Justiciable Social Rights as a Critique of the Liberal Paradigm

JEANNE M. WOODS†

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I. INTRODUCTION

Postmodern discourse on the moral and political problems of the day—from Afghanistan to AIDS—is shaped by the rhetoric of human rights. The discourse promotes as its core value the ideal of human dignity, enshrined in the Universal Declaration of Human Rights.† But human dignity may be too elusive a concept to provide a foundation on which to ground the full panoply of claims enumerated in the international catalogue of rights. While the Declaration posits as fundamental both the traditional tenets of individual liberty and so-called second-generation rights, the social, economic, and cultural

† Professor of Law, Loyola University School of Law, New Orleans. J.D. 1981, Temple University School of Law; B.A. 1974, Antioch College. I would like to thank James Donovan, Hope Lewis, Ibrahim Gassama, Cynthia Lepow, William Quigley, Lisa Croons, Adeno Addis, and Maxwell Chibundu for their comments on earlier drafts of this article. I would also like to thank my research assistant Dan Breen.

2. Universal Declaration of Human Rights, supra note 1, arts. 1–21.
3. In contemporary human rights discourse, rights are conceptualized in three distinct “generations,” according to their historical lineage. First-generation rights, generally composed of civil and political rights, date back to the ideas of the Enlightenment, and are designed to protect individual liberty against abuses by the state. See William Felice, Taking Suffering Seriously: The Importance of Collective Human Rights 31
preconditions of a dignified human life remain marginalized in the dominant rights discourse. 5

This article proposes human need as a more comprehensive framework for theorizing social rights claims, which are indispensable to the full development of the person represented by the concept of dignity. Social rights discourse is the assertion of collective claims to share in the abundance of our interdependent global civilization. The argument that social rights are inherently collective in nature embraces the following premises: that the human person is a socially constituted being; that community is a human need; 6 that human need is the ultimate source of rights; that social rights are claims to communally produced resources; that such claims are exercised within society rather than against society, that is, they are non-adversarial insofar as they are not asserted against the repressive machinery of the state; that the resources required for the satisfaction of the minimum core of social rights are universally necessary and available goods; that the duty-bearer is society as a whole, including individuals, states, and the international community; and that remedies for violations may be collective rather than individual. 8

Classic rights discourse distinguishes “negative” rights imposing constitutional restraints on the state from “positive” rights implicating affirmative state duties. 9 The negative rights/positive rights distinction poses a false dichotomy; all human rights

(1996). Second- and third-generation rights are collective in nature. Ideas about what are now called economic and social rights can be traced to late eighteenth-century philosophers such as Thomas Paine, as well as nineteenth-century socialist thinkers. See D.D. Raphael, Human Rights, Old and New, in POLITICAL THEORY AND THE RIGHTS OF MAN 62–63 (D.D. Raphael ed., 1967) (arguing that Thomas Paine “evidently understood the natural right to life as implying not only laws against homicide [rights to protection] but also laws to provide a bare subsistence”). According to Felice, “The third generation of rights [is] a response to the phenomenon of global interdependence . . . .” Felice, supra, at 31. Such claims include rights to peace, a healthy environment, humanitarian disaster relief, self-determination, and development. Id. at 31–32.


[T]he term “community” as used in contemporary political thought is a normative concept, in the sense that it describes a desired level of human relationships. The community, as a body with some common values, norms, and goals, in which each member regards the common goals as her own, is a good in itself.

Id.

7. See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE 65 (1983) (“[O]ne of our needs is community itself: culture, religion, and politics. It is only under the aegis of these three that all the other things we need become socially recognized needs, take on historical and determinate form.”). See also Avineri & de-Shalit, supra note 6, at 7 (discussing view of communitarian scholars that community is a human need).

8. Individual remedies would still be in order where the negative dimensions of social rights are implicated, for example, where the state is ordered to refrain from action impeding the exercise of a right, such as by invidious discrimination. See infra notes 164–165 and accompanying text.

9. Negative rights typically refer to classical political and civil rights that proscribe state interference with identified liberties, such as freedom of speech. For a classic statement on the nature of rights as immunities from governmental interference, see JOHN STUART MILL, ON LIBERTY (Gertrude Himmelfarb ed., Penguin Books 1982) (1859). Positive rights include economic and social rights that call for some affirmative action on the part of the state (i.e., the expenditure of resources) to ensure rights, such as the right to housing. Arguably, this theoretical distinction is arbitrary, since the enforcement of classical civil rights, such as the right to a fair and public trial, entails significant expense, while some economic rights, such as the right to form trade unions, are considered civil and political rights. See, e.g., Herman Schwartz, Do Economic and Social Rights Belong in a Constitution?, 10 AM. U. J. INT’L L. & POL’y 1233, 1233 (1995) (discussing the differentiation between positive and negative rights in legal discourse).
potentially contain both negative and positive dimensions. The assumed dichotomy blurs the true dilemma that social rights pose for the liberal paradigm: that rights implicating the redistribution of social resources are collective in character and rooted in the common needs of human beings in society. The collective nature of social rights contradicts the liberal conception of rights, which presumes that social living requires the surrender, not the creation, of rights.

Social rights pose a significant conceptual difficulty and practical challenge to the construct of rights as individual entitlements that are antagonistic to and supercede the common good or collective will. Commentators observe that the special function of rights discourse is to "represent the individual interest against the general good or claims of others, to put limits on the general welfare or collective interest." Liberalism recognizes collective rights only to the extent that they "support the formation of autonomous individuals to be able to compete equally in economic markets." Since democracy is often viewed as synonymous with the free market and social rights entail interference with the market's distributive outcomes, such rights are deemed incompatible with a free society.

Thus, critics of social rights argue that they are not authentic rights in the normative sense but mere moral aspirations. Even scholars more supportive of the concept of positive state duties nevertheless rank the two sets of rights on the basis of their perceived sources. To these theorists, negative liberties such as freedom of speech represent higher values because they are intrinsic to the human condition. These liberties preexist society in a hypothetical "state of nature," the theoretical construct within which liberal rights are

10. See Craig Scott & Patrick Macklem, Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution, 141 U. PA. L. REV. 1, 48–71 (1992), for examples of cases finding traditional civil and political rights to contain positive rights. But see DeShaney v. Winnebago County Dep’t of Soc. Serv., 489 U.S. 189, 194 (1989) (declining to find positive dimension to the Fourteenth Amendment due process clause and holding that the state was under no constitutional duty to protect the child from a brutally abusive father).


12. See, e.g., Mark Tushnet, The Critique of Rights, 47 SMU L. REV. 23, 27 (1993) (asserting that "rights are . . . almost necessarily individualistic") [hereinafter Tushnet, Critique of Rights]. See also the international instruments cited infra note 24, all of which couch social rights in individual terms.


14. FELICE, supra note 3, at 125.


Positive rights are typically imagined as requiring state intervention to correct for inequalities of wealth caused by market freedom, whereas negative rights are imagined as checking the growth of bureaucratic and governmental intervention into cherished areas of individual freedom. Proponents of limited government thus view positive rights as antithetical to a free and democratic society . . .

Id. Cf. WALSER, supra note 7, at 74 ("The arguments for a minimal state have never recommended themselves to any significant portion of mankind. Indeed, what is most common in the history of popular struggles is the demand . . . for performance: that the state actually serve the purposes it claims to serve, and that it do so for all its members.").

16. See, e.g., Maurice Cranston, Human Rights, Real and Supposed, in POLITICAL THEORY AND THE RIGHTS OF MAN 47–53 (D.D. Raphael ed., 1967) (identifying the "tests for the authenticity of a human right" as (i) practicability, (ii) universality, and (iii) paramount importance). Cranston uses the right to paid holidays in the Universal Declaration of Human Rights to illustrate the asserted incompatibility of social rights with this rights model. Id. at 46–53. But see Raphael, supra note 3, at 63–65. "Cranston’s tests of practicability and paramount importance do not afford a criterion for distinguishing the rights of liberty from economic and social rights." Id. at 65.

17. See, e.g., THEODORE M. BENNETT, RIGHTS 65 (1982).
imagined. The right is not provided by the state; having a right simply means that the state must refrain from interference with its exercise. On the other hand, positive rights such as food are classified as rights of recipience. In other words, they are “rights to things not yet possessed.” These rights are ranked lower in the hierarchy of rights because, presumably, they are not inherent characteristics of autonomous individuals, and having a right means that the state must provide some extrinsic good.

Arguably, however, rights are not readily distinguishable on this basis. The notion that freedom of speech precedes organized society is counterintuitive; expressive rights are wholly incomprehensible outside of a social context. At the same time, in a “state of nature,” without social institutions such as private property, individuals and groups inherently have access to the means of basic subsistence. Organized society can also interfere with the exercise of such rights through its ordering of political, economic, and social relations as well as controlling and distributing the resources needed for self-sufficiency. To the extent that rights are to be distinguished and prioritized, the bifurcation into intrinsic and extrinsic categories seems artificial and unworkable.

Finally, some scholars who do not reject social rights on philosophical grounds nevertheless contend that they are nonjusticiable. This perceived dilemma is traceable to the classic view that rights are individualistic, adversarial, and negative, and therefore must be susceptible to a private judicial remedy. As articulated by the prominent liberal thinker Ronald Dworkin, rights are “political trumps held by individuals.” Critics argue that judicial review is inappropriate in the case of positive rights, which, because of their budgetary implications, are deemed the sole province of the political branches. Thus,

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18. Id. at 78.
19. Justiciability refers to the ability of a court to adjudicate a dispute and order remedies for constitutional violations. In U.S. constitutional law, the concept of justiciability centers on the “case or controversy” requirement of Article III. In *Flast v. Cohen*, 392 U.S. 83 (1968), the U.S. Supreme Court identified the interrelated but analytically distinct limitations embodied in the phrase: (1) There must be an adversarial dispute that is “presented . . . in a form historically viewed as capable of resolution through the judicial process,” and (2) the courts must not “intrude into areas committed to the other branches of government.” Id. at 94–95. Laurence Tribe notes that these concerns “are typical ones in a constitutional jurisprudence marked by the central concepts of limited government and the separation of powers.” LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3–7, at 311 (3d ed. 2000) (emphasis added). According to Scott and Macklem, justiciability means

the ability to judicially determine whether or not a person’s right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect, or fulfill a person’s right . . . Justiciability is a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its changing character and evolving capability.


It is possible to test putative rights by imagining the sorts of injury their asserted infringement would bring about or by considering the sorts of remedies their enforcement would require, but the ultimate issue is whether it is possible and appropriate to translate the principles underlying the constitutional provision at issue into restrictions on government, or affirmative definitions of individual liberty, which courts can articulate and apply.

Id. at 368.
21. DE WET, *supra* note 11, at 92 (“[T]he term fundamental rights is regarded as a synonym for constitutional subjective rights.”).
23. DE WET, *supra* note 11, at 94.
while formalized in many legal instruments,\textsuperscript{24} economic, social, and cultural rights remain the normatively underdeveloped stepchild of the human rights family.

The second-class status of social rights has not gone unchallenged, however. After emerging from the depths of apartheid—a system declared a “crime against humanity” by the international community\textsuperscript{25}—the new democratic South Africa has become one of a handful of nations to include constitutionally entrenched and judicially enforceable social rights among the fundamental rights guaranteed to its citizens.\textsuperscript{26} The recent groundbreaking jurisprudence of the South African Constitutional Court provides a context for this exploration of the collective nature of social rights.

The South African experience in the constitutional adjudication of social rights has profound implications for the international community at large. The discourse that is being generated about the nature of rights and their enforcement promises to transform our normative understandings of human rights and freedom, democracy, the role of the state, and the relationship between the individual and the community. The jurisprudence of the new South African social contract is making a significant theoretical contribution to the ongoing critique of the liberal paradigm.

In Part II, I discuss the philosophical premises of liberalism that inhibit our conception of social rights. Part III examines arguments, based on these premises, that social rights are nonjusticiable. Part IV critiques theories of social rights that remain rooted in the liberal tradition and compares them to the African worldview. Part V analyzes the new social rights jurisprudence that is emerging in the South African Constitutional Court, and its elaboration of international human rights norms. Part VI proposes a global conception of collective rights and duties based in part on the right to development.

II. THE NATURE OF LIBERAL RIGHTS

Contemporary rights discourse is shaped by the classic liberal conception of the nature of the human person. It is a conception that imagines a solitary figure standing apart from society, jealously guarding her Lockean “property”—life, liberty, and estates\textsuperscript{27}—from


\textsuperscript{26} See S. AFR. CONST. (Constitution Act 108, 1996) ch. 2.

\textsuperscript{27} See JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT, THE SECOND TREATISE ch. IX, § 123 (1698).
a hostile community of others. As the philosopher Theodore Benditt explains, the individualistic character of rights discourse proceeds from its historical origins:

The idea of a right comes out of an era which saw the rise of the nation-state, and, as a concomitant, the rise of the individual, the citizen, a morally self-contained atom shorn of all the ties of family, class and status which for so long defined people and their moral and social situations. The possession of a personal right means that people think of themselves as distinct from others, as having interests that differ from the interests of others.  

In the individual rights paradigm, therefore, what defines the human person are her differences, not her shared commonalities.

The Lockean fiction of the autonomous individual provided a theoretical foundation for the revolutionary demand for limitations on the powers of government in an age of monarchal tyranny. This fiction has long ceased to be recognized as an invention, or “presumption[] of reality,” but is widely believed to have an independent existence. Notwithstanding the undeniable reality of interdependence in human society today—exemplified if not caused by pervasive social regulation and distribution of land and other means of self-sufficiency—Western culture perpetuates the myth of radical individual autonomy. The conception of the individual in modern liberal-democratic theory is “as essentially the proprietor of his own person or capacities, owing nothing to society for them . . . . The human essence is freedom from dependence on the wills of others, and freedom is a function of possession.” This fictional rendition of “human nature” presumes an adversarial relationship between the individual and organized society, nurturing a jurisprudence of rights that is inhospitable to claims to communal rights and confines the consideration of the collective good to narrowly defined exceptional circumstances.

The autonomous individual remains the centerpiece of contemporary liberalism across its ideological spectrum—from defenders of the welfare state like John Rawls to advocates of a minimal state such as Robert Nozick. The Rawlsian conceit posits a postmodern state of nature—the “original position”—within which individuals free of all social, political, economic, and cultural attachments choose the first principles of a just

29. Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 783 (1983) (“Liberalism’s psychology posits a world of autonomous individuals, each guided by his or her own idiosyncratic values and goals, none of which can be adjudged more or less legitimate than those held by others.”).  
30. The many conceptual fictions of legal discourse are contrived to facilitate adjudication of issues. Such fictions may serve as symbols, to make abstract concepts tangible, such as the fiction of corporate personality, or they may be myths designed to promote some normative principle or goal, for example, the fiction of the “reasonable man” promotes socially acceptable conduct. According to the philosopher Alasdair MacIntyre, fiction is a “pseudo-concept available for a variety of ideological uses . . . . Hence when we encounter its use in practical life, it is always necessary to ask what actual project or purpose is being concealed by its use.” Alasdair MacIntyre, After Virtue: A Study in Moral Theory 64 (1981).

33. Felice, supra note 3, at 37.  
34. For example, time, place and manner restrictions on speech that takes place in a public forum must be content-neutral. Thus, the Supreme Court invalidated a municipality’s attempt to stem the flight of white homeowners from a racially integrated town by banning “for sale” and “sold” signs, finding the ordinance content-based. Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 86 (1977).

society. Rawls insists that in the "public sphere" individuals make moral choices and create political institutions based only on perceived self-interest, detached from their social contexts and consequences. To Rawls, autonomy means the reduction of moral values and social connections in public life to optional undertakings rather than critical components of self-identity. According to philosopher Michael Sandel, this conception of the self as constitutionally independent from other individuals or groups, as well as from one’s interests and values, ensures a subordinated status for community-oriented values. Sandel argues that since “a person’s values and ends are always attributes and never constituents of the self, so a sense of community is only an attribute and never a constituent of a well-ordered society.”

Libertarian Robert Nozick posits similarly detached, atomistic individuals represented by hypothetical Robinson Crusoes working alone on separate islands who owe nothing to one another that they do not voluntarily undertake. Nozick argues that there is no social entity apart from the individuals who comprise it: “There are only individual people, different individual people, with their own individual lives.” This construct excludes the possibility of any rights against the collective beyond the negative rights held as to similarly situated “Robinson Crusoes.” Nozick is also unsympathetic to the notion of individual duties to the community: “Using one of these people for the benefit of others, uses him and benefits the others. Nothing more.”

The autonomous individual presents a substantial barrier to the development and implementation of a theory of social rights. He embodies a limited and incomplete concept of human dignity, which is the asserted normative premise of human rights discourse—a concept that omits the fundamental moral and material prerequisites to a dignified human life. Freedom is defined as the ability to engage in activity without external interference. The greater the detachment of the self from the community, its values, ends, and history, the more free one is deemed to be. Sandel opines that “[t]o imagine a person incapable of

37. RAWLS, A THEORY OF JUSTICE, supra note 35, at 12.
38. The public/private sphere distinction evolved from the desire to differentiate the individual from the state and protect the individual’s property from “public” interference by the government. See Tara J. Radin & Patricia H. Werhane, The Public/Private Distinction and the Political Status of Employment, 34 AM. BUS. L.J. 245, 248 (1996) (defining the private sphere as that part of society in which an individual operates within a sphere of autonomy, free from encroachment from others, including the state).
39. See MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 60 (2d ed. 1998) (stating that an empiricist understanding of Rawls’ assumption of mutual disinterest in the original position is “thought to introduce an individualistic bias, and to rule out or otherwise devalue such motives as benevolence, altruism and communitarian sentiments”).
40. Id. at 62. Sandel adds, “These assumptions [of the original position] do not admit all ends, but rule out in advance any end whose adoption or pursuit could engage or transform the identity of the self, and they reject in particular the possibility that the good of community could consist in a constitutive dimension of this kind.” Id. at 65.
41. Id. at 64.
42. NOZICK, supra note 36, at 185.
43. Id. at 33.
44. See BENDITT, supra note 17, at 67.
45. NOZICK, supra note 36, at 33. Thus, Anglo-American jurisprudence does not recognize a general duty to rescue another from peril. An accomplished adult swimmer can, even if there is no danger to himself, refuse to rescue a drowning child and (absent a special relationship) incur neither criminal penalty nor civil liability. See generally Edward A. Tomlinson, The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement, 20 N.Y.L. SCH. J. INT’L & COMP. L. 451 (2000) (contrasting common law opposition to recognizing a duty to rescue and civil law system recognition of a general duty to rescue).
46. See, e.g., Isaiah Berlin, Two Concepts of Liberty, in ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 118 (1969) (discussing negative and positive meaning of freedom and freedom as self-mastery).
constitutive attachments . . . is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth."  

He argues that this notion of freedom constrains our ability to imagine and create constitutive communities in which one’s well-being is inextricably linked with that of the other members.

The celebrated freedom of the pauper to "sleep under the bridges of Paris" makes a mockery of human dignity and compromises political freedom.

Critiquing the distinctive American flavor of rights discourse, Professor Mary Ann Glendon points out that the philosophy of the radically autonomous individual is accompanied by a "corresponding neglect of the social dimensions of human personhood." As Glendon observes, contemporary society internalizes "[a]n implicit anthropology—an encoded image of the human person as radically alone and as ‘naturally’ at odds with his fellows." Thus we are unable to fully accommodate this aspect of the self in legal and political discourse or to envision a theoretical foundation for social rights.

Individual autonomy requires the moral neutrality of the state, further retarding the development of a theory of social rights. The liberal maxim, "the right is prior to the good" means not only that individual rights supercede the common good, but that the collective/state must be neutral as to the worth of the interests that underlie these rights.

However, this notion of moral neutrality is another legal fiction; individualism is itself a conception of the good that is promoted by the liberal state. In its postmodern incarnation, the individualist norm glorifies self-centeredness and greed, epitomized by the recent corporate scandals. Beyond the minimal social programs grudgingly provided by
taxpayers, concern for one’s fellow human being is largely relegated to the realm of private charity. Inequality in material wealth and access to resources is deemed not only natural, but a moral good.\textsuperscript{57} Ambivalent environmental policies reflect our unwillingness to make sacrifices for future generations. The language of choice permeates debates on public education,\textsuperscript{58} which faces eroding support. Competitiveness, consumption, and pleasure seeking are ranked high among our cultural values,\textsuperscript{59} rendering elusive a “genuine community capable of offering its members a just distribution of goods and a morally meaningful life.”\textsuperscript{60} Individualist norms make the idea of social rights virtually incomprehensible to the liberal mindset.

III. THE JUSTICIABILITY DEBATE

The conception of rights as individualistic, negative claims against government underlies the argument that social rights are not judicially enforceable.\textsuperscript{61} For example, in her work on the social rights in the South African Constitution, Erica De Wet argues that meaningful judicial review is possible only if these rights are guaranteed as individual subjective rights, in other words, only if having the right to housing means that an individual can go to court and receive an order awarding him a house.\textsuperscript{62} Furthermore, she contends that if such an order were to be issued, it would implicate the court in matters reserved to the political branches, violating a cardinal principle of democratic governance—the separation of powers.\textsuperscript{63}

De Wet asserts that the normative contents of social rights are too vague to be legally enforceable,\textsuperscript{64} assuming that a court would have no judicially discoverable standards by which to measure the state’s compliance.\textsuperscript{65} She contrasts this presumed state of affairs with political and civil rights, arguing that their core values are more easily ascertained, given the “wealth of political and historical knowledge, experience and significance” behind them.\textsuperscript{66}

This argument overlooks the valuable work that is being done on the international level to define these norms\textsuperscript{67} as well as the collective judicial expertise in constitutional construction. In many jurisdictions, courts routinely apply well-established interpretive

\textsuperscript{57} See, e.g., Robert Bellah et al., Habits of the Heart: Individualism and Commitment in American Life 148–49 (1985) (arguing that defining success only by income and consumption creates anxieties about individual integrity).

\textsuperscript{58} For a discussion of the choice movement in public schools, see James Ryan & Michael Heise, The Political Economy of School Choice, 111 Yale L.J. 2043 (2002).

\textsuperscript{59} See Luther D. Ivory, Toward a Theology of Radical Involvement: The Theological Legacy of Martin Luther King, Jr. 150–53 (1997) (identifying commercialism and societal anomie as defining features of postmodern American culture).

\textsuperscript{60} Quinn, supra note 13, at 295.

\textsuperscript{61} See supra note 19 for definitions of justiciability.

\textsuperscript{62} De Wet, supra note 11, at 71.

\textsuperscript{63} Id. at 41. See also Scott & Macklem, supra note 10, at 17.

\textsuperscript{64} De Wet, supra note 11, at 42.

\textsuperscript{65} “If... constitutional subjective rights do not have a fixed normative substantive core, the court has no yardstick by means of which it can... determine[] whether the essential content of the right is being violated by [the] legislation or not.” Id. at 40.

\textsuperscript{66} Id. at 41.

\textsuperscript{67} The normative content of the rights recognized in ICESCR, supra note 24, is elaborated by the ICESCR Committee through periodic General Comments. See, e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 4, Annex III, UN Doc. E/1992/23 (1991) (recognizing the human right to adequate housing). See also infra Part V.B (discussing treatment by South African Constitutional Court of international concept of minimum core content of housing rights).
principles to define constitutional norms. Interpretive techniques include parsing the language of the provision; examining the legislative history and intent of the drafters; considering the community’s history and traditions; and analyzing the relation of the provision to other relevant norms, enabling courts to implement the core values of constitutional guarantees. Courts are equally competent to apply these techniques to develop a jurisprudence of social rights. Without judicial review these rights would remain in the normatively underdeveloped state of which she complains. De Wet further argues that the content of social rights is indeterminate because “the socio-economic circumstances of the day constantly determine new state priorities.” But political and civil rights are not static either.

What lies at the heart of the justiciability debate is the redistributive nature of the remedial measures. The allocation of resources is typically deemed the province of the legislature, which has both the political legitimacy of being an elected body and the institutional capacity to weigh and accommodate competing demands on the public purse. Since rights override other legislative priorities, a judicial power of review positions an unelected judiciary to overrule majority decisions, raising accountability concerns.

The concept of a judicially enforceable bill of rights is inherently countermajoritarian. We have learned to live with this democratic contradiction when it comes to political and civil rights because they are viewed as shielding fundamental minority interests from the political majority. Because the Lockean paradigm conflates property and liberty, we are more uncomfortable with judges openly making decisions affecting fiscal policy. However, there are always legislative dimensions to judicial interpretation, and courts affect the distribution of resources in myriad ways, for example, by allocating risk through tort policy. I argue that judicial enforcement of collective legislative commands does not entail a significant divergence from the classic judicial role.


69. See CRAVEN, supra note 5, at 10 (arguing that the dearth of case law adjudicating social rights perpetuates the idea that they are unenforceable).

70. DE WET, supra note 11, at 97.

71. We have witnessed the growth of constitutional rights jurisprudence in the United States as new realms of personal privacy have been recognized, for example, in Roe v. Wade, 410 U.S. 113 (1973) (reproductive rights). Rights have also been enlarged in response to new technologies, for example, in Kyllo v. United States, 533 U.S. 27 (2001) (holding thermal-imaging constitutes a search under the Fourth Amendment).

72. Scott & Macklem, supra note 10, at 43.

The concern with the supposed positive nature of social rights is not simply a legitimacy concern that the courts will usurp the power of the legislature to initiate social change through law and determine the terms on which such initiation takes place. There is also a concern that their perceived positive nature entails the expenditure of state resources and that courts are ill-positioned to make [these] kind[s] of complex fiscal decisions . . . .

Id.

[T]he state has limited financial means at its disposal . . .

The means brought into play for this purpose are means which the state takes away from others in one or other form, for example taxation. This redistribution is permissible only if the purpose for which it is applied is reconcilable with the constitutional civil and political rights of the citizens. This means that the state’s capacity to perform desired actions does not only depend on the amount of available means, but also on the purpose towards which the state means are applied.

DE WET, supra note 11, at 41 n.25.

73. See Scott & Macklem, supra note 10, at 20–26; DE WET, supra note 11, at 41.
Separation of powers as a normative principle is not an end in itself—it is a means of keeping the government in check in order to ensure the protection of preferred rights. In the case of social rights, judicial review serves the function of checking the political branches to ensure that they are responsive to the constitutional rights of the least privileged in society, and that policymakers do not lose sight of their suffering in the inevitable political games of compromise and horse-trading. In some instances, especially where free legal services are available, a court may actually be more accessible than a legislative or executive body; a judicial forum “keep[s] the plight and pain of marginalized members of the community on the political agenda.”

Finally, De Wet warns that constitutional entrenchment of social rights can generate unreasonable expectations on the part of the poor for immediate provision of basic needs. “It would be extremely disillusioning if the members of the public were to find out that their constitutional right was, in fact, only a right to judicial review.” This point is well taken given the liberal focus on individual remedies. As I will discuss in Part V, however, the South African experience suggests that, rather than being discouraged, litigants will simply become more sophisticated in fashioning social rights claims.

IV. THEORETICAL CONSTRUCTIONS OF SOCIAL RIGHTS

Two interconnected precepts characterize the liberal conception of the self: (1) it is capable of dispensing with collective identities and values; and (2) it is a free agent motivated primarily by self-interest. This conception undermines the development of a sense of community that entails nonconsensual obligations to the collective. The penultimate virtue of self-interested free choice overshadows communal values of generosity, reciprocity, and solidarity in public life, and the notion that it is possible (or desirable) to achieve “the good life” for all is virtually absent from public debate.

The idea of social rights presupposes a conception of the human person as a predominantly socially constituted being. This “intersubjective conception” of the self contemplates the possibility that in some contexts the self could embrace more than one person, such as the family, community, or other relevant collective. Unlike the

74. As Scott and Macklem point out, arguing in favor of a right of individual petition under the ICESCR, there are limits to how well any supervisory body, no matter how democratic, diligent, or expert, can determine whether policies and laws respect human rights without having the benefit of real-life detail that individual petitions provide. Such petitions have the effect of drawing attention to personal circumstances that reveal failures and problems unknown to or avoided by those responsible for drafting legislation. Such failures and problems may not have been predicted by, or may remain hidden from the view of, legislators or bureaucrats who live a more privileged life than those claiming the benefit of constitutionally entrenched social rights, and who are not institutionally required to listen to individual stories to produce a bridge between life experiences.

Scott & Macklem, supra note 10, at 37.
75. Id. at 38–39.
76. De Wet, supra note 11, at 98.
77. See infra Part V.
79. For purposes of this discussion, relevant collectives are defined by their capacity for constitutive import of self-identity, for example, ethnicity, race, class, gender, and nation.
80. Sandel, supra note 47, at 63.
voluntarism of the liberal paradigm, this conception accepts that the “social attachments which determine the self are not necessarily chosen ones.”

The notion that the community is structurally part of who we are as individuals suggests a commonality of interests between the individual and the collective. The assumption of an inherently antagonistic relationship is absent. In contrast to the Rawlsian construct, communal values are ineluctably entwined with the self in public as well as private life. The elevation of communal values likewise serves to elevate communal needs, and allows for the prioritization of these needs through their classification as legal rights. The goal of rights discourse is thus furthered not simply through negative freedoms, but through the recognition of positive freedoms to fulfill one’s basic needs, thus embracing the totality of the human condition.

The importance of a social conception of the self that grounds rights in human need can be appreciated by examining efforts to theorize social rights without repudiating fully the individualistic bias of the liberal tradition. Some scholars agree that there is a category of “social rights,” but reject the grounding of such rights in human need. Thus lacking a jurisprudential foundation, such rights do not generate correlative duties on the part of society.

For example, the philosopher Theodore Benditt posits a right to mutual aid—a “right to beneficence.” While he acknowledges no general right to resources, he suggests that “a person may have a right, in some circumstances, to another person’s making efforts to make needed resources available. This might take the form of a right to a change in individual institutional structures, so that needed resources might be available in the future.”

To Benditt, the collective consists of “individuals engaged in primary economic activities.” It is characterized by “the move from widespread self-sufficiency to large-scale specialization and division of labor . . . .” One becomes part of the collective by taking part in its economic life. For this economic self, the relationship between the individual and the community is dominated by self-interest.

81. Avineri & de-Shalit, supra note 6, at 3.
82. As Felice points out, there is an individual and collective component to every human being. Felice, supra note 3, at 3.
83. For example, the right to work might mean that the government has a duty to prioritize employment over other macroeconomic goals such as controlling inflation. See generally Philip Harvey, Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously, 33 Colum. Hum. RTS. L. Rev. 363 (2002). The right to social security means that “the community as a whole has a duty to provide its needy members with the means of subsistence and with essential services such as schools and hospitals.” Raphael, supra note 3, at 61.
84. But cf. Charles L. Black, Jr., Further Reflections on the Constitutional Justice of Livelihood, 86 Colum. L. Rev. 1103 (1986) (arguing that the Ninth Amendment provides a basis for protecting rights not explicitly enumerated in the constitution); Peter B. Edelman, The Next Century of Our Constitution: Rethinking Our Duty to the Poor, 39 Hastings L.J. 1 (1987) (arguing that a constitutional right to a subsistence income exists); Frank I. Michelman, Forward: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969) (arguing that past discrimination resulting in poverty is not so much the issue as a current duty to alleviate current deprivation and poverty).
85. Benditt, supra note 17, at 79.
86. Id.
87. Id. at 113.
88. Id.
89. Id. The individual “can benefit from membership only if others benefit . . . for if enough do not benefit, the collective will disintegrate.” Id. at 113–14. “[A]n individual cannot benefit . . . very significantly without contributing to the enterprise.” Benditt, supra note 17, at 114.
Benditt suggests that the right to mutual aid may be grounded in the mutual dependency of the winners and losers in the economic life of the collective.90 Those who are successful need the continuous functioning of the collective life to maintain their success, which requires participation by others.91 The losers are unable to benefit on their own from the collective activity,92 and everyone is “virtually dependent on the collective” economy.93 In other words, total self-sufficiency is not possible.94 However, to Benditt need alone does not create rights;95 rights accrue only to the extent that the collective is directly responsible for the need—for example, unemployment or industrial-related disease. Thus, the collective has wide discretion as to which needs to meet, subject to limitations on resources.96

Similarly, in his book Right and Wrong, Charles Fried argues that each individual has a positive right to a fair share of his community’s scarce resources,97 a right grounded in the Kantian duty of beneficence.98 Fried argues that respect for persons and for our common humanity99 requires affirmative care for others and a positive contribution to their welfare.100 However, in his construct, rights are not generated by need.101 Fried sees positive rights as primarily enhancements of autonomy:102 they are “claims that men have on each other . . . to help maintain and further their enterprise as free, rational beings pursuing their life plan.”103 In deference to autonomy, one’s positive right is not to any particular resource, such as education or medical care, but rather to a fair share of objective resources. In other words, the individual’s positive right is to money, which represents an opportunity to obtain goods, leaving the individual free to choose among various wants and needs.104 Fried has no proposal for how to ascertain one’s fair share, but he insists that state neutrality be maintained105 and that the claim is limited by scarcity.106 Moreover, the right is prior to the good;107 “negative rights constrain . . . what may be taken from an individual to provide a fair share to others.”108 Nevertheless, while accepting the basic postulates of the liberal model, he inserts into the construct the moral criterion that the

90. Id.
91. Id.
92. Id.
93. Id. at 115.
94. Id. at 117.
95. BENDITT, supra note 17, at 116.
96. According to Benditt, “A collective can decide to alleviate certain sorts of needs while not alleviating others—for example, it can decide to deal with heart problems but not kidney problems (assuming there is no invidious motive behind such a distinction).” Id. at 117.
98. Id. at 115.
99. Id. at 118.
100. Id. (arguing that “it is inconceivable that respect for common humanity should compel the recognition for the negative rights of our fellow men even at disastrous cost to ourselves, while leaving us totally indifferent to their needs . . . ”).
101. Id. at 120–22. “[I]f we were to recognize a right to the satisfaction of our most unfortunate fellow citizens’ medical needs, the drain on resources available to satisfy other kinds of needs . . . would be staggering.” Id. at 122.
102. FRIED, supra note 97, at 127.
103. Id. at 124.
104. Id. at 125.
105. Id. at 136 ("[A] pure and exclusive fairness theory makes no moral judgments at all . . . ").
106. Id. at 110.
107. Id. at 162.
108. FRIED, supra note 97, at 139.
polity be guided by “aspirations toward fairness, toward distributive justice.” Fried freely concedes the indeterminacy of outcomes produced by such a model.

Like Fried, Alan Gewirth views individual autonomy as a primary normative value. However, he sees social rights not as unalterably opposed or incompatible, but as integral to the attainment of autonomy. Gewirth shares Dworkin’s conception of rights as individual “trumps” over other policy considerations; like Nozick, he views the community as no more than an amalgam of individuals. But his goal is to achieve a discourse that promotes social solidarity, grounding rights in the moral principle “that all humans are equally entitled to have [the freedom and well-being that are the] necessary conditions to fulfill the general needs of human agency.” By identifying a single normative principle underlying both political and social rights, this formulation serves to equalize them and transcends the dichotomy posited in liberal discourse between negative and positive rights. He also rises above the positivist state-centric bias, asserting that the duty-bearers of human rights “are all persons, not simply governments.”

But Gewirth’s theory falls short of conceptualizing fundamental norms with equal status to traditional rights, because it attempts to squeeze social rights into the liberal mold. Significantly, the duty owed to the community is framed in terms of individual choice and contingent upon a meritocratic stipulation that belies a claim of right:

For . . . persons to have a duty of supplying A with food . . . they must both be aware that he lacks food from causes beyond his control and be able to repair this lack. They must have sufficient resources to have a surplus from their own basic food needs so as to be able to transfer some to A. By virtue of this ability, it is within their control to determine by their own unforced choice whether or not A has food. If, under these circumstances, A lacks food and they withhold

109. Id. at 162 (emphasis added).
110. Id.
111. See ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 5 (1982).

Even when the rights require positive assistance from other persons, their point is not to reinforce or increase dependence but rather to give support that enables persons to be agents, that is, to control their own lives and effectively pursue and sustain their own purposes without being subjected to domination and harms from others.

112. Id. (stating that “these rights must take precedence over all other practical criteria or requirements”).
113. Thus, “when a right is overridden by considerations of the general welfare, the latter criterion, to be genuinely overriding, must be composed of the rights of individuals.” Id. at 6.
114. Id. at 19.
115. Id. at 1–2. Gewirth confines his analysis to “claim-rights,” to “certain especially important objects or goods,” which necessitate that “all other persons at least refrain from interfering with . . . and also, in certain circumstances, that other persons or groups assist him to have or acquire these objects.” GEWIRTH, supra note 111, at 2. Gewirth asserts that rights grounded in the necessary conditions for human action “have more specific and less disputable contents than may be attributed to concepts like ‘dignity’ . . . .” Id. at 5.
116. Id. at 2–3.
117. Id. at 18. Gewirth’s moral principle is concerned with individuals’ relations with one another. Since this principle “requires the relief of starvation, it also requires that such relief be facilitated, where necessary, by appropriate legal measures by the political authorities.” Id. at 206.
118. Id. at 19.
food from him, then they *voluntarily* interfere with his having food and hence inflict basic harm on him. Thereby they violate his right to have food.\(^{119}\)

Thus, the right to food is not an inalienable right of persons by virtue of their humanity or need, but is conditioned on the choices of both the right-holder and the duty-holder.

Similarly, Michael Walzer implicitly adopts the Lockean assumption that life and liberty are natural, self-evident norms, whereas rights beyond these are social constructions, which “do not follow from our common humanity [but] from shared conceptions of social goods.”\(^{120}\) Walzer grounds such socially constructed rights in the primary function of human society, which he regards as the distribution of social goods.\(^{121}\) Walzer does move beyond the Rawlsian concept of the self, acknowledging social goods as key to distinct individual identities,\(^{122}\) and he abandons the negative Lockean version of the social contract, advancing the idea of an agreement for mutual provision of socially determined needs.\(^{123}\) Walzer envisions a moral bond that “connects the strong and the weak, the lucky and the unlucky, the rich and the poor, creating a union that transcends all differences of interest.”\(^{124}\) This description suggests that the social contract may create a collective entity distinct from the individuals of which it is comprised, capable of being a positive rights-holder and duty-bearer.

But Walzer does not go this far. His implicit distinction between “self-evident” and “socially constructed” rights leads him to adopt a cultural relativist approach to social rights. While presumably he would reject such arguments with regard to life and liberty, he argues that “goods have different meanings in different societies,”\(^{125}\) thus denying social rights the status of universal norms.

Yet if it is possible to establish nonderogable norms of liberty that cross cultural boundaries, it is possible to determine the minimum core content of social rights. All human beings need a certain minimum caloric intake to stay alive and healthy. All human societies need to educate their young. And, while the particulars of one’s dwelling may vary widely from one society to the next, there is no gainsaying the basic human need for shelter. But to Walzer need is vague,\(^{126}\) elusive,\(^{127}\) and subject to an inevitable scarcity of

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\(^{119}\) Gewirth, *supra* note 111, at 203 (emphasis added).

\(^{120}\) Walzer, *supra* note 7, at xv.

\(^{121}\) Id. at 3.

Human society is a distributive community…. [W]e…. come together to share, divide, and exchange. We also come together to make the things that are shared, divided, and exchanged; but that very making—work itself—is distributed among us in a division of labor. My place in the economy, my standing in the political order, my reputation among my fellows, my material holdings: all these come to me from other men and women.

\(^{122}\) Id.

\(^{123}\) Id. at 85. The parties to Walzer’s social contract “owe one another…. mutual provision of all those things for the sake of which they have separated themselves from mankind as a whole and joined forces in a particular community.” Id.

\(^{124}\) Walzer, *supra* note 7, at 82. Walzer adds that “[a]rguments about communal provision are, at the deepest level, interpretations of that union. The closer and more inclusive it is, the wider the recognition of needs, the greater the number of social goods that are drawn into the sphere of security and welfare.” Id. at 83. As examples, Walzer cites the provision of public theater and education by the ancient Greeks and Jews, which were “not merely enhancements of the common life but vital aspects of communal welfare.” Id.

\(^{125}\) Id. at 7.

\(^{126}\) Id. at 65.
resources. Therefore it is not a source of rights but a potential distributive principle, subject to political limitation.

The case for social rights from within the liberal tradition, then, is a modified endorsement of the liberal welfare state. While acknowledging that our common humanity and interdependence generate some sort of collective responsibility for one another, these arguments accept that there must be winners and losers in the game of life and seek a way to accommodate the minimal needs of the inevitable (potentially disruptive) losers. These accommodations, while significant, remain mere gratuitous entitlements. They are subject to the whim of the polity or—even less—simply moral aspirations for future distributive justice, rather than fundamental rights with normative force.

In contrast, African traditions more fully encompass the social dimensions of the person and the saliency of human need in the construction of fundamental social norms. In the African worldview, the concept of personhood is not merely descriptive, but has a normative content that expresses the relationship between social rights and duties. The Akan culture of West Africa is illustrative. In this culture, personhood is inherently connected to community; its complete attainment requires fulfillment of one’s obligations to self, family, and community. Correspondingly, the *raison d’etre* of society is mutual aid. The Akan do not share the philosophical premise of the Lockean model; for them, interdependence, not autonomy, is the defining element of the rights paradigm. As the maxim goes, “to be human is to be in need of help.” Consequently, their source of rights lies not in the human capacity for choice, but in their mutual interdependence, which is reflected in the saying, “a genuine human need carries the right to satisfaction.” Thus, these duties to society are dialectically transformed into rights because these duties are incumbent upon all members of Akan society.

The continent-wide struggle against European colonialism reaffirmed traditional African values in the mid-twentieth century. For example, the “Negritude” movement during the period preceding independence embraced “the idea that the realization of the human personality lies less in the search for singularity than in the development of [one’s]
potential through participation in a community."\textsuperscript{137} More recently, the African Charter on Human and Peoples’ Rights\textsuperscript{138} codifies these traditional values by incorporating into human rights theory the collective concept of peoples, "the embodiment of the African concept of a person in society."\textsuperscript{139} Arguably, African humanist philosophy provides a jurisprudential basis on which to ground a theory of social rights.\textsuperscript{140}

Perhaps owing to the influence of this worldview, South African jurisprudence embraces an expanded rights discourse that accommodates the social nature of the human person and the normative claims that flow therefrom—the economic, social, and cultural rights that are "the needs of human beings in their social groupings."\textsuperscript{141} It is a recognition that human society is not an optional state of affairs. Walzer puts it succinctly: "Men and women live together because they literally cannot live apart."\textsuperscript{142} This mutual need is the source of our social rights and duties to one another. Needless to say, there will always be a tension between the interests of the individual and the community. The challenge lies in balancing the values of community and solidarity with the freedom and dignity of each person.\textsuperscript{143} There is a dialectical relationship between the two sets of rights. "[H]uman rights cannot be understood apart from social interdependence nor can social well-being be understood apart from personal rights."\textsuperscript{144}

V. SOUTH AFRICAN SOCIAL RIGHTS JURISPRUDENCE

A. Soobramoney: The Utilitarian Calculus

The 1996 South African Constitution contains an extensive panoply of socio-economic rights and duties. In contrast to previous efforts to constitutionalize social rights, the Constitution contains a unique bill of rights that integrates social rights with the more traditional fundamental freedoms.\textsuperscript{145} The absence of a structural hierarchy of rights\textsuperscript{146} effectively merges the public and private spheres, engaging the state in the formerly private endeavor of securing the social and economic pre-conditions to the full realization of human freedom. The state is obligated to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these

\textsuperscript{137} Janet G. Vaillant, Black, French, and African: A Life of Leopold Sedar Senghor 244 (1990).
\textsuperscript{141} Felice, supra note 3, at 142.
\textsuperscript{142} Walzer, supra note 7, at 65.
\textsuperscript{143} See Quinn, supra note 13, at 308.
\textsuperscript{144} Id. at 61.
\textsuperscript{145} The Indian Constitution, for example, follows a bifurcated approach to justiciability, placing classical civil and political rights in a section of the constitution that is expressly justiciable, while economic and social rights are included as "Directive Principles of State Policy," which are expressly unenforceable. India Const. pts. III & IV.
This constitutional formulation of the state’s duty reflects the collective character of social rights, whose realization requires the resources and effort of the whole society.

The Constitutional Court was presented with its first opportunity to interpret this language barely a year after the 1996 Constitution took effect, posing an unenviable challenge to a new judiciary with precious little precedent to guide it. Soobramoney v. Minister of Health involved a forty-one year old unemployed diabetic who suffered from chronic renal failure, necessitating regular kidney dialysis. Because Mr. Soobramoney suffered from a combination of serious ailments rendering his condition irreversible, the treatment was calculated to prolong his life but would not cure him. He had exhausted his personal funds and sought treatment at the state hospital in Durban. Due to an insufficient number of dialysis machines in the public health sector, however, the hospital rationed their use, limiting them to patients who were eligible for a kidney transplant. Under the guidelines developed by the hospital, Mr. Soobramoney was ineligible for a transplant because of his complicated medical history. The plaintiff invoked several provisions of the South African Constitution, claiming violations of his rights to life, health, and emergency medical treatment.

In the Court’s first pronouncement on social rights, it affirmed their integral connection to human dignity, freedom, and equality, without which the aspirations of the new constitutional dispensation would “have a hollow ring.” Noting, however, that in Section 27(2) the state’s duty with regard to health care was circumscribed by the “available resources” the Court read additional limiting language into the provision, restating the obligation of the state as “dependent upon the resources available for such purposes.” Thus, the Court indicated that it would not consider the state’s resources as a whole, but in effect limited the state’s duty to whatever resources it had already allocated to health care in general, and dialysis treatment in particular.

The Court also declined to give serious consideration to the plaintiff’s right to life claim, reasoning that resort to the right to life in Section 11 was obviated by Section 27’s specific protection of health care. Cautioning that its “purposive” approach to constitutional interpretation may not always require a “generous” construction of the rights afforded by the Constitution, the Court narrowly construed the right to emergency medical treatment in Section 27(3), holding it to be a negative right that does not confer

147. S. Afr. Const. § 27(2).
149. Id. at 1698.
150. Id.
151. Id. at 1699–70.
152. Id. at 1699. Merely thirty percent of the patients with chronic renal failure met these guidelines. Id. at 1705.
154. S. Afr. Const. § 11 (“Everyone has the right to life.”).
155. Id. § 27 (“(1) Everyone has the right to have access to (a) health care services, including reproductive health care . . . . (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of [this right].”).
156. Id. § 27(3) (“No one may be refused emergency medical treatment.”); Soobramoney, 1997 (12) BCLR at 1700.
158. Id. at 1701 (emphasis added).
159. Id. at 1701–02. The Court distinguished the jurisprudence of the Indian Supreme Court, which has interpreted the right to life in the Indian Constitution to require the state to provide medical treatment to those in need. Id. at 1702 n.4.
160. Id. at 1702.
affirmative obligations on the state, and declining to impute any positive obligations from the right to life in Section 11. The Court defined an “emergency” as an urgent, sudden occurrence for which advance preparation was not possible and a constitutional violation as state denial of available treatment, implying that there must be some misconduct or improper motive for the denial, such as racial discrimination. In the Court’s view, such a narrow construction was necessary in order to conserve the resources needed to effectuate the state’s overall health care obligations.

The Court’s analysis under Sections 27(1) and (2) was similarly circumspect. It rejected the claim that the positive right to health required the state to make additional resources available for dialysis treatment, emphasizing that the regional health budget was already overspent, and that a dramatic increase of the health budget would be required to accommodate all similarly situated patients in South Africa, which would imperil other state social obligations. Applying a reasonableness test to the guidelines imposed by the hospital administration, the Court announced what appeared to be an overly-deferential standard of review with regard to social rights, cautioning that it would “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.”

Expressing sympathy for the appellant (who died three days after the decision), the Court acknowledged “[t]he hard and unpalatable fact . . . that if the appellant were a wealthy man he would be able to procure [dialysis] treatment from private sources . . .” The Court nonetheless reasoned that the state has to manage its limited resources, and that “[t]here will be times when this requires it to adopt a holistic approach to the larger

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161. *Id.* at 1703–04.
163. *Id.*
164. *Id.* Again, the Court distinguished an Indian case relied on by the appellant, *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, A.I.R. 1996 S.C. 2426 (India). In that case, a man suffering severe head injuries after falling off a train was refused admittance to several government hospitals. The Indian Supreme Court held that the state’s failure to provide timely medical treatment violated his right to life. *Soobramoney*, 1997 (12) BCLR at 1703–04 (citing *P*aschim Banga Khet Mazdoor Samity v. State of West Bengal, A.I.R. 1996 S.C. 2426, 2429 (India)).
165. The Court refers to the history of racial discrimination in South Africa to illustrate the intended scope of Section 27(3). *Soobramoney*, 1997 (12) BCLR at 1704 n.10.
166. *Id.* at 1703. The Court stated:

> If section 27(3) were to be construed in accordance with the appellant’s contention it would make it substantially more difficult for the state to fulfil its primary obligations under sections 27(1) and (2) to provide health care services to “everyone” within its available resources. It would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the State for purposes such as preventative health care . . . .

*Id.*
167. *Id.* at 1704.
168. *Id.* at 1705.
169. *Id.* at 1706.
172. The Court relied on an English case, saying, “Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make.” *Soobramoney*, 1997 (12) BCLR at 1706 (quoting R. v. Cambridge Health Auth., *ex parte B*, [1995] 2 All E.R. 129, 137 (C.A.)).
needs of society rather than to focus on the specific needs of particular individuals within society.”

Thus, the Court adopted a utilitarian perspective—advancing the health of the population as a whole versus “doing everything for each individual patient until you run out of funds and everybody else gets nothing.” Such reasoning is extremely problematic in a rights context. The point of giving policy choices the priority status of fundamental rights is to avoid the utilitarianism inherent in majority decision making. Utilitarianism in this context is premised on a presumption of fixed and limited resources. While such a presumption is contained in the language of the constitutional provision itself, it is troubling that the Court arbitrarily embellished this language with the additional qualification that the resources be available “for such purposes.”

In a concurring opinion, Justice Sachs asserted that “the rationing of access to life-prolonging resources is . . . integral to . . . a human rights approach to health care.” He proposed a “new analytical framework” for collective rights, which substituted interdependence for autonomy as its bedrock principle:

Traditional rights analyses . . . have to be adapted so as to take account of the special problems created by the need to provide a broad framework of constitutional principles governing the right of access to scarce resources and to adjudicate between competing rights bearers. When rights by their very nature are shared and inter-dependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights . . . but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.

Soobramoney may be understood—especially in light of the Court’s subsequent jurisprudence, discussed below—as a first step in defining the minimum normative core of the social rights guaranteed by the South African Constitution. Under this analysis, the relief sought by Mr. Soobramoney required access to a level of health care that exceeded the minimum core of the right to health. Similarly, although the majority opinion did not reach this issue, the case suggests that the minimum core of the right to life does not require the state to provide extraordinary life-support measures that would not lead to a cure of the patient’s illness.
Nevertheless, both the majority and concurring opinions beg the question whether the collective right to health actually conflicted with the individual’s right to health and life in this context, that is, whether the state should be allowed to treat dialysis as an extraordinary resource that must be rationed for the poor in a country whose white citizens enjoy one of the highest standards of living in the world. The majority opinion made no mention of the resources available in the private sector, nor did it suggest that the state should do anything further to respond to the epidemic of kidney disease. In acknowledging that a person’s wealth determined whether he would live or die, yet failing to interpret the constitutional rights to health and life to avoid this outcome, the Court missed an important opportunity to give meaning to the new social contract, suggesting a retreat from the challenge of justiciable social rights.

B. Grootboom: Collective Remedies for Legislative Commands

The Constitutional Court’s decision in Government of the Republic of South Africa v. Grootboom reassured social rights advocates that it was indeed willing to adjudicate positive rights claims. Contrary to the complaint that justiciable social rights remove policy choices from the legislative prerogative, the South African Constitutional Court demonstrated that violations of these rights can be remedied by a court without intruding unduly on legislative discretion.

The case arose under Section 26 of the South African Constitution which provides, in pertinent part:

(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 realization of this right.

As part of the legacy of apartheid, millions of Black South Africans live in intolerable conditions. To alleviate the acute shortage of adequate housing in the country, the South African government developed an ambitious long-term plan to build quality housing.

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183. In his concurring opinion, Justice Madala mentioned an alternative treatment for kidney disease that was available in the private sector, but concluded that since the private sector was not before it, the Court “cannot condemn it.” Id. at 1711 (Madala, J., concurring). In a subsequent case, however, the Court stated that the duty-holders of social rights include private individuals as well as the state. See Gov’t of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169, 1189 (CC) (S. Afr.).

184. A suggestion of educating the public was made in a concurring opinion. See Soobramoney, 1997 (12) BCLR at 1711.

185. Id. at 1706. Justice Sachs’ analogy to “right to die” cases in the United States is misplaced. His citation to Cruzan v. Director, Mo. Dep’t of Health, to support an argument for limiting the role of government in decisions to prolong life referred to a situation in which a comatose woman who would never recover was being fed artificially. Soobramoney, 1997 (12) BCLR at 1713 (Sachs, J., concurring) (quoting Cruzan v. Director, Mo. Dep’t of Health, 497 U.S. 261, 302 (1990)). The instant case involves a man in the prime of his life who, with the expensive dialysis treatment, would otherwise live a normal life.

186. 2000 (11) BCLR 1169 (CC) (S. Afr.).

187. See discussion supra Part III.

188. S. Afr. Const. § 26(1)–(2).

189. National housing legislation set forth an ambitious scheme for “housing development, [which] as defined, seeks to provide citizens and permanent residents with access to permanent residential structures with secure tenure ensuring internal and external privacy . . . to provide adequate protection against the elements [and] to ensure convenient access to economic opportunities and to health, educational and social amenities.” Grootboom, 2000 (11) BCLR at 1197.
However, a desperate need for emergency housing existed, which was not addressed in the
plan. The Court found that this omission was a fatal constitutional flaw\textsuperscript{190} and ordered the
Constituent Assembly to develop a program to accommodate those in desperate need with
temporary shelter short of the sophisticated dwellings contemplated by the government
plan.\textsuperscript{191}

The case was brought by a group of families who lived in Wallacedene, a squatter
camp in the Western Cape, in what the Court described as “appalling conditions.”\textsuperscript{192} When
their situation became intolerable, they were forced to move out and settled on private land
that had been earmarked for public housing.\textsuperscript{193} They were evicted by the government in a
brutal manner reminiscent of the forced removals of the apartheid era: their shacks and
belongings were destroyed, and the families were left homeless.\textsuperscript{194}

The Court found that the plaintiffs’ housing situation was exacerbated by extreme
poverty, noting that “a quarter of the households in Wallacedene had no income at all . . . .
In some cases, their shacks are permanently flooded during the winter rains, others are
severely overcrowded and some are perilously close to busy roads.”\textsuperscript{195} The case was
appealed by the government to the Constitutional Court after a lower court ordered the state
to accommodate the families in basic shelter until permanent housing could be provided.\textsuperscript{196}

While commending the “major achievement” represented by the government’s
comprehensive housing program, the Court determined that the plan was not a reasonable
effort to promote the constitutional right of access to adequate housing, because it excluded
a significant segment of the population—those in desperate need.\textsuperscript{197} Noting that the United
Nations Committee on Economic, Social and Cultural Rights\textsuperscript{198} has formulated the concept
of a state’s “minimum core obligation,”\textsuperscript{199} the Court stated that it was possible to ascertain

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\textsuperscript{190} The Court stated that the issue before it was whether the measures taken by the state were reasonable.
\textit{Id.} at 1188.

\textsuperscript{191} \textit{Id.} at 1209.

\textsuperscript{192} \textit{Id.} at 1175.

\textsuperscript{193} \textit{Id.} at 1176.

\textsuperscript{194} \textit{Id.} at 1178.

\textsuperscript{195} \textit{Grootboom}, 2000 (11) BCLR at 1199.

\textsuperscript{196} \textit{Id.} at 1176. Many plaintiffs had been on a government waiting list for permanent housing for seven
years. \textit{Id.} at 1177.

\textsuperscript{197} The problem, the Court found, was that the housing development program contained

no express provision to facilitate access to temporary relief for people who have no access to land, no
roof over their heads, for people who are living in intolerable conditions and for people who are in
crisis because of natural disasters such as floods and fires, or because their homes are under threat of
demolition. These are people in desperate need. Their immediate need can be met by relief housing
which fulfils the requisite standards of durability, habitability and stability encompassed by the
definition of housing development in the Act.

\textit{Id.} at 1198.

\textsuperscript{198} The Committee consists of eighteen independent experts, whose task is to assist in the development of
the normative content of ICESCR. \textit{See} \textit{CRAVEN}, supra note 5, at 1, 42.

\textsuperscript{199} \textit{Grootboom}, 2000 (11) BCLR at 1187. The Court distinguished the language of the South African
Constitution from that of ICESCR. The Court explained that the

right of “access . . . ” [is] distinct from the right to adequate housing encapsulated in the Covenant.
This difference is significant. It recognises that housing entails more than bricks and mortar. It
requires available land, appropriate services such as the provision of water and the removal of sewage
and the financing of all of these, including the building of the house itself. For a person to have access
to adequate housing all of these conditions need to be met: there must be land, there must be services,
there must be a dwelling.

the meaning of this standard in international law and apply it to the rights enumerated in the South African Constitution: “Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question.” A reasonable measure must therefore address the needs of this group.

In developing this concept the Court gave more teeth to the reasonableness standard than it appeared willing to do in Soobramoney. While giving assurances that it would not substitute its judgment on the wisdom of legislative measures for that of the political branches, the Court outlined the parameters of reasonableness in terms of the minimum core obligation: A reasonable legislative program “must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs.” It must take into account “[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril . . .” Mere statistical success is not enough.

Similarly, the Court found added normative weight in the criterion in Section 26(2) of “progressive realization,” a phrase that was not part of the analysis in Soobramoney, although it is also contained in the health care provision. Under this standard, consistent with the meaning that term is given in international law, the measures promulgated by the state must be calculated to realize the rights in question for everyone incrementally. Again, the Court cited the analysis of the Committee on Economic, Social and Cultural Rights, which declared that the requirement of progressive realization of the right to housing “imposes an obligation to move as expeditiously and effectively as possible towards that goal.”

Accordingly, the Court found that the government’s program lacked the requisite momentum:

The absence of this component [emergency shelter] may have been acceptable if the nationwide housing programme would result in affordable houses for most people within a reasonably short time. However the scale of the problem is such that this simply cannot happen. Each individual housing project could be

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200. Id. at 1187.
201. See International Committee on Economic, Social and Cultural Rights, General Comment 3, ¶10 (1990), available at http://www.unhchr.ch/tbs/doc.nsf (last visited Mar. 17, 2003) (stating that “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”). The Covenant was signed by South Africa in October 1994, but has not yet been ratified.
203. Groothoom, 2000 (11) BCLR at 1191 (“The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. . . . 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.”).
204. Id. at 1191.
205. Id.
206. Id.
207. ICESCR, supra note 31, art. 2(1).
208. See S. AFR. CONST. § 27(2).
209. “The 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 to accept that it bears the same meaning in the Constitution as in [ICESCR] from which it was so clearly derived.” Groothoom, 2000 (11) BCLR at 1192.
210. Id.
expected to take years . . . . The result is that people in desperate need are left without any form of assistance with no end in sight.\textsuperscript{212}

Emphasizing that the state has “the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need,”\textsuperscript{213} the Court ordered the government to create a program that includes “reasonable measures . . . to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.”\textsuperscript{214} The opinion observed that the right to housing protects not only the most vulnerable in society, but people at all economic levels of society.\textsuperscript{215} However, the Court ruled that there was no positive individual right to housing on demand.\textsuperscript{216}

\textit{Grootboom} represents a major milestone in the vindication of justiciable social rights. The decision has enriched the jurisprudence on the meaning of two fundamental concepts in international human rights law: that of minimum core obligation and progressive realization.\textsuperscript{217} Significantly, the case illustrates that because of the collective character of social rights these standards do not necessarily impose limitations on rights, but can be stringent criteria by which a court can measure states’ compliance.

At the same time, the decision evidences the possibilities of judicial restraint. While undertaking the novel task of discovering the normative content of a constitutional right that is subject to the unusual condition of resource availability,\textsuperscript{218} the Court utilized textbook judicial methods to determine the reasonableness of a legislative measure. If its intervention could be labeled redistributive, it merely redistributed resources within the government program; the Court did not disturb the legislative determination of what resources were available. Thus, while the protection of fundamental rights required the judiciary to exercise a policy choice, the Court left to the legislature the ultimate policy decision of how much of the state’s resources to commit to the right to housing.

The Court’s ruling does, however, represent a victory for the organized efforts of housing rights advocacy groups, which could prompt the legislature to reconsider the adequacy of its housing budget. By highlighting the priority status of the right to housing and the plight of those deprived of that right, judicial review serves as a catalyst for social change.

\textbf{C. Treatment Action Campaign: Negative Rights and Positive Remedies}

In \textit{Minister of Health v. Treatment Action Campaign},\textsuperscript{219} the South African Constitutional Court revisited the issue of the scope of the right to health in the context of the tragic AIDS epidemic—a public health crisis of enormous proportions. The government appealed a High Court ruling finding it in breach of its constitutional

\textsuperscript{212} Grootboom, 2000 (11) BCLR at 1201.
\textsuperscript{213} \textit{Id.} at 1208.
\textsuperscript{214} \textit{Id.} at 1209.
\textsuperscript{215} \textit{Id.} at 1189.
\textsuperscript{216} \textit{Id.} at 1208.
\textsuperscript{217} Unlike Mr. Soobramoney, the \textit{Grootboom} applicants sought a remedy that was within a plausible definition of the core minimum right to housing, i.e., basic shelter.
\textsuperscript{218} Grootboom, 2000 (11) BCLR at 1192. The Court cited Soobramoney’s finding that the state’s obligations are dependent on resources, and that the “corresponding rights themselves are limited by reason of the lack of resources.” Grootboom, 2000 (11) BCLR at 1192–93 (citing Soobramoney, 1997 (12) BCLR at 1701). The Court concluded that “the availability of resources is an important factor in determining what is reasonable.” Grootboom, 2000 (11) BCLR at 1193.
\textsuperscript{219} 2002 (10) BCLR 1033 (C.C.).
obligation with respect to the right to health. In the decision, the High Court cited estimates that 10% of the South African population is HIV-positive, including 24% of pregnant women. Approximately 70,000 infants are infected annually through mother-to-child transmission. Clinical trials showed that the anti-retroviral drug Nevirapine could significantly reduce this risk if administered during labor. The manufacturer of the drug had offered to supply it to South African health authorities free of charge for five years. However, the Health Ministry instituted a limited pilot program administering the drug to pregnant women at a few selected public health clinics throughout the country.

The petitioners, apparently learning the lessons of Soobramoney and Grootboom, did not argue that every pregnant woman had a right to be provided Nevirapine on demand, but they challenged the government’s failure to design a comprehensive nationwide program. They further argued that the state should not prohibit the administration of the drug by doctors and other health care professionals in the public health sector so long as patients have given informed consent to treatment. The High Court’s opinion, authored by Justice Botha, focused on Section 27(2) of the Constitution, framing the issue as whether the limited treatment program constituted a reasonable governmental measure to ensure the progressive realization of the right to health.

Citing Grootboom, the Court identified the factors to be considered in making a determination of reasonableness: (1) provision of appropriate financial and human resources; (2) reasonable implementation of the plan; and (3) the inclusion of all relevant segments of society. While acknowledging that the standard of progressive realization contemplates that the right to health care would not be achievable immediately, the Court pointed out that the program lacked an “unqualified commitment to reach the rest of the population in any given time or at any given rate.” In view of the enormity of the threat to human life and health, the Court ruled that the phased implementation of the Nevirapine program was discriminatory. It reasoned that the state violated the negative obligation to desist from impairing the right to health care implicit in Section 27(1) by prohibiting the use of Nevirapine outside the pilot sites, and that the government had no justification for not making the drug widely available to the public. Moreover, the Court determined that the state had also violated the positive obligation in Section 27(2) to achieve the progressive realization of the right, concluding that “[t]he programme of the respondents lacks the impetus that is required for a programme that must move progressively. If there is no time-scale, there must be some other built-in impetus to maintain the momentum of progression . . . . That does no justice to the exigency of the case.”

220. 2002 (4) BCLR 356, 359 (T. S. Afr.).
221. Id.
222. Id. at 360.
223. Id.
225. Id. at 371.
226. Id.
227. Id. at 379.
228. Id. at 381.
230. Id. at 382.
231. See id. at 383–84. In Grootboom, the Court also determined that there was a negative dimension to the right to housing in Section 26: “Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.” Grootboom, 2000 (11) BCLR at 1188.
232. Treatment Action Campaign, 2002 (4) BCLR at 382–83. The Court dismissed concerns about possible side effects of the drug, citing evidence that the side effects were associated with long-term use. Id. at 382.
233. Id. at 385.
On appeal the Constitutional Court affirmed the essential elements of the High Court’s ruling.\textsuperscript{234} Declaring that economic and social rights are “[c]learly” justiciable,\textsuperscript{235} the Court added that “when it is appropriate to do so, courts . . . must . . . use their wide powers to make orders that affect policy as well as legislation.”\textsuperscript{236} In citing its earlier decision in \textit{Soobramoney} in support of justiciability, the Court implicitly distinguished that case on its facts, opining that the plaintiff had simply failed to make out a violation of the right to health.\textsuperscript{237}

In preliminary comments, the Court sought to clarify its elaboration of the concept of “minimum core” in \textit{Grootboom}, rejecting an argument by amici that this principle vests everyone with an individual right to the satisfaction of basic needs.\textsuperscript{238} Rather, the Court explained, the concept of minimum core provides a standard by which to assess the reasonableness of a governmental measure.\textsuperscript{239} Under this standard, the government program must address the needs of the most vulnerable in society, “[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril.”\textsuperscript{240}

The case before it required the Court to consider the claim of a uniquely vulnerable group—infants threatened with the transmission of HIV/AIDS from their mothers at birth—that the government violated the negative dimension of their right to health\textsuperscript{241} by confining the use of Nevirapine to the pilot sites.\textsuperscript{242} It found that the allegedly prohibitive costs cited by the government as justification for its policy were associated with the development of a comprehensive long-term program, not with the provision of a single dose of the drug to mothers and their babies at birth.\textsuperscript{243} Dismissing concerns raised by the government regarding the efficacy and safety of the drug as unsupported by the evidence,\textsuperscript{244} the Court ruled that the government had breached its obligation under Sections 27(1) and (2) by its insistence that Nevirapine be administered only under the most optimal conditions.\textsuperscript{245} Thus, the government’s program would not achieve the progressive realization of the right to health care mandated in Section 27(2) of the constitution.\textsuperscript{246}

\begin{itemize}
\item \textsuperscript{234} Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033, 1071 (CC) (S. Afr.). The Court sought to make its orders more flexible, stating, “[c]ourt orders concerning policy choices made by the executive should . . . not be formulated in ways that preclude the executive from making . . . legitimate choices.” \textit{Id.} at 1066.
\item \textsuperscript{235} \textit{Id.} at 1043.
\item \textsuperscript{236} \textit{Id.} at 1066.
\item \textsuperscript{237} \textit{Id.} at 1043.
\item \textsuperscript{238} \textit{Id.} at 1044.
\item \textsuperscript{239} \textit{Minister of Health,} 2002 (10) BCLR at 1046.
\item \textsuperscript{240} \textit{Id.} at 1054 (quoting \textit{Grootboom,} 2000 (11) BCLR at 1191).
\item \textsuperscript{241} The negative obligation to desist from impairing the right to health is implicit in § 27(1), which states in pertinent part: “Everyone has the right to have access to—(a) health care services, including reproductive health care . . . .” \textit{S. Afr. Const.} § 27(1).
\item \textsuperscript{242} \textit{Minister of Health,} 2002 (10) BCLR at 1049.
\item \textsuperscript{243} \textit{Id.} at 1050. These costs included “providing the infrastructure for counseling and testing, . . . providing formula feed, vitamins and an antibiotic drug and . . . monitoring, during bottle-feeding, the mothers and children who have received Niverapine.” \textit{Id.}
\item \textsuperscript{244} \textit{Id.} at 1052–53. According to the Court, the only evidence of valid safety concerns was associated with the long-term use of the drug. While recognizing the government’s desire to proceed cautiously in the administration of a new and potent drug, the Court stressed the urgency of the problem and the fact that the safety and efficacy of the drug has been established. \textit{Id.} at 1070. The Court noted that Nevirapine has been approved for use by the South African Medicines Control Council, as well as the World Health Organization. \textit{Minister of Health,} 2002 (10) BCLR at 1053.
\item \textsuperscript{245} \textit{Id.} at 1057.
\item \textsuperscript{246} Section 27(2) provides: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.” \textit{S. Afr. Const.} § 27(2).
\end{itemize}
because it entailed “waiting for a protracted period before taking a decision on the use of Nevirapine beyond the research and training sites. . . .” 247

After concluding that restricting access to Nevirapine in public health centers was unreasonable, the Court considered the implications of this determination for the government’s AIDS policy, emphasizing the need for “a concerted national effort to combat the HIV/AIDS pandemic.” 248 It ruled that the government’s policy “fails to meet constitutional standards because it excludes those who could reasonably be included where such treatment is medically indicated to combat mother-to-child transmission of HIV.” 249 While reiterating that this ruling does not grant everyone the right to individual treatment on demand, the court stressed that “[e]very effort must . . . be made to [achieve this goal] as soon as reasonably possible.” 250 In the meantime, “[t]he policy will have to be that Nevirapine must be provided where it is medically indicated at those hospitals and clinics within the public sector where facilities exist for testing and counselling.” 251

The Court acknowledged that since the case was first brought, the government had made significant adjustments in its AIDS policy, relaxing its rigid restrictions on the availability of Nevirapine 252 making substantial additional funds available for HIV treatment, and establishing comprehensive programs to combat mother-to-child transmission in three of the nine provinces in the country. 253 Nevertheless, the Court found that additional relief was necessary, and ordered the government to “devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV” which must include counseling, testing, and treatment. 254

The government was further ordered “without delay” to (a) remove the restrictions on Nevirapine; (b) make it available at public hospitals and clinics when medically indicated; (c) provide counselors at these sites; and (d) expand the availability of testing and counseling facilities throughout the public health sector to “facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.” 255 Thus, while taking pains to insist that it was not creating a private right of action, the Court’s ruling nonetheless requires the government to provide specific medical treatment to a specific population.

This ruling highlights the speciousness of Erica De Wet’s distinction between traditional individual rights and social rights framed as constitutional commands addressed to state, which she calls “objective legal norms.” 256 Because in her view only individual entitlements are rights, De Wet does not regard legislative commands as generating correlative enforceable rights, 257 since they do not, in terms, entitle individuals to relief on

248. Id. at 1069.
249. Id.
250. Id.
251. Id. at 1067.
252. Id. The Court interpreted this change of heart to mean that “provided the requisite political will is present, the supply of Nevirapine at public health institutions can be rapidly expanded to reach many more than the 10% of the population intended to be catered for in terms of the test site policy.” Minister of Health, 2002 (10) BCLR at 1067–68. This effectively eviscerates the “for such purposes” limitation imposed in Soobramoney on the resources available to implement the right to health. Soobramoney, 1997 (12) BCLR at 1701.
253. Minister of Health, 2002 (10) BCLR at 1068.
254. Id. at 1071.
255. Id. at 1072.
257. Id. at 71.
Nevertheless, as this case illustrates, a court order enforcing a constitutional legislative command ultimately will benefit specific individuals. The perceived dilemma she posits is resolved if social rights are understood as collective rights, for which individual remedies are not necessarily the most efficacious response.

D. Reconciling the Results

The South African case law has evolved from the rejection of individual rights claims for life-preserving dialysis treatment, to recognition of collective rights to comprehensive government programs to address urgent social needs for housing and health care. Permeating these decisions is the influence of the two often-countervailing components of the social construction of rights: ideology and practice. On the one hand, pervasive individualist norms, such as the public/private dichotomy and the principle of free choice, inhibit the expansion of rights analysis beyond traditional first generation liberties. On the other, popular movements stimulate legal developments that can lead to more encompassing definitions of rights.

Both kidney disease and AIDS are serious, life-threatening harms. However, the AIDS epidemic has all of the characteristics of a classic “public” health crisis: a communicable disease that threatens the entire population. As such, AIDS more readily falls within the traditional scope of liberal state responsibility. In contrast, kidney disease, no matter how widespread, is seen as a “private” misfortune; its victims, while generating sympathy, may even be deemed “undeserving” of an urgent public response by having made bad lifestyle choices. Notably, in Treatment Action Campaign, the beneficiaries of constitutional relief were not the infected mothers, but the innocent—hence “deserving”—infants to whom the disease was transmitted in utero. Hopefully, these mothers will survive long enough to care for their children.

The fact that public housing has long been imbued with assumptions of government responsibility may also explain the Grootboom Court’s willingness to intercede. Mass homelessness evokes the specter of rampant crime, disease, and public unrest. Interestingly, the court in this case identified individuals and other agents, as well as the state, as duty-holders of the right to housing. In contrast, in Soobramoney the Constitutional Court was markedly unwilling to recognize any duty in the private sector for the provision of dialysis treatment, despite the fact that the identical language on which it

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258. Id. at 98.
259. See, e.g., DAVID P. FIDLER, INTERNATIONAL LAW AND PUBLIC HEALTH: MATERIALS ON AND ANALYSIS OF GLOBAL HEALTH JURISPRUDENCE 3–4 (2000) ("[P]ublic health deals with society: groups of people and actions affecting many people. . . . [P]ublic health measures are] designed to achieve a collective good . . . [and] to promote the health of the community."). Fidler argues that such measures will not necessarily guarantee every individual good health. Id. at 4. The South African Constitutional Court emphasized that HIV/AIDS is the “greatest threat to public health in our country.” Minister of Health, 2002 (10) BCLR at 1061.
260. See id. at 5 (stating that the “history of public health was closely related to the control of infectious disease epidemics”).
261. See, e.g., Justice Madala’s concurring opinion in which he suggests that persons with renal failure could prolong their life expectancy with proper diet. Soobramoney, 1997 (12) BCLR at 1711 (Madala, J., concurring).
262. See Treatment Action Campaign, 2002 (4) BCLR at 359 (“It stands to reason that the victim of [mother-to-child] transmission is entirely innocent.”).
263. Grootboom, 2000 (11) BCLR at 1189. The Court stated that Section 27’s phraseology, entrenching a “right of access to adequate housing” requires the state to use legislative and other measures to enable “other agents within our society, including individuals themselves . . . to provide housing.” Id. (emphasis added). Cf. GEWIRTH, supra note 111, at 18 (stating that “since each person has rights to freedom and well-being against all persons, every other person also has these rights against him, so that he has correlative duties toward them”).
relied to eliminate the public/private distinction is contained in the section on the right to health.\textsuperscript{264}

Finally, the Court more readily acknowledged rights and correlative state duties where there was a history of political struggle demanding their recognition. Both the housing and AIDS cases took place against the backdrop of tenacious local and international movements on those issues. In light of the huge domestic and international outcry over the South African government’s handling of the AIDS crisis, the Court was apparently unwilling to presume the good faith of the authorities, as it had in \textit{Sooobramoney}.\textsuperscript{265} With each case, the Court has been more willing to question the adequacy of the government’s allocation of resources to pressing social needs.

VI. TOWARD A GLOBAL SENSE OF COMMUNITY

The new South African jurisprudence demonstrates that there are no institutional obstacles to the realization of collective rights where the political will exists to enforce them. The cases also show that the full protection of social rights cannot be achieved without a reevaluation and reconstruction of liberal rights discourse.

According to economist Michel Chossudovsky, the world’s poor countries, with 85.2% of the population, share only 21.5% of its income, while rich nations—14.8% of the population—account for 78.5%.\textsuperscript{266} As the chasm widens between the planet’s privileged minority and its impoverished masses, the need for international recognition of collective rights has never been more apparent. Such a development is needed to fulfill the promise of universality proclaimed by human rights discourse. As Felice points out, in many cultures “the concept of collective human rights... has an historical basis that runs far deeper... than does the Western concept of individual rights.”\textsuperscript{267} Moreover, individual rights are inadequate to protect disempowered groups when collective rights have not been realized.\textsuperscript{268}

The argument that a scarcity of resources renders social rights unattainable is unpersuasive. It is well documented that the world’s abundant resources are sufficient to

\begin{itemize}
\item \textsuperscript{264} See S. AFR. CONST. § 26(1). Similarly, the Court in \textit{Minister of Health v. Treatment Action Campaign} called upon “all sectors of the community, in particular civil society” to assist in combating the AIDS epidemic. \textit{Minister of Health}, 2002 (10) BCLR at 1069.
\item \textsuperscript{265} See \textit{Sooobramoney}, 1997 (12) BCLR at 1706.
\item \textsuperscript{266} \textit{MICHEL CHOSUDOVSKY, THE GLOBALISATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS} 39 (1997).
\item \textsuperscript{267} \textit{FELICE, supra note 3, at 38–39.}
\item \textsuperscript{268} \textit{See, e.g., Regents of the University of California v. Bakke}, 438 U.S. 265 (1978) (holding that the medical school’s special admissions program violated the white applicant’s Fourteenth Amendment right to equal protection). The Court emphasized that the rights protected by the Fourteenth Amendment are “individual” and “personal.” \textit{Id.} at 289. The Court dismissed the historic group deprivation experienced by African-Americans, stating that “[t]here is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not.” \textit{Id.} at 296. \textit{See also Shaw v. Reno}, 509 U.S. 630 (1993) (declaring that white residents stated a claim for unconstitutional racial gerrymandering against the state of North Carolina for designing an electoral district to enhance voting power of black residents pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973(e)). Though the dissent pointed out that political power is effectively exercised in groups, and that members of the same race often have the same interests, \textit{id.} at 682, the Court’s holding emphasized that “racial bloc voting and minority-group political cohesion never can be assumed.” \textit{Id.} at 653. Thus, white individuals were able to challenge remedial redistricting on Fourteenth Amendment grounds, without establishing any dilution of white voting strength, because such gerrymandering “injures voters [by] reinforce[ing] racial stereotypes... .” \textit{Id.} at 650. The Court goes so far as to assert that remedial redistricting “threatens to undermine our system of representative democracy... .” \textit{Id.}
meet minimum core needs. World poverty is a function not of scarcity, but of distribution. Walzer defines the available resources of the community as “the past and present product, the accumulated wealth of its members—not some ‘surplus’ of that wealth . . . . Socially recognized needs are the first charge against the social product; there is no real surplus until they have been met.” He criticizes the inherently undemocratic nature of the right to unlimited accumulation in the face of dire need: “Men and women who appropriate vast sums of money for themselves while needs are still unmet act like tyrants, dominating and distorting the distribution of security and welfare.”

To Walzer’s definition I would add that the available resources include not just the wealth produced within a given state but that of the global community as a whole. This conception flows not only from the recognition of humanity’s interdependence in the age of globalization but from elementary principles of justice: the international slave trade, colonialism, apartheid, physical and cultural genocide of indigenous peoples and continued inequities in North-South relations provide ample grounds to support an inclusive definition of available resources. Moreover, these historical experiences are constitutive of the human person in the twenty-first century. They are part of our collective identity. They are who we are. The rapid globalization of the economy and communications, as well as objective threats to global human welfare—such as nuclear war, environmental degradation, and the AIDS epidemic—lend urgency to the need for a collective conceptualization of the self that transcends geographical boundaries.

Thus, the available resources of South Africa include not only the monies directly at the disposal of the state; they include the immense wealth in the hands of the white minority—riches wrung from the suffering of the African people. It is possible that when the total resources of the country are taken into account, kidney dialysis could be considered a component of the minimum core right to health. Moreover, many rich nations are heavily indebted to the Black majority of South Africa for their government’s economic, political, diplomatic, and military support of the apartheid regime. Similarly, the available resources of the “Third World” include those of the industrialized nations whose development was made possible by colonial exploitation.

Despite its theoretical weaknesses, the collective right of peoples to development offers a potential conceptual framework within which the issue of scarcity of resources can be addressed. Originally formulated by Senegalese jurist Keba M’Baye, the United Nations

269. See Felice, supra note 3, at 87 (“There is enough food to offer everyone in the world around 2,500 calories a day—200 calories more than the basic minimum. Hunger cannot be blamed on a shortage of food. Yet . . . at least 800 million people around the world go hungry.”)

270. See Kai Nielsen, Global Justice, Capitalism and the Third World, in INTERNATIONAL JUSTICE AND THE THIRD WORLD 27 (Robin Attfield & Barry Wilkins eds., 1992). There is a massive redistribution of resources from the poor to the rich. Felice notes that “[d]uring the 1980s, despite all sorts of foreign aid, the deeply indebted poor countries were faced with a net transfer of more than $100 billion a year to rich countries.” Felice, supra note 3, at 84 (referring to Bruce Rich, Mortgaging the Earth: The World Bank, Environmental Impoverishment, and the Crisis of Development (1994)). This is due in large measure to the burgeoning external debt of poor countries which have become dependent on international financial institutions. See, e.g., Chossudovsky, supra note 266, at 51.

271. Walzer, supra note 7, at 76–76.

272. Id. at 76.

273. Gewirth’s theory supports the claim to such an international duty, suggesting that the requirements of personal morality may be extended, with due qualifications, to the morality of the relations between states or nations. From this it follows that . . . Nation A has a strict duty to give food to Nation B where Nation A has an overabundance of food while Nation B lacks sufficient food to feed its population so that sizeable numbers are threatened with starvation.

See Gewirth, supra note 111, at 207.
General Assembly adopted the Declaration on the Right to Development in 1986.\textsuperscript{274} The Declaration defines the right to development in both individual and collective terms. It is “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”\textsuperscript{275}

Critics correctly point out that the Declaration is vague as to the juridical basis and normative content of the right to development, including the identity of the rights-holders and duty-holders.\textsuperscript{276} Tanzanian scholar Issa Shivji criticizes the concept as essentially a demand for charity “based on an illusory model of co-operation and solidarity.”\textsuperscript{277} When seen as part of the global demand for economic, social, and cultural rights, however, the right to development has the potential to surmount welfarist constraints. As William Felice argues, the right to development establishes an emerging principle in international law that “there is a collective international responsibility for the human condition.”\textsuperscript{278}

VII. CONCLUSION

In order for human rights discourse to evolve in the twenty-first century, the eighteenth-century fiction of natural, self-evident rights must give way to the realization that all rights are social constructs. They are the product of collective struggles: particular demands made on organized society in particular historical times and places. They represent values that, as a result of these struggles, society has agreed to prioritize. Critical scholars have deconstructed, denounced, and defended rights discourse, and have vigorously debated the efficacy of reifying fundamental values in legal form.\textsuperscript{279} Nevertheless, rights ideology is a powerful transformative force and a potent weapon in the hands of the dispossessed. Just as individual rights-talk served as a catalyst in the democratic revolutions of Europe and the United States, so too will the demand for second- and third-generation rights play a galvanizing role in the ongoing struggle of the world’s impoverished millions to realize fully the dream of human dignity.

\textsuperscript{275} Id. art. 1.
\textsuperscript{278} Felice, supra note 3, at 77.
\textsuperscript{279} Compare Tushnet, Critique of Rights, supra note 19, at 27 (arguing that rights-claims are individualistic), with Patricia J. Williams, Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (arguing that rights remain valuable social constructs in the lives of disempowered people).