be ordered. This is tantamount to imposing their rule upon the defeated groups who are then usually denounced as 'counter-revolutionary,' 'reactionary,' or sometimes even as 'enemies of the people.' Constitution-making after a war is not very different").
[46] Id., at 472 ("While the universalization of freedom (and constitutionalism, its institutionalized paradigm) promised the liberation of mankind from the evils of oppression and tyranny, the realization of this high-spirited project entailed a major problem: The distinction between imperialism and liberation was blurred, and this was tantamount to confusing liberty and tyranny").
[47] Id., at 470 ("If constitution-making is a phenomenon of citizens' activation, then the idea of imposing a constitution upon a nation appears odd and incoherent. Imposition means degrading the people to a thoroughly passive and subaltern status which is exactly what constitutionalism is supposed to overcome in the first place").

though in recent instances of such constitutions,[48] external influence has been less coercive than in the cases of immediate post-WWII occupied states.[49] International powers often have profound influence over constitution-building in former failed states, as national and regional institutions have already collapsed. Transformative constitutions of this type tend to have less local ownership and thus can encounter backlash and secondary transformations over time.

The second type of transformative constitution is one which sets out to incrementally institute societal change over a indeterminate period of time. This type of constitution does not lend itself to simple analysis, partially because, by design, the text of a given constitutional draft is temporal thing, meant, at some point, to be abandoned or revised. The constitutional process in Poland and Hungary provide excellent examples of this typology, as does the Constitution of India to a lesser degree. In Poland, a nation with a modern history fraught with constitutional revision,[50] the transition from Soviet dominance to independent nation occurred over a series of years and documents.[51] Post-Soviet Hungary began its constitutional journey with Act XXXI of 1989, which consisted of nearly one hundred amendments to the previous constitution, Law XX

[48] *E.g.* The Constitution of the Republic of Iraq.

[49] *Compare* Jackson, at 1262 ("Japan and Germany are two widely cited examples of post-conflict constitution-making imposed and/or heavily supervised by victorious occupying powers. In both of these instances, a clean break was successfully imposed, marking a decisive abandonment of prior regimes that were presumably supported by significant numbers of the population. Yet both of these cases occurred under historically specific conditions not replicated in Iraq" citations omitted) *and* Yash Ghai and Guido Galli, Constitution Building Processes and Democratization, International Institute for Democracy and Electoral Assistance, 11 (2006) ("There is often severe criticism of foreign involvement by particular sections of the people, and there is undoubtedly a danger that external forces will determine the pace of the process as well as the content of the document (as undoubtedly happened in Iraq and Afghanistan)").

[50] In the twentieth century alone Poland has had eight constitutions: the Little Constitution of 1919), the March Constitution (1921), the April Constitution (1935), the July Manifesto (1944), the Little Constitution of 1947, the Constitution of the People's Republic of Poland (1952), the Small Constitution of 1992, and the Constitution of the Republic of Poland of 1997.

[51] The Polish Round Table Agreement preceded the April Novelization of 1989, which in turn preceded the "Small Constitution" of 1992, all of which modified substantially, but did not replace, the 1952 Constitution of the People's Republic of Poland. The Small Constitution of 1992 set the stage for five years of discussion, debate, and negotiation which eventually produced the 1997 Constitution of the Republic of Poland. See Jackson, at 1266.

of 1949, and altered almost ninety percent of the text.[52] These amendments created a Constitutional Court which supervised the transitional process vigorously,[53] going so far as to declare that the Court was not bound by the text of the Constitution, but rather to the goals of the transformative process, which it called the "invisible Constitution."[54]

Last, the third typology is the intentionally transformative constitution, which sets forth openly and explicitly to change the cultural and political landscape over a specified timeline and in distinct stages. This typology is best represented by South Africa, which emerged from an oppressive regime of apartheid as a nation on the cutting edge of constitutionalism. Perhaps the most innovative aspect of South Africa's constitutional process was its trim division into two stages.[55,56] The process began with formal negotiations[57] (both multiparty[58] and bilateral[59]) which spanned several years and resulted in a coalition government with a deliberately limited lifespan[60] and the Record of Understanding,[61] which erected the framework of a transitional government moving toward democratic elections. The negotiations produced a set of 34

[52] Kim Lane Scheppele, Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe, 154 U. Pa. L. Rev. 1757, n.43 (2006)
[53] Id., at 1776 ("Constitutional supervision was to be continual, aggressive, and without regard to the democratic pedigree of the government making the laws).
[54] On Capital Punishment, Decision 23/1990 (Hung. Const. Ct. Oct. 31, 1990) (Sólyom, P., concurring) at 125,(trans. in László Sólyom & Georg Brunner, Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court (2000))("The Constitutional Court must continue in its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form a coherent system with its decisions, which as an "invisible Constitution" provides for a reliable standard of constitutionality beyond the Constitution, which nowadays is often amended out of current political interests).
[55] Jackson, at 1287-1288 *and* note 26.
[56] It could be argued that the process occurred in three stages rather than two. Long before the initiation of formal negotiations, conversation was taking place on two levels. During his captivity in the 1980's, Nelson Mandela opened communication with his jailors while prominent exiles such as Thabo Mbeki entered formal and informal discussions with the ruling regime (Office of the Deputy Executive President (1996-09-13). "Biography of Thabo Mbeki" (available at http://www.anc.org.za/ancdocs/history/mbeki/bio/)).
[57] *See* Constitutional Court of South Africa, The History of the Constitution (available at http://www.constitutionalcourt.org.za/text/constitution/history.html#1993).
[58] *E.g.* Convention for a Democratic South Africa, Declaration of Intent, 21 December 1991 (available at http://www.sahistory.org.za/pages/governence-projects/constitution/doc22-codesa01.htm).
[59] *E.g.* National Peace Accord, 14 September 1991(available at http://www.anc.org.za/ancdocs/history/transition/npaccord.html#1)
[60] *See* Jakkie Cilliers Institute for Security Studies, From Pariah to Partner - Bophuthatswana, the NPKF, and the SANDF, 7 African Security Review No. 4 (available at http://www.iss.co.za/pubs/asr/7No4/Pariah.html).
[61] Available at http://www.anc.org.za/ancdocs/history/record.html

Constitutional Principles,[62] which would provide the context in which the Constitutional Assembly would draft a more permanent constitution to be certified by the newly created Constitutional Court. The bifurcation of the constitutional process allowed both for the settlement of many factional disputes over content and for a democratic election prior to a constitution, creating both a pragmatic[63] and democratic consensus.

Conditions resembling "ideal" are rare when operating in a post-trauma environment; nations setting out to craft constitutions are forced to work with the means and methods available. While the third typology, the two-stage transformative constitution, does not guarantee the overlapping consensus[64] of Rawls,[65] it provides more opportunities for consensus formation as both the multiple rounds of negotiations and the democratic election of drafters[66] allow for several returns to the Rawlsian original position.

IV. Economic, Social, and Cultural Rights

Economic, Social, and Cultural Rights (ESCR) are those rights which are socio-economic, as distinguished from "civil" and "political rights." Many scholars cast ESCR as "positive rights," meaning that they create an obligation of positive action, against civil and political rights, which are most often seen as "negative" in that they require the state to refrain

[62] Constitution of the Republic of South Africa, 1993 (as amended), Schedule 4 ("Constitutional Principles") (available at http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/schedules.html#sched4).
[63] Albie Sachs, The Creation of the South African Constitution, 41 N.Y.L. Sch. L. Rev. 669, 672. *See also* Heinz Klug, Constitution-making, Democracy and the "Civilizing" of Unreconcilable Conflict: What Might We Learn from the South African Miracle? (Univ. of Wis. Legal Stud. Research Paper No. 1046, 2007)(available at
[64] *See* John Rawls, The Idea of an Overlapping Consensus, 7 Oxford Journal of Legal Studies 1 (1987).
[65] Jackson, at 1288 ("the goal of this transitional process may be understood as establishing the conditions for informed democratic decision-making about the constitution: decisions which may or may not represent a Rawlsian consensus").
[66] Id, at 1287 (the two stage "provides a means for combining constitutional 'learning' (from experience with democratic politics and governance) and constitutional legitimacy (by more full-fledged democratic participation in later stages").

from action.[67] Other scholars prefer to partition rights into three categories or "generations:" first generation rights being the "the rights of the citizen and the free person,"[68] second generation rights being rights to the "minimum decencies of life"[69] such as food, clothing and shelter, and third generation rights being those nebulous rights which could belong both to the individual (such as "clean, healthy environment")[70] as well as communities (such as the right to development).[71] ESCR are perhaps best likened to the great, gaseous giants of Jupiter and Saturn; they are most solid at their center, the "minimum core,"[72] and grow increasingly less so further out. While they are distinct and distinguishable from afar, there are few bright lines of division up close. Even at the "minimum core," there is little consensus as to where to draw legally significant lines[73] despite the obligatory language calling for their realization.[74] Even so, the content of ESCR in and of themselves are generally accepted as social goods worth having: the controversy arises over how such rights could or should be realized.

The mercurial nature of ESCR has been cited as a strong reason to avoid their inclusion in constitutions; it seems difficult for a right to be protected or achieve its expressive purpose

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[67] *See* Frank B. Cross, The Error of Positive Rights, 48 UCLA L. Rev. 857, 864 (2001) ("The distinction between positive and negative rights is an intuitive one. One category is a right to be free from government, while the other is a right to command government action").

[68] Albie Sachs, Social and Economic Rights: Can They Be Made Justiciable?, 53 SMU L. Rev. 1381, 1383(2000) (hereinafter Sachs, Can The Be Made Justiciable).

[69] Id.

[70] Id., at 1384.

[71] Id.

[72] In the interests of simplicity, this paper adopts the definition of the "minimum core" proffered by the International Covenant on Economic, Social and Cultural Rights. See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, Report on the Fifth Session, Supp. No. 3, Annex III, P 10, U.N. Doc. E/1991/23 (1991) (a state "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").

[73] *See generally* Katharine G. Young, The Minimum Core of Economic, Social, and Cultural Rights: A Concept in Search of Content, 33 Yale J. Int'l L. 113 (2008).

[74] U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12), P 47, U.N. Doc. E/C.12/2004 (Aug. 11, 2000) (hereinafter General Comment No. 14) ("[A] State party cannot, under any circumstances whatsoever, justify its non-compliance with ... core obligations

without some consensual definition.[75] This problem becomes especially acute when the realization of one right requires limited social goods or conflicts with another right.[76] A parallel concern is that these rights are merely aspirational, as they are unenforceable: even if a right achieved conceptual clarity and consensus was reached on absolute means of determining what would constitute an adequate share, there are simply not enough resources to actualize the right.[77] The constitutionalization of an unattainable right might even undermine the rule of law: just as "[c]onstitutional entrenchment of rights sends a strong, expressive message to citizens,"[78] the failure to protect such a right may send an equally strong message.

The expressive function of the law and its role in valuation plays a large role in the debate over ESCR. Expressivists assert that the law can do more than control behavior, that its ability to "make statements" deserves some consideration in assessing its value.[79] The expressive value can come in two forms, the purest being "revelatory" expressivism,[80] which assesses a statement's "dramaturgical" and normative value.[81] Under such a scheme, the value of a law as pure statement or as a normative commitment is calculated independently of (and perhaps despite) the law's empirical consequences.[82] The second form, "instrumental"[83] expressivism,

[75] Ellen Wiles, Aspirational Principles of Enforceable Rights? The Future for Socio-Economic Rights in National Law, 22 Am. U. Int'l L. Rev. 35, 50 ("Despite these points of principle, legally enforceable socio-economic rights are denounced on the basis of the principle of legal certainty; it is argued that they are, by nature, open-ended and indeterminate, and that there is a lack of conceptual clarity about them").
[76] Roberk Nozick, Anarchy, State and Utopia , 238 (1974) ("The major objection to speaking of everyone's having a right to various things such as equality of opportunity, life, and so on, and enforcing this right, is that these rights require a substructure of things and materials and actions; and other people may have rights and entitlements over these. No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over").
[77] See D. M. Davis, The Case Against The Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles, 8 S. Afr. J. on Hum. Rts. 475, 479 (1992).
[78] Wiles, at 49.
[79] See Cass R. Sunstein, On the Expressive Function of the Law, 144 U. Penn. L. Rev. 2021 (1996)(hereinafter Sunstein, Expressive Function).
[80] For a more nuanced explanation, see Elizabeth S. Anderson; and Richard H. Pildes, Expressive Theories of the Law: A General Restatement, 148 U. Pa. L. Rev. 1503 (2000).
[81] *See* Jane B. Baron, The Expressive Transparency of Property, 102 Colum. L. Rev. 208, 212 (2002)
[82] Sunstein, Expressive Function, at 2047 (discussing support for an amendment criminalizing flag burning even if such an amendment might increase the number of flags burned).

which evaluates the law on the basis of norm management and its effect on the legal, social, or political landscape.[84] The South African Constitution, for example, set out with the specific goal of replacing a "culture of authority" with "a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defense of its decisions, not the fear inspired by the force of its command."[85] The goal of the Constitution was not merely to change the government, it was also to change the way citizens viewed their government. In this respect, "good expressivists are consequentialists."[86,87]

V. Enforcement Models

The simple presence of ESCR in constitution is not indicative of their place within the constitutional regime; rights find expression partially through the means of adjudication and enforcement.[88] Models of enforcing ESCR can be broken down into two components, each of which has multiple variations. The first component is the strength of the substantive right, which can be declaratory,[89] weak,[90] or strong.[91] The second is the strength of remedies available, which

[83] This should not be confused with "The New Chicago School of law and economics;" (See Lawrence Lessig, The New Chicago School, 27 J. Legal Stud. 661 (1998)) rather, instrumentalism here is used to denote approaches which view the law as a tool to achieve some consequence, either behavioral or normative.
[84] Id., at 2045 ("any support for 'statements' should be rooted not simply in the intrinsic value of the statement, but also in plausible judgments about its effect on social norms").
[85] E Mureinik, A Bridge to Where? Introducing the Interim Bill of Rights' 10 S Afr. J. Hum. R. 31, 32 (1994).
[86] Sunstein, Expressive Function, at 2047.
[87] As evaluating the pure normative value is beyond the scope of this paper, any assessment of expressive value will be conducted based on norm management.
[88] Even the purely expressive value of their inclusion turn on the methods of adjudication and enforcement, as these methods can be seen as making statements about how a society values these rights, adding a second dimension to their expressive value.
[89] Declaratory rights are expressed but not accorded any mechanism of enforcement. "Directive Principles" are the paradigmatic example of declaratory rights.
[90] Weak substantive rights occur when a constitution "recognizes judicially enforceable social welfare rights, but give legislatures an extremely broad range of discretion about providing those rights (or, equivalently, direct that courts defer substantially to legislative judgments)."(Mark Tushnet, Social Welfare Rights and the Forms of Judicial Review, 82 Tex. L. Rev. 1895, 1902 (2004)(hereinafter Tushnet, Social Welfare Rights).
[91] Rights are considered strong when courts "enforce them fully, without giving substantial deference to legislative judgments, whenever they conclude that the legislature has failed to provide what the constitution requires."(Tushnet, Social Welfare Rights, at 1906).

can be classified as weak[92] or strong.[93] The combination of these elements and the method of assembly are determinative of the resultant jurisprudence.

A. India and Directive Principles.

On August 15, 1947 India ceased to be a British colony and joined the Commonwealth as an independent nation. On January 26, 1950, the Constitution of India entered into force. Inspired by the Irish nationalist movement, the Constitution of India borrowed heavily from its Irish counterpart.[94] One of the elements borrowed was that of the Directive Principles; a set of non-justiciable axioms which were "not mandates, but more points of guidance to future governments."[95] These Principles are "not be enforceable in any court" but "are nevertheless fundamental in the governance of the country."[96]

Despite the non-binding nature of the Directive Principles, Indian jurisprudence has evolved along similar lines as nations with stronger substantive right provisions. While the

Directive Principles are only persuasive authority, they have been invoked by courts and acknowledged as an animus of constitutional rights[97] and a lens through which the courts should interpret fundamental rights.[98] The Directive Principles of the Indian Constitution provide the weakest form of substantive rights and no mechanisms of enforcement, yet their language has

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[92] A weak remedy scheme implements the "requirement that government officials develop plans that hold out some promise of eliminating the constitutional violation within a reasonably short, but unspecified time period. Once the plan is developed, the courts step back, allowing the officials to implement the plan.")(Id., at 1911).

[93] Id., at 1911 ("Strong remedies are mandatory injunctions that spell out in detail what government officials are to do by identifying goals, the achievement of which can be measured easily, for example, through obvious numerical measures").

[94] *See* Jeffrey Usman, Non-Justiciable Directive Principles: A Constitutional Design Defect, 15 Mich. St. J. Int'l L. 643, 643 (2007).

[95] Seval Yildirim, Expanding Secularism's Scope: An Indian Case Study, 52 Am. J. Comp. L. 901, 910 (2004).

[96] Constitution of India, Article 37.

[97] Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 67, 69 (acknowledging that the "right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy").

[98] Id., at 70 ("While interpreting Article 32, it must be borne in mind that our approach must be guided not by any verbal or formalistic canons of construction but by the paramount object and purpose for which this Article has been enacted as a Fundamental Right in the Constitution and its interpretation must receive illumination from the Trinity of provisions which permeate and energies the entire Constitution namely, the Preamble, the Fundamental Rights and the Directive Principles of State Policy").

repeatedly influenced the outcome of critical cases.[99] Two factors may be at work behind this course of jurisprudence: the first is the exceptionally high expressive value of the Directive Principles in the continuing constitutional dialogue[100] and the second is their deep entrenchment in civil institutions.[101] These factors, however, detract from the model's exportability: its power is derived principally from the context in which it operates and turns too much upon "the weight civil society itself gives to judicial declarations"[102] to be easily transported.

B. Hungary, The Constitutional Court, and The Invisible Constitution

The post-Soviet Hungarian Constitution had an auspicious beginning: after a mere three hours of debate,[103] roughly ninety-five percent of the language from the 1949 Constitution was replaced.[104] The legislature's haste was based on very pragmatic considerations: first was the quick solidification of the fragile compromise which emerged from round-table talks,[105] second was the desire to avoid a public referendum (mandated for a constitution but not for amendments),[106] and third to announce a new republic with a new constitution on a day of planned public demonstrations.[107] The next year saw a period of tremendous fluctuation in constitutional language; with only a two thirds majority required to amend it, the constitution

[99] *E.g.* Sunil Batra v. Delhi Admin., A.I.R. 1978 S.C. 1675 (right to lead a convict's life in prison with dignity and freedom from torture); Prem Shanker v. Delhi Admin., A.I.R. 1980 S.C. 1535; Citizens for Democracy Through Its President v. State of Assam, A.I.R. 1996 S.C. 2193 (freedom from cruel and unusual punishment or treatment); Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1360 (right to speedy trial); Kedra Pahadiya v State of Bihar, A.I.R. 1981 S.C. 1675 (right to speedy trial); Francis Coralie Mullin v. Delhi Admin., A.I.R. 1981 S.C. 746 (right to live with dignity which includes right of a detainee to meet her family and lawyers); Nelabati Behera v. State of Orissa, A.I.R. 1993 S.C. 1966 (right to be compensated for violation of right to life); Jolly George Varghese v. Bank of Cochin, A.I.R. 1989 S.C. 420 (freedom from imprisonment for the nonfulfillment of a contractual obligation).

[100] Usman, at 678 ("non-justiciable directive principles may provide benefits by reflecting the aspirational nature of a constitution, by encouraging the court to participate in a dialogue with the political branches, and by inspiring the people to push the government toward vindication of these rights").

[101] Tushnet, Social Welfare Rights at 1902 ("Perhaps civil society institutions could make more headway with such a declaration in hand than they could otherwise with only the Constitution's language to rely upon").

[102] Id.

[103] Andras Sajo, New Legalism in East Central Europe: Law as an Instrument of Social Transformation, 17 J. Law & Soc. 329, 336 (1990)(hereinafter Sajo, New Legalism).

[104] Id., at note 11.

[105] Id., at 336.

[106] Id., at 336.

[107] Id. at 336.

underwent multiple changes and revisions.[108] Hungary's precarious Post-Soviet economic position[109] only added to the uncertainty.

Under these turbulent circumstances, the Constitutional Court began to assert its broad powers and wide jurisdictional reach. The Court had no "case and controversy" requirement and was empowered to, on its own initiative: hear individual complaints,[110] review Acts of Parliament,[111] and address abstract constitutional matters.[112] In 1990, the Court further expanded its reach by announcing that while the text of the Constitution was fluid and subject to change, the Court was obligated to uphold the principles upon which the Constitution was based; an "invisible constitution."[113] The Court was not squeamish in wielding its power, as reflected in both the tremendous volume of laws reviewed its first three years[114] and in the unusually high annulments rate for those laws.[115]

In 1995, the Court took a direct role in shaping the future of the nation when it struck down the bulk of the Austerity Package Bill, which would have radically reshaped Hungary's welfare state. The Court invalidated twenty-six provisions of the Bill and effectively enacted the "constitutional entrenchment of certain welfare rights based on the insurance principle."[116] Even in the absence of a comprehensive constitutional scheme, and theoretically in the absence of a constitution itself, the Hungarian Constitutional Court embraced a strong conception of

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[108] Id., at 337.
[109] Kim Lane Scheppele, A Realpolitik Defense of Social Rights, 82 Tex. L. Rev. 1921, 1942 (2004) ("Hungary started the transition in 1989 in bad financial shape. Even though market-based reforms had been initiated in the mid-1960s, Hungary's economy had largely stagnated by the late 1970s") *and* Bojan Bugaric, Courts as Policy Makers: Lessons From Transition, 42 Harv. Int'l L.J. 247, 265 (2001).
[110] Andras Sajo, Reading the Invisible Constitution: Judicial Review in Hungary, 15 Oxf. J.L.S. 253, 255 (1995) (hereinafter Sajo, Invisible Constitution).
[111] Id., at 256.
[112] Id., at 255.
[113] 23/1990. (X31.) AB. Concurring opinion of Chief Justice Solyom in the abolition of death penalty case.
[114] An average of 90 cases a year (Sajo, Invisible Constitution, at 256).
[115] The court struck down 19 percent of the reviewed provisions of Acts of Parliament and 40 percent of the provisions in the reviewed decrees (Sajo, Invisible Constitution, at 256).
[116] Bugaric, at 266.

substantive rights; the "minimum subsistence"[117] standard the Court embraced is an objective test which provides very little room to maneuver in conditions of scarcity. In upholding this standard and striking down the Economic Stabilization Act, the Court put the nation in direct conflict with the International Monetary Fund; the strict austerity measures were conditions attached to a much needed IMF loan.[118] While the possible economic crisis did not materialize, it was unlikely to have been averted by the Court's economic prowess;[119] the potential dangers of judicial usurpation of administrative affairs far beyond their expertise are many and varied.[120]

The blended,[121] incremental process combined with an active judiciary interpreting foundational principles creates a model with substantial advantages, though it may prove difficult to generalize or export.[122] In the early days of the new Hungarian republic, the activist Court served as a bulwark against political revenge and acted as guardian of the foundational principles of the new regime.[123] As the political culture became less volatile, the Court's continued assertion of the nation's basic values helped to sustain the constitutional and transformative dialogue, acting as the voice of the invisible constitution. In a model which

[117] The "minimum subsistence test," as used by the Court, is an objective test which is subject to empirical verification; proceedings have been halted in order to gather data and assess whether a particular provision did, in fact, "secure the minimum livelihood necessary for the realisation of the right to human dignity in line with the constitutional requirement specified in the holdings" (Decision on Unemployment Benefits, P. 7/92, translated in Selection of Decisions, 103).
[118] Scheppele, Realpolitik at 1944.
[119] Though here, the Court appears to have been oddly prescient; the deceleration of reform may actually have been the most economically beneficial course of action. (Scheppele, at 1948).
[120] Andras Sajo, How the Rule of Law Killed Hungarian Welfare Reform, E. Eur. Const. Rev. 31, 41 (asserting that such meddling "jeopardizes the efficiency of the social, formal rationality of the budget, hence it threatens the financing of state activities and even macroeconomic stability itself").
[121] Jackson, at 1266(stating that the constitutional "processes relied on a mix of informal negotiations, legislative action, judicial interpretation").
[122] Despite its rushed beginning, the Hungarian constitutional process was aided by a confluence of conditions which allowed for its freewheeling, evolutionary nature (Jackson, at 1267 ("There was no crushing military victory, no occupying or dominant and well-organized power to insist on speedy action on a single, integrated new constitution")).
[123] Scheppele, Realpolitik at 1943 ("the Court blocked substantial parts of the government program, refused to allow political revenge to dominate the political agenda, and required that the new democratic government divest itself of powers that would have helped it maintain its control").

conceives the Constitution as an "extended negotiations and practice in democratic bargaining,"[124] flexibility comes at the expense predictability.

C. South Africa and Rational Review

On February 2, 1990, South African President FW de Klerk committed publicly to release Nelson Mandela as well as end of restrictions on the African National Congress and other opposition parties.[125] As prominent exile, constitutional drafter, and later Constitutional Court Justice Albie Sach observed: "all revolutions are impossible until they happen; then they become inevitable." Within weeks, Nelson Mandela was released and the South African revolution became inevitable. For more than a decade prior to de Klerk's announcement, serious discussions on a new constitution and Bill of Rights had been taking place among academics and exiles. As momentum toward a new constitutional regime began to build, the concept of a Bill of Rights which embraced ESCR rose to the fore.[126] This model, championed by Sachs and the ANC,[127] called for the inclusion and harmonization of all three generations of rights,[128] a position Sachs would later find vexing as a Justice.[129] While the young Sachs sought to avoid placing primacy on any one generation of rights, he and others acknowledged that second and third generation rights would require a unique standard of enforcement.[130] By the time the final

[124] Jackson, at 1267.
[125] De Klerk dismantles apartheid in South Africa, BBC 2 February 1990 (available at http://news.bbc.co.uk/onthisday/hi/dates/stories/february/2/newsid_2524000/2524997.stm)
[126] See Albie Sachs, Towards a Bill of Rights for a Democratic South Africa, 35 J.Afr. L. 21 (1991)(hereinafter Sachs, Towards a Bill of Rights).
[127] Hugh Corder & Dennis Davis, The Constitutional Guidelines of the African National Congress: A Preliminary Assessment, 106 S. AFR. L. J. 633 (1989).
[128] Id., at 26.
[129] Sachs, Can They Be Made Justiciable, at1384 ("Initially, I argued strongly for recognition of all three generations of human rights. That initiative has now come back to haunt us! We are not simply pushing for what we believe should one day be in a new South African constitution. We are interpreting the actual text of an explicit document containing clear constitutional commitments").
[130] Id., at 1385 ("We expressly included the right of access to adequate housing and access to health and other welfare rights in the text of our Bill of Rights. We made it clear, however, that these rights would not be enforceable in the same, self-executing way as other rights"). See also Sachs, Towards a Bill of Rights, at 27 (each

Constitution was certified, the standard of enforcement had been distilled into a tripartite obligation upon the State to "take *reasonable…measures*, within its *available resources*, to achieve the *progressive realisation* of this right."[131] This provision appears in the Articles detailing the rights to housing,[132] heath,[133] and education.[134] The interpretation of this tripartite obligation sits at the heart of South Africa's ESCR jurisprudence, referred to here as "rational review."

Nearly a decade after arguing vociferously for the inclusion of ESCR in the Bill of Rights, Sachs and his fellow Constitutional Court Justices were faced with the problems of adjudicating them. In Government of the Republic of South Africa v. Grootboom,[135] the seminal South African ESCR case, a group of several hundred squatters brought suit after twice being forcibly and violently evicted from their makeshift settlements.[136] The Court held the right to housing was justiciable,[137] supplied a context in which that right was to be seen,[138] and established the minimum obligation of the State to negatively protect this right.[139] The Court then applied the tripartite test, declining the opportunity to define or address the "minimum core" of the right to housing and its surrounding jurisprudence.[140] In determining whether the measures

right "has its own sphere, its own modalities of enforcement; each has a fundamental and irreducible character, but all need to be taken together in framing a new constitution").

[131] Constitution of the Republic of South Africa, Article 26(2)(emphasis added) (hereinafter S. Afr. Const.).

[132] S. Afr. Const., 26(2).

[133] S. Afr. Const., 27(2).

[134] S. Afr. Const., 29(1)(b).

[135] 2000 (11) BCLR 1169 (CC)

[136] Grootboom, at P 3

[137] Grootboom, at P 20 (quoting Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) P 78).

[138] Id., at P 25 ("Rights also need to be interpreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality").

[139] Id., at P 20

[140] Id., at P 33 ("There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution").

taken by the State were reasonable,[141] the Court both considered whether the measure was coordinated,[142] comprehensive,[143] coherent,[144] and purposive[145] as well as examined the measure's adaptability[146] to the socio-economic, historical,[147] and legal[148] context framing the State's action.

The Court's conception of progressive realization is informed by the language in the international law,[149] specifically the International Covenant on Economic, Social and Cultural Rights and its General Comments.[150] Grootboom lays out four obligations created by the

[141] Here the Court distinguished reasonableness from desirability and efficiency; thus the Court is sparred the task of determining whether a given measure is the normatively "best" or most economic attractive. (*See* Grootboom, at P 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")).While this weakens the substantive right (*See* Tushnet, Social Welfare Rights at 1903), it restrains the courts to their constitutional role while still providing for a remedy.

[142] Grootboom, at P 39 ("What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. . . A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available").

[143] Id., at P 40 ("a co-ordinated State housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution. It may also require framework legislation at national level, a matter we need not consider further in this case as there is national framework legislation in place").

[144] Id., at 41 ("The programme must be capable of facilitating the realisation of the right," i.e. the measure must have a rational connection to the realization of the right).

[145] Id., at 42 ("Legislative 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").

[146] This includes the reach (Id., at P 43("make appropriate provision for attention to housing crises and to short, medium and long term needs") and breadth of program's application (Id., at P 43("A programme that excludes a significant segment of society cannot be said to be reasonable")).

[147] Id., at P 43

[148] Id., at P 44 ("Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs").

[149] Interestingly, while the Court explicitly rejects a domestic application of the "minimum core" (Grootboom, at P 43) found in the General Comments, it happily uses the application of "progressive realization" (Id., at P 45). The Court asserts that "[t]he meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived" (Id., at P 45) but offers little in the way of defining which conceptual elements of the minimum core are not "in harmony" with the Constitution.

[150] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990. E/1991/23. (available at: http://www.unhcr.org/refworld/docid/4538838e10.html accessed 29 April 2009) (hereinafter General Comment 3).

requirement of progressive realization:[151] to increase accessibility,[152] to expand the reach of this accessibility,[153] to proceed with speed and efficiency,[154] and to justify any retrogression.[155] The jurisprudence surrounding the available resources test can be reduced to a pair of delicate balancing acts. The first is in abstract; the Court must weight the enforcement of constitutionally enshrined rights against the encroachment into the domain of legislating from the bench. The Court has stated both that it will be "slow to interfere"[156] with rational public policies and has noted its own limitations in budgetary matters[157] but has also indicated that, should it find such action necessary, can compel the government to "find the resources"[158] to meet an obligation. The second is the dark calculus the Court must perform when competing claims vie for finite resources.[159] Such was the case Soobramoney v Minister of Health,[160] in which the Court held that the right to health did not include life saving kidney dialysis. The Court's assessment of

[151] For a more detailed analysis of these four requirements, *see* Cyrus E. Dugger, Rights Waiting for Change: Socio-Economic Rights in the New South Africa, 19 Fla. J. Int'l L. 195, 222-230 (2007).
[152] Grootboom, at P 45 ("accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time").
[153] Id., ("Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses").
[154] Id., at P 45 (progressive realization "imposes an obligation to move as expeditiously and effectively as possible towards that goal"). *See also* General Comment 3, Para. 9.
[155] Id., ("deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources"). *See also* General Comment 3, Para. 9.
[156] Soobramoney v Minister of Health, 1997 (12) BCLR 1696 (CC) P 29 ("The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent… A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters").
[157] Minister of Health v Treatment Action Campaign 2002 (10) BCLR 1075 (CC) P 38 ("Courts 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").
[158] Treatment Action Campaign, at P 99 ("Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so").
[159] Soobramoney , at P 31 ("The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society")
[160] 1997 (12) BCLR 1696 (CC)

available resources revealed factual scarcity both on national[161] and local level[162] with multiple competing claims upon scarce resources.[163] Under such conditions, the Court has shown an inclination to leave policy making to the political branches of the government.[164]

South Africa's constitutional ESCR scheme provides for weak substantive rights[165] and moderate remedies.[166] This combination adequately defers to more populist branches of the government yet provides incentive for those branches to remain within certain bounds. The highly public and participatory nature of the Constitutional process accords the scheme a certain level of expressive value, though this could be endangered by repeated failures to bring about actual and concrete change. Rational review as an ESCR regime is still in it's nascence; both the content of the obligation of progressive realization and the means of adjudicating (and allocating) scarce resources are underdeveloped[167] and will likely undergo significant

[161] Soobramoney, at P 24 ("At present the Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of the services which are being provided to the public. In 1996-1997 it overspent its budget by R152 million, and in the current year it is anticipated that the overspending will be R700 million rand unless a serious cutback is made in the services which it provides… This is a nation-wide problem and resources are stretched in all renal clinics throughout the land").

[162] Id., at P 26 ("Ideally the dialysis machines available at the Addington Hospital should handle no more than about 60 patients. At present they are being used to treat 85 patients and the hospital can barely accommodate those who meet its guidelines. The nurse-patient ratio in the renal unit is 1:4.5 instead of the recommended ratio of 1:2.5. According to Dr Naicker, if the hospital were required to treat all persons who, like the appellant, are suffering from chronic renal failure, it would be unable to do so").

[163] Soobramoney, at P 24 ("There are many more patients suffering from chronic renal failure than there are dialysis machines to treat such patients").

[164] Id., at P 24 ("Guidelines have therefore been established [by the Department of Health] to assist the persons working in these clinics to make the agonising choices which have to be made in deciding who should receive treatment, and who not. These guidelines were applied in the present case").

[165] These rights are "weak" in that they fall somewhere between declaratory rights and the minimum core (Tushnet, Social Welfare Rights, at 1903). A more accurate term might be "soft."

[166] While the Court has yet to tip its hand and issue a powerful injunction or sweeping remedy, it has retained, by its own measure at least, the power to do so (*See* Treatment Action Campaign, at P 99).

[167] See Cass R. Sunstien, Social and Economic Rights? Lessons from South Africa, John M. Olin Law and Economics Working Paper Series (2d Series), 14 ("Of course the approach leaves many issues unresolved. Suppose that the government ensured a certain level of funding for a program of emergency relief; suppose too that the specified level is challenged as insufficient. The Court's decision suggests that whatever amount allocated must be shown to be "reasonable"; but what are the standards for resolving a dispute about that issue? The deeper problem is that any allocations of resources for providing shelter will prevent resources from going elsewhere") (available at http://www.law.uchicago.edu/Lawecon/index.html).

transformation in the near future. However, as many of the original drafters and developers[168] of the Constitution now sit on the bench of Constitutional Court, it appears unlikely that the Court will drastically misinterpret the founder's intent and thus allow the scheme to reach maturity uncompromised.

VI. Conclusions

The inclusion of ESCR in constitutions is nothing new; indeed it may well be a hallmark of the modern constitution,[169] rendering the classical model an artifact of the past. The ESCR of consequence to this paper are those which are in some way active[170] and some way instrumental.[171] Each of the three models presented has advantages, disadvantages, surprises, and peculiarities; each reflects a different social and cultural order. The Directive Principles of the Indian Constitution appear to be anemic in comparison to other forms, yet the core values they embody have remained persuasive in guiding the project of nationhood, and with some notable success. In Hungary, the Constitutional Court appears very much unchecked, subject to no review, capable of striking down Acts of Parliament on its own initiative, intervening in matters well outside its expertise, and unfettered by even the Constitution itself; yet the judiciary remains the most trusted institution in Hungary with an approval rating of almost 70%.[172] Of the three models presented, the South African model of Rational Review appears to be the most viable for replication.[173] Splitting the middle between non-justiciablity and mandatory enforcement, the

[168] *E.g.* Albie Sachs, Pius Langa.
[169] Tushnet, Social Welfare Rights, at 1913 ("Modern constitutions--those adopted after 1945, and particularly those adopted after 1989--go beyond classical liberal ones, giving some constitutional status to social welfare rights").
[170] They are active in that they are conspicuous and speak for the core values of a society. The right to sport would not meet this criteria.
[171] They are instrumental in that they have a particular, purposive role in the constitutional scheme and are intended to accomplish change of some sort, be it legal, political, normative, or cultural.
[172] Balázs Kovács and Viktória Villányi, Hungary, in Nations in Transit 2007, 300, 316 (available at http://www.unhcr.org/refworld/pdfid/4756ad5727.pdf)
[173] Eric C. Christiansen, Exporting South Africa's Social Rights Jurisprudence, 5 Loy. U. Chi. Int'l L. Rev. 29 (2007)

South African scheme identifies, but does not denigrate, ESCR and erects a somewhat predictable, pragmatic framework for enforcement. The issue of distributive equality of rights is somewhat more difficult to resolve intellectually, but in practice, brute necessity has proved as sound a guide as pure logic.

ESCR under rational review may provide weak remedies to individual plaintiffs, but it places an enforceable check on the actions of the government and in turn serves both an expressive and instrumental purpose. The Constitutional Court is now positioned to act as a gadfly on the transitional project, ensuring that the principles of the New South Africa do not become muddled or undermined. As the most grievous depravations of ESCR are visited on the impoverished and marginalized, the Court also provides the mechanisms of justice to those previously without voice. Calling the government to account for its actions, or inactions, is a vital part of establishing the "culture of justification" that the framers set out to create and sends a powerful societal message: a government that was once answerable to no one now must answer to Mrs. Grootboom.