NOTES

USING STRUCTURAL INTERDICTS AND THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION TO ACHIEVE JUDICIAL ENFORCEMENT OF ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA

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In 1996, South Africa's transformative Constitution inspired human rights activists worldwide by incorporating justiciable economic and social rights (ESRs), including rights to housing, health care, food, water, social security, and basic education. Yet over the past twelve years, problems related to separation of powers considerations, vagueness concerns, and enforcement costs have impeded the South African judiciary's efforts to enforce these crucial rights meaningfully. After surveying these obstacles, this Note offers a two-step proposal for change: increased use of the structural interdict remedy and an enhanced, collaborative role for the South African Human Rights Commission. Used in tandem, these measures can improve judicial enforcement of ESRs in South Africa—and perhaps set a concrete example for the rest of the world.

INTRODUCTION

The South African Constitution of 1996 was designed to overcome two legacies of the apartheid era: the doctrine of parliamentary supremacy and the "rigid system of economic and social segregation" that had marred South Africa for decades.[1] Accordingly, in addition to institutionalizing a threefold separation of powers so that neither

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[1] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of S. Afr. 1996* (*First Certification Judgment*) 1996 (4) SA 744 (CC)

Parliament nor the Executive could claim absolute authority in the future,[2] the final document also guaranteed a wide variety of rights—including economic and social rights (ESRs)[3]—in the postapartheid era.[4] Today, South Africa's Constitution is celebrated around the world[5] for integrating ESRs into its Bill of Rights, declaring these rights generally justiciable,[6] and developing a sophisticated jurisprudence interpreting socio-economic rights. As Constitutional Court Judge Zac Yacoob explained in 2001, "[t]he question is therefore . . . how to *enforce* [these justiciable ESRs] in a given case."[7]

The enforceability of ESRs is not merely an academic problem. According to the United Nations Development Programme's 2007–2008 Human Development Report, 34.1% of South Africa's population survives on less than two dollars a day.[8] Constitutionally protected and judicially enforceable ESRs—particularly rights to

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at 776–77 (S. Afr.) (noting apartheid-era economic and social segregation and active promotion of parliamentary supremacy and executive domination).

[2] *See, e.g.*, S. AFR. CONST. 1996 ch. 4, s. 42–82 (outlining role of Parliament); *id.* ch. 5, s. 83–102 (delineating roles of President and National Executive).

[3] The terms "socio-economic rights" and "economic and social rights" (ESRs) are used interchangeably throughout this Note. These umbrella terms include the rights of access to housing, health care, food, water, social security, and basic education. See *infra* Part I for a general overview.

[4] See S. AFR. CONST. 1996 ch. 2 (Bill of Rights), in particular s. 26 (right to housing), 27 (health care, food, water, and social security), and 29 (education).

[5] *See, e.g.*, Cyrus E. Dugger, *Rights Waiting for Change: Socio-economic Rights in the New South Africa*, 19 FLA. J. INT'L L. 195, 197–98 (2007) ("In 1996, South Africa brought into creation one of the most advanced constitutions in history . . . a revolutionary document unlike any other."); Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 37 (2006) ("The current position of socio-economic rights on the constitutional world map is marginal . . . . The South African Constitution is undoubtedly the most noteworthy [exception] . . . ."); *see also* Marius Pieterse, *Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience*, 26 HUM. RTS. Q. 882, 882–83 (2004) (declaring South Africa's experiment in ESR enforcement "bold," "relatively novel," and thus "sure to prove useful"). *But see* Eric C. Christiansen, *Adjudicating Non-justiciable Rights: Socio-economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 322–24 (2007) (noting that South Africa's "unparalleled" role in social rights adjudication debate has been considered either "revolutionary and heroic" or "irresponsible and doomed").

[6] *Gov't of the Republic of S. Afr. & Others v Grootboom & Others* 2001 (1) SA 46 (CC) at 60–61 (S. Afr.) ("[T]he issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the [*First*] *Certification* judgment.").

[7] *Id.* at 61 (emphasis added).

[8] U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008, POPULATION LIVING BELOW $2 A DAY (BY PERCENT), *available at* http://hdrstats.undp.org/indicators/24.html; U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008, SOUTH AFRICA DATA SHEET, *available at* http://hdrstats.undp.org/countries/data_sheets/cty_ds_ZAF.html. This data was compiled from a 2000 survey that appears to be the most up-to-date comprehensive poverty data available for South Africa. *See* WORLD BANK

housing, health care, food, water, social security, and basic education—could play a vital role in improving the lives of the most vulnerable South Africans.[9] Moreover, South Africa's experiment with judicial enforcement of ESRs serves as an example for human rights advocates around the world.

But judicial enforcement of ESRs presents unique challenges. Three stand out. First are separation of powers concerns. These include worries about both institutional legitimacy and competence: Is it democratically legitimate for courts to make rights decisions that turn on resource allocations, and do courts have the skills necessary to evaluate or alter policy choices made by the legislative or executive branches? Second, both proponents and opponents of socio-economic rights have cited the problem of vagueness:[10] What does the right of access to housing mean? How much health care satisfies a right to health? Third, and related to the first two, is the problem of enforcement costs. Since many dimensions of socio-economic rights require "progressive realization,"[11] enforcing these rights can involve extended judicial oversight, necessitate repeat court appearances, and require the courts to engage in nuanced factual analyses of government actions. The costs of such activities can be prohibitive.

GROUP, WORLD DEVELOPMENT INDICATORS 2006, tbl.2.7 (2006), *available at* http://devdata.worldbank.org/wdi2006/contents/Section2.htm.

[9] *Cf.* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 161–62 (2004) (arguing that persistent racially based disparities in South African housing and health care, despite constitutionalized ESRs, reveal need for proactive, even radical, enforcement measures to actualize these rights).

[10] Efforts to define socio-economic rights with greater precision have persisted for decades and stem in part from the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR's language—requiring States Parties to "take steps" toward "achieving progressively the full realization of the rights recognized" in the Covenant—is undeniably ambiguous. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 2(1), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), *available at* http://www.unesco.org/education/pdf/SOCIAL_E.PDF [hereinafter ICESCR]. *See also infra* Part II.B (discussing challenges involved in interpreting and enforcing vaguely worded ESRs).

[11] *See, e.g.*, S. AFR. CONST. 1996 ch. 2, s. 26 (directing State to take reasonable measures within available resources to "achieve the progressive realisation" of right to housing), s. 27 (same, with respect to health care, food, water, and social security). "Progressive realization" is a term of art that reflects "a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time." U.N. Comm. on Econ., Soc. and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (Art. 2, Para. 1 of the Covenant)*, ¶ 9, 5th Sess., U.N. Doc. E/1991/23, Annex III (Dec. 14, 1990) [hereinafter CESCR General Comment 3]; *see also* Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 172–77 (1987) (surveying ICESCR *travaux préparatoires*, or drafting history, and States Parties' varying conceptions of progressive realization in ESR context).

Yet the judiciary can play a crucial role in advancing ESRs over time by ensuring that those who *do* manage to come to court and litigate socio-economic rights issues—whether on their own behalf or on behalf of a larger class of similarly situated disadvantaged South Africans—are granted meaningful remedies that are actually implemented. The Final Constitution of 1996 (also known as the "Final Constitution" or the "1996 Constitution") empowers courts to take a flexible approach to remedies,[12] which can include declaratory relief (declaring certain law or conduct invalid),[13] prohibitory orders (preventing the State from engaging in behavior determined to violate rights),[14] mandatory orders (requiring government officials to take remedial action),[15] and structural interdicts (supervising government plans to remedy rights violations).[16]

This Note weighs both the criticisms and the stakes and proposes a two-part mechanism for judicial enforcement of ESRs in South Africa. First, it argues for greater use of a specific *type* of judicial remedy in ESR litigation: the structural interdict. Second, it advocates for a new *methodology* of enforcement: involving the South African Human Rights Commission (SAHRC) with the courts to ensure that structural interdicts are implemented successfully once litigation has ended. Though others have evaluated and endorsed the use of structural interdicts in ESR litigation,[17] this Note is the first call

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[12] *See infra* Part I.C.2 (surveying 1996 Constitution's grant of judicial enforcement powers).

[13] *See infra* notes 64–66 and accompanying text.

[14] *See infra* notes 124–25 and accompanying text.

[15] *See infra* notes 126–27 and accompanying text.

[16] Structural interdicts are a type of injunction "requir[ing] the government to report back to the court at regular intervals about the steps taken to comply with the constitution." Kent Roach, *Crafting Remedies for Violations of Economic, Social and Cultural Rights*, *in* THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 111, 113 (John Squires et al. eds., 2005); *see also infra* Part III.A.1 (outlining elements of structural interdicts).

[17] *See generally, e.g.*, Iain Currie & Johan de Waal, *Remedies*, *in* THE BILL OF RIGHTS HANDBOOK 217–19 (Iain Currie & Johan de Waal eds., 5th ed. 2005) [hereinafter Currie & de Waal, *Remedies*] ("The structural interdict is arguably the only really *effective* remedy [for violations of socio-economic rights]."); Kent Roach & Geoff Budlender, *Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?*, 122 SALJ 325, 326 (2005) (providing "guidance and principles for determining when mandatory and on-going structural relief will be appropriate and just"); Mia Swart, *Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor*, 21 SAJHR 215, 226–28 (2005) ("[I]n the context of a constitutional commitment to realising socio-economic rights and in the light of the demonstrated need for ongoing supervisory function by the court because of government inaction[,] employing structural interdicts might make sense."); Wim Trengove, *Judicial Remedies for Violations of Socio-economic Rights*, ESR REV., Mar. 1999, *available at* http://www.communitylawcentre.org.za/Socio-Economic-Rights/esr-review/esr-previous-editions/esr-review-vol-1-no-4-march-1999.pdf (PDF file at 13, 15–17) (explaining supervisory jurisdiction); Murray Wesson, Grootboom *and Beyond:*

to combine this recommendation with a proposal for a greater role for the SAHRC in judicial enforcement of ESRs in South Africa.

The Note proceeds as follows. Part I presents an overview of South Africa's constitutional provisions regarding rights and remedies. Part II then surveys the three aforementioned criticisms of judicial enforcement of ESRs. An analysis of recent Bill of Rights decisions[18] illustrates how these criticisms have influenced and circumscribed South African courts' approaches to enforcement generally and to remedies in particular. Part III attempts to overcome these roadblocks, arguing first for more frequent use of the structural interdict remedy in ESR litigation and then for an expanded role for the SAHRC in supporting judicial enforcement of this remedy.

I
Introduction to Economic and Social Rights in South Africa

Before evaluating the difficulties of, and potential solutions to, judicial enforcement of ESRs in postapartheid South Africa, it is necessary to understand the key constitutional provisions pertaining to rights and remedies. This Part reviews South Africa's transition to a constitutional democracy, provides a typology of ESRs included in the Final Constitution of 1996, and surveys constitutional limitations on these rights. It then discusses the contours of the South African State's duties vis-à-vis ESRs and explores the remedial tools available to courts for enforcing these obligations.

A. The 1996 Constitution: The Creation of Justiciable Economic and Social Rights

South Africa's transition from apartheid to democracy was a cautious, piecemeal process.[19] After the adoption of an interim Constitu-

Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court, 20 SAJHR 284, 286, 305–07 (2004) (urging Constitutional Court to make greater use of supervisory jurisdiction to improve enforcement of ESRs and establish "relationship of collaboration" between State and judiciary).

[18] This paper focuses on the Bill of Rights jurisprudence of the South African High Courts (which may hear all constitutional matters not within the exclusive jurisdiction of the Constitutional Court, as well as any other matters pursuant to Acts of Parliament), the Supreme Court of Appeal (which may decide appeals on any matter and serves as the highest court for all nonconstitutional cases), and the Constitutional Court (which may only decide constitutional matters and is the final word on all such questions). *See generally* S. Afr. Const. 1996 ch. 8, s. 167–169 (describing duties and jurisdictional scope of Constitutional Court, Supreme Court of Appeal, and High Courts).

[19] *See generally* Lourens du Plessis & Hugh Corder, Understanding South Africa's Transitional Bill of Rights 1–12 (1994) (providing brief overview of South Africa's constitutional transition in early 1990s).

tion in November 1993, a democratically elected Constitutional Assembly drafted the Final Constitution,[20] guided by detailed, binding "Constitutional Principles."[21] Before the Final Constitution could become supreme law, the new South African Constitutional Court was required to certify that the document complied with these Principles.[22]

Though the interim Constitution had not included a broad range of socio-economic rights,[23] the Constitutional Assembly chose to add the rights of access to housing, health care, food, water, social security, and basic education to the draft Final Constitution. Critics raised three arguments against constitutionalized ESRs. First, since ESRs were not "universally accepted fundamental rights," their inclusion violated Constitutional Principle II.[24] Second, the fact that ESRs implicated budgetary issues also made these rights nonjusticiable.[25] Finally, critics claimed that constitutionalizing socio-economic rights and then making these rights justiciable would violate Constitutional

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[20] *See generally* Cyril Ramaphosa, *Negotiating a New Nation: Reflections on the Development of South Africa's Constitution*, *in* THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW 71, 80–84 (Penelope Andrews & Stephen Ellmann eds., 2001) (describing Constitutional Assembly's work and lead-up to Final Constitution's adoption).

[21] A full list of the thirty-four Constitutional Principles is annexed to the interim Constitution. *See* S. AFR. (Interim) CONST. 1993 sched. 4, *available at* http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/schedules.html [hereinafter Interim Constitution, Constitutional Principles]; *see also* DU PLESSIS & CORDER, *supra* note 19, at 9, 13–15 (describing remarkable features of Constitutional Principles); Const. Court of S. Afr., The History of the Constitution, http://www.concourt.gov.za/text/constitution/history.html (last visited Sept. 27, 2008).

[22] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of S. Afr. 1996* (*First Certification Judgment*) 1996 (4) SA 744 (CC) at 784 (S. Afr.).

[23] *See* S. AFR. (Interim) CONST. 1993 ch. 3, s. 7–35 (enumerating "Fundamental Rights"), *available at* http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/ch3.html. A few ESRs were included, however: Section 29 guaranteed that "[e]very person shall have the right to an environment which is not detrimental to his or her health or well-being"; Section 30(1)(c) granted every child the right "to security, basic nutrition and basic health and social services"; and Section 32(a) guaranteed everyone access "to basic education and to equal access to educational institutions."

[24] Constitutional Principle II specified that "[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution . . . ." Interim Constitution, Constitutional Principles, *supra* note 21; *see also First Certification Judgment* 1996 (4) SA at 800 (addressing compatibility of constitutionalized ESRs with Constitutional Principle II).

[25] *First Certification Judgment* 1996 (4) SA at 800 (addressing budgetary objection to constitutionalized ESRs).

Principle VI, forcing the judiciary "to encroach upon the proper terrain of the Legislature and Executive."[26]

During certification, the Constitutional Court countered these challenges. The Court first addressed whether ESRs could be constitutionalized. Though tacitly accepting that socio-economic rights were not "fundamental" rights, the Court held that Constitutional Principle II allowed the Constitutional Assembly to "supplement the universally accepted fundamental rights with other rights not universally accepted."[27] The Court then addressed the justiciability of ESRs. While conceding that ESR litigation could generate court orders with "direct implications for budgetary matters," the Court pointed out that "even when a court enforces civil and political rights . . . the order it makes will often have such implications."[28] The Court concluded that justiciable ESRs did not confer upon the courts "a task . . . so different from that ordinarily conferred upon them by a bill of rights" that the separation of powers principle would be breached.[29] Finally, and with nearly identical reasoning, the Court held that ESRs "are, at least to some extent, justiciable."[30] The budgetary implications of civil and political rights enforcement did not suffice to bar justiciability; neither, the Court argued, should the budgetary consequences of ESRs.[31] "At the very minimum," held the Court, "socio-economic rights can be negatively protected from improper invasion."[32]

The *First Certification Judgment* thus both approved constitutional ESRs and held these rights to be justiciable in South Africa.

B. South African ESRs: Constitutional Provisions and Limitations

South African lawyer and constitutional scholar Sandra Liebenberg has sorted the ESRs contained in the 1996 Constitution

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[26] *Id.* (addressing compatibility of constitutionalized ESRs with Constitutional Principle VI). Constitutional Principle VI held that "[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness." Interim Constitution, Constitutional Principles, *supra* note 21.

[27] *First Certification Judgment* 1996 (4) SA at 800.

[28] *Id.* Specifically, the Court mentioned the civil and political rights of equality, freedom of speech, and fair trial. *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 800–01.

[32] *Id.* Commentators note that this language "makes it clear that negative protection is merely the minimum extent to which the rights can be judicially protected and does not exhaust the possibilities of justiciability" of ESRs in South Africa. Iain Currie & Johan de Waal, *Socio-economic Rights: Housing, Health Care, Food, Water, Social Security*, *in* THE BILL OF RIGHTS HANDBOOK, *supra* note 17, at 566, 571 [hereinafter Currie & de Waal, *Socio-economic Rights*].

into three categories: qualified positive socio-economic rights, unqualified (or "basic") socio-economic rights, and negative socio-economic rights.[33] Although most rights have both negative and positive aspects, this typological overview is a useful starting point in understanding pertinent differences between various ESRs included in the 1996 Constitution.

The majority of South African ESRs are qualified positive socio-economic rights. In the main, the rights to access to housing,[34] health care, food, water, and social security fall under this classification.[35] These rights are "positive" insofar as they require the State to take some affirmative action, but "qualified" to the extent that the provisions only ask the State to "take *reasonable* legislative and other measures, *within its available resources*, to achieve the *progressive realisation*" of these rights, acknowledging limited resources.[36]

Despite recognized resource limitations, however, some socio-economic rights are considered unqualified.[37] These include chil-

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[33] *See* Sandra Liebenberg, *The Interpretation of Socio-economic Rights*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 33-1, 33-5 to 33-6 (Stuart Woolman et al. eds., 2d ed. 2005) [hereinafter Liebenberg, *Interpretation of Socio-economic Rights*].

[34] S. AFR. CONST. 1996 ch. 2, s. 26(1) ("Everyone has the right to have access to adequate housing.").

[35] *Id.* s. 27(1) ("Everyone has the right to have access to . . . health care services, including reproductive health care . . . sufficient food and water . . . [and] social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.").

[36] *Id.* s. 26(2) (emphasis added) (State's duty of progressive realization of right of access to housing), s. 27(2) (emphasis added) (same, with respect to right of access to health care, food, water, and social security). As the Constitutional Court explained in 1998, South African drafters adopted such limitations because these particular ESRs are necessarily "dependent upon the resources available for such purposes, and [so] the corresponding rights themselves are limited by reason of the lack of resources." *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at 771 (S. Afr.). Given the severe resource constraints faced by the postapartheid South African State, the Court acknowledged that "an unqualified obligation to meet these [socio-economic] needs would not presently be capable of being fulfilled." *Id.* When formulating the 1996 Constitution's core ESR provisions, therefore, drafters relied heavily on international law, importing the ICESCR's language of "progressive realization" based on "available" resources. Liebenberg, *Interpretation of Socio-economic Rights*, *supra* note 33, at 33-3 to 33-4 (noting "strong influence of international law on the drafting of the relevant sections protecting socio-economic rights"); *see also supra* note 11.

[37] Although the constitutional text does not qualify these "basic" rights, South African courts have recognized some practical limitations rooted in resource constraints. *See, e.g.*, PJ Schwikkard, *Arrested, Detained, and Accused Persons*, *in* THE BILL OF RIGHTS HANDBOOK, *supra* note 17, at 737, 774 (quoting *B v Minister of Correctional Services* 1997 (6) BCLR 789 (C) at 802 (S. Afr.)). In *B v Minister of Correctional Services*, the High Court held that "what is '*adequate medical treatment*' [depends on] . . . what the State can afford," while acknowledging that once "adequate medical treatment" had been defined, nonaffordability provided no defense against the asserted right. 1997 (6) BCLR at 802.

dren's rights,[38] the right to a basic education,[39] and certain rights of detainees.[40] The status of these rights likely reflects policy priorities within South Africa.[41]

The final category of ESRs contains those phrased to emphasize limits on State or private party behavior: so-called negative rights.[42] This group includes the right to be free from summary, unjustified evictions (a notorious apartheid-era practice)[43] and the right not to be refused emergency medical treatment.[44]

Moreover, all Bill of Rights provisions are subject to the Constitution's general limitations clause. *See infra* note 45 and accompanying text.

[38] *See* S. AFR. CONST. 1996 ch. 2, s. 28(1)(c) ("Every child has the right . . . to basic nutrition, shelter, basic health care services and social services.").

[39] *See id.* s. 29(1)(a) ("Everyone has the right . . . to a basic education, including adult basic education."). It is noteworthy, however, that Section 29(1)(b) contains qualifications similar to those in Sections 26 and 27: "Everyone has the right . . . to further education, which the state, through reasonable measures, must make progressively available and accessible."

[40] *See id.* s. 35(2)(e) ("Everyone who is detained, including every sentenced prisoner, has the right . . . to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."); *see also* Liebenberg, *Interpretation of Socio-economic Rights*, *supra* note 33, at 33-5 (including detainees' rights among ESRs).

[41] For example, the special status afforded to children and detainees likely reflects these groups' historic and ongoing vulnerability. *See, e.g.*, Elsje Bonthuys, *Children*, *in* THE BILL OF RIGHTS HANDBOOK, *supra* note 17, at 599, 602–03 ("The purpose of [Section] 28 is to protect children in situations where they are particularly vulnerable."). Similarly, it is possible that the Constitutional Assembly chose, in light of limited resources and low adult illiteracy rates, to prioritize basic education first. *Cf.* UNESCO INST. FOR STATISTICS, ESTIMATES AND PROJECTIONS OF ADULT ILLITERACY FOR POPULATION AGED 15 YEARS AND ABOVE, BY COUNTRY AND BY GENDER 1970–2015 (July 2002) (projecting adult illiteracy rate in South Africa to be 12.9% by 2005, 11.2% by 2010, and 9.8% by 2015), *available at* http://www.uis.unesco.org/en/stats/statistics/UIS_Literacy_Country2002.xls.

[42] The divide between "positive" and "negative" rights has been criticized frequently and sharply. *See, e.g.*, Cécile Fabre, *Constitutionalising Social Rights*, 6 J. POL. PHIL. 263, 267–70 (1998) (presenting overview of positive and negative rights before refuting soundness of binary distinction).

[43] *See* S. AFR. CONST. 1996 ch. 2, s. 26(3) ("No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."). For a succinct overview of the apartheid-era policies that led to the current housing crisis, including the practice of forced removals and evictions, see *Gov't of the Republic of S. Afr. & Others v Grootboom & Others* 2001 (1) SA 46 (CC) at 54–55 (S. Afr.).

[44] *See* S. AFR. CONST. 1996 ch. 2, s. 27(3) ("No one may be refused emergency medical treatment."). The meaning of "emergency medical treatment" was the central point of contention in *Soobramoney* and remains contested in light of South Africa's limited resources. *See Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at 770–74 (S. Afr.).

All Bill of Rights provisions, including ESRs, are subject to the limitation of rights contained in Section 36 of the 1996 Constitution.[45] In Bill of Rights litigation, South African courts ask two questions: whether a right enumerated in the Bill of Rights has been infringed, and if so, whether the infringement can be justified as a permissible limitation given the factors outlined in Section 36.[46] The party proclaiming the legitimacy of a rights limitation (for example, the government) bears the burden of supplying the court with relevant factual or policy materials.[47]

Much of the litigation seeking judicial enforcement of ESRs in the past twelve years has centered on qualified positive socio-economic rights.[48] As the principal aim of this Note is to evaluate and improve such judicial enforcement, the following discussion focuses on these rights.

C. Responsibilities and Remedies: The State's and Judiciary's Obligations Regarding the Bill of Rights

In addition to enumerating core human rights, the 1996 Constitution explicitly identifies the State's obligations to uphold and advance, as well as the courts' powers to remedy and enforce, these rights. A review of these provisions will clarify the scope of legal duties the Constitution imposes on various government actors.

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[45] Section 7(3) states that "[t]he rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill." S. AFR. CONST. 1996 ch. 2, s. 7(3). In turn, Section 36 provides:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> *(a)* the nature of the right;
>
> *(b)* the importance of the purpose of the limitation;
>
> *(c)* the nature and extent of the limitation;
>
> *(d)* the relation between the limitation and its purpose; and
>
> *(e)* less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Id. s. 36.

[46] *See* Iain Currie & Johan de Waal, *Limitation of Rights*, *in* THE BILL OF RIGHTS HANDBOOK, *supra* note 17, at 163, 166 (explaining courts' two-step analysis).

[47] *Id.* at 167. The courts' ability to process and evaluate such information, however, may be limited. *See infra* notes 89–94 and accompanying text.

[48] There is also a significant body of South African jurisprudence dealing with the "negative" aspect of the housing right—i.e., relating to evictions. *See, e.g.*, Currie & de Waal, *Socio-economic Rights*, *supra* note 32, at 587–91 (providing brief overview of evictions and Section 26(3)).

1. The State's Obligations

In South Africa, the Bill of Rights "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."[49] Section 7 establishes that "[t]he state must respect, protect, promote and fulfil" these rights.[50] While these obligations undoubtedly overlap, each phrase also imposes a distinctive duty on the State. The U.N. Committee on Economic, Social and Cultural Rights (CESCR) has developed the meaning of these terms,[51] as have South African ESR experts. An understanding of these meanings indicates what South Africa must do to implement and advance ESRs.

The duty to "respect" requires the State "to refrain from law or conduct that directly or indirectly interferes with people's enjoyment of socio-economic rights."[52] Liebenberg notes that whereas the international standard for "respect" prohibits only direct or indirect interference with people's enjoyment of socio-economic rights, the South African standard—which further proscribes "preventing or impairing" access to ESRs—is a broader, more rights-protective baseline.[53] The South African State may thus breach its duty to respect ESRs in one of three ways: by depriving people of the access they currently enjoy to socio-economic rights; by approving legislation or taking other official action which effectively obstructs or denies an individual's or a

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[49] S. AFR. CONST. 1996 ch. 2, s. 8(1). Section 8(2) asserts that a Bill of Rights provision also "binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

[50] *Id.* s. 7(2). This "typology of state obligations" is a conceptual framework often linked to ESRs, both in various domestic settings and within the international human rights framework. *See, e.g.*, CESCR, *General Comment 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 20, 29th Sess., U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) ("The right to water, like any human right, imposes three types of obligations on States parties: obligations to *respect*, obligations to *protect* and obligations to *fulfil*.").

[51] CESCR General Comments are authoritative (since the U.N. Economic and Social Council empowers the CESCR to issue such interpretations) but not legally binding on States (since the CESCR's power does not derive from State consent). *See, e.g.*, David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT'L L. 53, 57 & n.15 (2006) (describing CESCR General Comments as "useful expositors" of ICESCR but not legally binding); *see also* MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 91 (1995) (noting that CESCR General Comments, while not legally binding, have "considerable legal weight").

[52] Liebenberg, *Interpretation of Socio-economic Rights*, *supra* note 33, at 33-6; *see also, e.g.*, CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 33, 22d Sess., U.N. Doc. E/C.12/2000/4 (July 4, 2000) ("The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health.") [hereinafter CESCR General Comment 14].

[53] Liebenberg, *Interpretation of Socio-economic Rights*, *supra* note 33, at 33-17 to 33-18.

group's access to ESRs; or by adopting policies or laws that exclude particular groups from the full and equal enjoyment of socio-economic rights.[54]

The duty to "protect" requires "the State to take legislative and other measures, *including the provision of effective remedies*, to protect vulnerable groups against violations of their rights by more powerful private parties."[55] That this duty contemplates judicial measures (in the form of effective remedies) as well as executive and legislative action is particularly noteworthy.

Perhaps most importantly, the duty to "fulfil" (which is read to include the duty to "promote") demands that the State take proactive, concrete actions to facilitate individual access to human rights.[56] This is reflected in Sections 26 and 27 of the 1996 Constitution, which instruct the State to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of rights of access to housing, health care, food, water, and social security.[57]

2. *Remedies and Enforcement*

The 1996 Bill of Rights grants South African courts flexible powers to enforce these duties and to remedy violations. There are three key provisions in this regard.

Section 38 grants standing for Bill of Rights claims to assorted individuals and groups[58] and provides that a court "may grant appro-

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[54] *See* Steven Budlender, Making Socio-economic Rights Effective: Judicial Remedies for Breaches of the State's Duty to Respect, Protect, Promote and Fulfil Socio-economic Rights 19–21 (Jan. 2002) (unpublished manuscript, on file with the *New York University Law Review*).

[55] Liebenberg, *Interpretation of Socio-economic Rights*, *supra* note 33, at 33-6 (emphasis added) (identifying landlords, banks, and insurance companies as private entities State may need to control); *see also, e.g.*, CESCR, *General Comment 12: The Right to Adequate Food (Art. 11)*, ¶ 15, 20th Sess., U.N. Doc. E/C.12/1999/5 (May 12, 1999) ("The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.").

[56] Liebenberg, *Interpretation of Socio-economic Rights*, *supra* note 33, at 33-6. The CESCR has stated that "the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization" of the rights in question. CESCR General Comment 14, *supra* note 52, ¶ 33.

[57] S. AFR. CONST. 1996 ch. 2, s. 26–27; *see also supra* note 36.

[58] Section 38 of the 1996 Constitution provides:

> The persons who may approach a court are—
> *(a)* anyone acting in their own interest;
> *(b)* anyone acting on behalf of another person who cannot act in their own name;
> *(c)* anyone acting as a member of, or in the interest of, a group or class of persons;
> *(d)* anyone acting in the public interest; and

priate relief, including a declaration of rights" when confronted with rights violations.[59] Section 8(3)(a) instructs the courts to "apply, *or if necessary develop*, the common law" to give effect to the Bill of Rights when applying it to private parties.[60]

Section 39 regulates judicial interpretations of Bill of Rights provisions. Courts "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom" when interpreting the Bill of Rights.[61] Similarly, courts are to "promote the spirit, purport and objects of the Bill of Rights" when interpreting legislation or developing South Africa's common and customary law.[62]

Chapter 8 of the 1996 Constitution, governing "Courts and Administration of Justice," further empowers South African courts to remedy and enforce rights violations.[63] Of particular importance is Section 172, which pertains to courts' powers in constitutional matters, including Bill of Rights adjudication. When deciding "a constitutional matter within its power," a South African court "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."[64] Such declaratory relief may include declarations of invalidity[65] or declaratory orders.[66]

Although the various forms of declaratory relief are among the most oft-used remedies in Bill of Rights litigation to date,[67] these rem-

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(e) an association acting in the interest of its members.

S. AFR. CONST. 1996 ch. 2, s. 38.

[59] *Id.*

[60] *Id.* s. 8(3)(a) (emphasis added).

[61] *Id.* s. 39(1)(a). Courts are additionally required to consider relevant international law provisions and permitted (though not obligated) to consider foreign law on point. *Id.* s. 39(1)(b)–(c).

[62] *Id.* s. 39(2).

[63] *See generally id.* ch. 8, s. 165–180.

[64] *Id.* s. 172(1)(a).

[65] Declarations of invalidity may target either legislation or conduct that is found unconstitutional. The prevalence of declarations of invalidity is not surprising, since such declarations are among the few remedies explicitly referenced in the 1996 Constitution. *See id.* Moreover, "[s]ince the declaration of invalidity is not a discretionary remedy . . . a court is obliged to declare unconstitutional laws or conduct invalid." Currie & de Waal, *Remedies*, *supra* note 17, at 193 (internal citation omitted).

[66] When issuing declaratory orders, courts inform the legislative and/or executive branches of their constitutional obligations and remind government officials of their duty to take appropriate action to fulfill these responsibilities. Such declarations are authorized by Section 38 of the 1996 Constitution and differ from declarations of invalidity in two key respects. First, declarations of rights may be granted even if no law or conduct is found to be inconsistent with the Bill of Rights. Second, such declarations aim to resolve a specific dispute between particular parties, rather than binding all South Africans. *See* Currie & de Waal, *Remedies*, *supra* note 17, at 213–14.

[67] Budlender, *supra* note 54, at 3.

edies are not always ideal. While it is valuable for the courts to recognize and publicly denounce rights transgressions, declarations of invalidity assume "that governments will make prompt and good faith efforts at compliance with the general standards articulated by the courts."[68] When this assumption proves false—whether because of legitimate resource constraints or egregious contempt of court—declarations of invalidity fail to remedy the violation in question.[69] Meanwhile, declaratory orders are likely to resolve problems only when the government has been inattentive (leaving obligations unaddressed or, alternatively, misconceiving the nature of such obligations),[70] not when the "government is either incompetent (unable to fulfil its obligations) or intransigent (refusing to fulfil its obligations)."[71]

Fortunately, Section 172(1)(b) grants courts broad authority to "make *any* order that is just and equitable."[72] In a landmark 1997 case, *Fose v Minister of Safety and Security*,[73] the Constitutional Court addressed the question of just what remedies courts could and should provide to litigants. The *Fose* Court held that "[t]he courts have a particular responsibility . . . and are obliged to 'forge new tools' and shape innovative remedies, if needs be . . . ."[74] The Court stressed that "an appropriate remedy must mean an effective remedy,"[75]

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[68] Roach, *supra* note 16, at 115.

[69] As one commentator has observed, declarations are inadequate "in cases of grave systematic problems and when administrators 'have proven themselves unworthy of trust.'" *Id.* at 116 (paraphrasing Canadian Supreme Court Justice Frank Iacobucci).

[70] *See* Roach & Budlender, *supra* note 17, at 345–51 (outlining different degrees of judicial intervention to promote government compliance and suggesting that declaratory relief is sufficient when constitutional problems can be traced to government inattention).

[71] Budlender, *supra* note 54, at 45; *see also* Roach & Budlender, *supra* note 17, at 349–50 (recommending various forms of mandatory relief for cases involving either incompetent or intransigent governments).

[72] S. AFR. CONST. 1996 ch. 8, s. 172(1)(b) (emphasis added). The provision states in full:

> (1) When deciding a constitutional matter within its power, a court—
>
> *(b)* may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Id.

[73] 1997 (7) BCLR 851 (CC) (S. Afr.).

[74] *Id.* at 888–89.

[75] *Id.* at 888. In an effort to define what might constitute "appropriate" relief, the Constitutional Court has further explained that "'appropriateness' . . . require[s] 'suitability' which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights." *Sanderson v Attorney-General, E. Cape* 1997 (12) BCLR 1675 (CC) at 1691 (S. Afr.).

noting that effective remedies were particularly critical in South Africa, a country "where so few have the means to enforce their rights through the courts."[76]

Despite the 1996 Constitution's specific obligations and flexible remedial provisions and the Constitutional Court's progressive rhetoric on remedies, the South African government has often failed to meet its Bill of Rights responsibilities—particularly those related to ESRs. Meanwhile, courts have struggled to address violations of these key rights. The next Part takes a closer look at the lingering obstacles to meaningful ESR enforcement, examining both theoretical debates and the jurisprudence of South African courts over the past decade.

II
Theoretical and Practical Problems with Judicial Enforcement of Socio-economic Rights

Though South Africa waged and won the battle for justiciable, constitutional ESRs, South African courts still wrestle with the distinctive difficulties posed by judicial enforcement of these rights. As noted previously, three problems can be identified: separation of powers concerns, vagueness issues, and enforcement costs. Each underscores the judiciary's limited capacity, when acting alone, to remedy ESR violations. Courts' worries about judicial competence, vague rights provisions, and runaway enforcement costs have combined to limit judicial enforcement of ESRs in South Africa. This Part relies on academic commentary to define these problems; where relevant and available, it also analyzes recent Bill of Rights decisions (from the High Courts to the Constitutional Court).

A. Separation of Powers Problems

Perhaps the single largest theoretical obstacle to judicial enforcement of ESRs remains the separation of powers problem, which may be regarded more accurately as the twin difficulties of judicial legitimacy and competence.[77]

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[76] *Fose* 1997 (7) BCLR at 888.

[77] A similar bifurcation recurred in previous debates over whether ESRs should be justiciable at all, both in South Africa prior to 1996 and elsewhere. *See, e.g.*, 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, 20 & n.59 (1992) ("[A]rguments against the inclusion of social rights in a written bill of rights correspond to two dimensions of justiciability: the *legitimacy* dimension and the *institutional competence* dimension.").

Legitimacy itself is a bundled idea that includes debates over "democracy, majoritarianism and judicial accountability."[78] In the classic conceptualization, government in accordance with the principle of separation of powers requires a division of labor among government branches.[79] The notion that "the legislature makes the law, the executive implements the law, and the judiciary applies and enforces the law" is strained by the constitutionalization of human rights which are then "to be interpreted and enforced by the judiciary."[80] Moreover, critics argue that unelected judges, whose judicial independence is secured via insulation from public accountability, act in a countermajoritarian manner when criticizing or invalidating "legislation or policy conceived by the 'democratic' branches."[81]

Over the past dozen years, the separation of powers "problem," in its various iterations, has continued to inform judicial enforcement of ESRs. Interestingly, however, the legitimacy objection has fallen out of favor. The transformative nature of the Constitution,[82] paired with the disastrous historical record of judicial overdeference to a brutal apartheid regime,[83] led constitutional drafters[84] and later judges to assert the legitimacy of independent, proactive judicial review—and to proclaim such review integral to a functioning democracy. Each of the Constitutional Court's first three major ESR decisions—*Soobramoney v Minister of Health, Kwazulu-Natal*,[85] *Government of*

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[78] Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-economic Rights*, 20 SAJHR 383, 390 (2004).

[79] Scott & Macklem, *supra* note 77, at 17–18.

[80] *Id.*

[81] Pieterse, *supra* note 78, at 390.

[82] Pieterse, reflecting on the consequences of adopting a transformative constitution, observes:

> By requiring the judiciary to "uphold and advance its transformative design," the Constitution simply does not allow the degree of deference to which judges schooled in South African legal culture have become accustomed. The judiciary is no longer able to shy away from vindicating socio-economic rights merely because doing so would have political and resource repercussions.

Id. at 417 (internal citation omitted).

[83] In the apartheid era, the majority of South Africans viewed the judiciary as "illegitimate and existing to serve the interests of the ruling white people," a view reaffirmed when "the judiciary itself frequently and blatantly sided with the executive even in cases where it was not obliged by the relevant statutory instruments to do so." John Hlophe, *The Role of Judges in a Transformed South Africa—Problems, Challenges and Prospects*, 112 SALJ 22, 24 (1995). Indeed, judges often hid their complicity behind a separation of powers veil. *Id.* at 25. Since many apartheid-era judges remained on the bench during and after the transition to democracy, fears about judicial legitimacy have lingered. *Id.* at 24.

[84] *See generally* S. AFR. CONST. 1996 ch. 8, s. 165–180 (laying out powers and responsibilities of South African courts in chapter titled "Courts and Administration of Justice").

[85] 1998 (1) SA 765 (CC) (S. Afr.). In *Soobramoney*, the litigant was a 41-year-old diabetic suffering from a variety of severe illnesses, including irreversible chronic renal failure. *Id.* at 769. Too impoverished to afford private hospital dialysis treatments, he sued for the

the Republic of S. Afr. & Others v Grootboom & Others,[86] and *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* (*TAC (No 2)*)[87]—assumed that the judiciary's evaluation of executive or legislative ESR policies was democratically legitimate. The lower courts soon followed suit.[88]

Yet competency questions persist and are often linked to the concept of "polycentricity,"[89] a term used to denote "decisions that affect an unknown but potentially vast number of interested parties and that have many complex and unpredictable social and economic repercussions, which inevitably vary for every subtle difference in the deci-

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right to receive free dialysis treatments at State hospitals under Section 27(3). *Id.* at 770; *see also supra* note 44 and accompanying text. The Constitutional Court first determined that the claim properly involved Sections 27(1) and (2) rather than Section 27(3), and then proceeded to evaluate the existing (executive branch–approved) guidelines regulating access to dialysis in Kwazulu-Natal State hospitals. *Soobramoney* 1998 (1) SA at 774–75.

[86] 2001 (1) SA 46 (CC) (S. Afr.). In *Grootboom*, litigants were a large number of landless South Africans evicted from a squatters' settlement erected on a privately owned vacant lot. *Id.* at 55. Petitioners challenged their eviction and extant national, municipal, and local housing policies under Sections 26 and 28 of the Constitution. *Id.* at 57; *see also supra* notes 34, 36, 38 and accompanying text (discussing constitutional provisions governing right of access to housing). The Constitutional Court once again presumed the legitimacy of judicial review and explained that the judiciary's task in evaluating the Section 26(2) claim was to determine whether the State's legislative and other policies were reasonable. *Grootboom* 2001 (1) SA at 67–80. Consequently, "the court developed a review standard that allowed it to engage the political branches in rational discussion over the fairness of the national housing programme, without, however, setting government's priorities for it." Theunis Roux, *Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court*, 10 DEMOCRATIZATION 92, 107 (2003).

[87] 2002 (5) SA 721 (CC) (S. Afr.). The second *Treatment Action Campaign* case (*TAC (No 2)*) involved a challenge to executive branch policies regarding the distribution of Nevirapine, an anti-retroviral drug which had been shown to decrease the incidence of mother-to-child-HIV transmission. *See id.* at 728. Though acknowledging that separation of powers considerations, including judicial deference to executive policies, were "relevant to the manner in which a Court should exercise the powers vested in it under the Constitution," the Court proclaimed:

> Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. . . . Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself.

Id. at 735, 755.

[88] *See, e.g.*, *Magidimisi v Premier of the E. Cape & Others* 2006 JDR 0346 (B) ¶ 18, at 11 (S. Afr.) ("One of the founding values of the Constitution is the rule of law. One of the fundamental principles of the rule of law is that everybody, including the state, is subject to the law and judgments of the courts.").

[89] *See* Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978) (coining term "polycentric" and presenting examples of polycentric decisionmaking to illustrate what sorts of tasks are inherently unsuited for resolution via adjudication).

sion."[90] Those who argue against judicial enforcement of ESRs posit that judges, who are trained to understand and apply legal principles but ill-equipped to evaluate and adjudicate more complex questions of social policy, inevitably struggle to resolve polycentric problems successfully.[91] Since "decisions concerning the realisation of socio-economic rights are, due to their society-wide impact and almost inevitable budgetary implications, typically regarded as 'preponderantly polycentric,'"[92] effective judicial enforcement of such rights is considered by some to be impossible. Furthermore, insist critics, the "triadic" nature of most judicial proceedings—two adversarial parties presenting their respective cases to a single judge, with necessarily limited evidentiary findings—makes judicial resolution of polycentric issues inappropriate and unsatisfying.[93] In the worst case scenario, a judge will hand down an order affecting many individuals outside the courtroom without having had the time or resources to properly evaluate the larger ramifications of such polycentric decisionmaking.[94]

Court decisions reveal a deep anxiety about judicial encroachment on legislative or executive decisionmaking, particularly when the challenged policies implicate budgets and public spending. In *Soobramoney*, the Constitutional Court explained that a "court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."[95] Three years later, the *Grootboom* Court clarified that in evaluating the reasonableness of executive or legislative socio-economic policies, the judiciary "will not enquire whether other more desirable or favourable measures could have been

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[90] Pieterse, *supra* note 78, at 392–93 (synthesizing Fuller's main thesis with respect to notion of polycentricity and competence-based criticisms of judicially enforceable ESRs).

[91] These criticisms of judicial enforcement of ESRs echo the earlier transition-era debates over justiciability. *See, e.g.*, Dennis Davis, *The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles*, 8 SAJHR 475, 477–79 (1992) (voicing concern that positive obligations "progressively realized" socio-economic rights imposed on State implicated "choice sensitive" issues—i.e., those involving policy decisions—that should be confined to political, rather than legal, branches).

[92] Pieterse, *supra* note 78, at 393 (internal citation omitted). Even proponents of judicial enforcement of socio-economic rights recognize that "[r]elief that requires the state to take positive actions, like providing drugs and building schools, raises polycentric issues that affect multiple parties and budgetary priorities." Roach & Budlender, *supra* note 17, at 326.

[93] Pieterse, *supra* note 78, at 393.

[94] *See* Davis, *supra* note 91, at 478 (discussing adjudication that affects particular interests of all citizens "notwithstanding their lack of participation in the litigation"); Pieterse, *supra* note 78, at 393 (observing that in polycentric matters, "all affected parties cannot, for reasons of logistics, be made part of the proceedings").

[95] *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at 776 (S. Afr.).

adopted, or whether public money could have been better spent."[96] As the *TAC (No 2)* Court elaborated:

> Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[97]

Similarly, lower courts have emphasized the judiciary's limited competence,[98] though judges have rejected such arguments in ESR cases involving relatively small costs.[99]

The courts' worries about competence have had direct effects on judicial enforcement of ESRs, influencing "the standard of review and the deference that the courts show to executive and legislative decisions" and "the remedies that are awarded in socio-economic rights cases."[100] Despite progress with regard to separation of powers argu-

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[96] *Gov't of the Republic of S. Afr. & Others v Grootboom & Others* 2001 (1) SA 46 (CC) at 68 (S. Afr.).

[97] *Minister of Health & Others v Treatment Action Campaign (No 2)* (*TAC (No 2)*) 2002 (5) SA 721 (CC) at 740 (S. Afr.).

[98] *See, e.g.*, *Magidimisi v Premier of the E. Cape & Others* 2006 JDR 0346 (B) ¶ 26, at 14 (S. Afr.) ("The constitutional duty of the courts in this regard is not to tell [provincial government officials] how to [effectuate right to social security under Section 27 of Constitution], but merely to ensure that they do take reasonable measures to make the system effective.").

[99] In 2006, for example, the Transvaal Provincial Division of the High Court ordered the Gauteng Member of Executive Council (MEC) for Education, *inter alia*, to purchase sleeping bags for children living at JW Luckhoff High School, an institution caring for children whose parents were unable to do so. *Centre for Child Law & Others v Member of Exec. Council for Educ., Gauteng, & Others* 2008 (1) SA 223 (T) at 230 (S. Afr.). Judge John Murphy indicated:

> Insofar as polycentric issues may arise from the courts becoming involved in budgetary or distribution matters, our Constitution recognises . . . that budgetary implications ought not to compromise the justiciability of the rights. Each case must be looked at on its own merits . . . . The minimal-costs or budgetary-allocation problems in this instance are far outweighed by the urgent need to advance the children's interests in accordance with our constitutional values.

Id. at 228.

[100] Currie & de Waal, *Socio-economic Rights*, *supra* note 32, at 571; *see also* Pieterse, *supra* note 78, at 411 ("In relation to both civil- and socio-economic rights, problems of separation of powers, institutional competence, polycentricity and enforcement arise most acutely at the level of remedy.").

ments based on legitimacy, competence concerns continue to constrain judicial enforcement of ESRs.

B. Vagueness Problems

Judicial enforcement of ESRs has encountered a second obstacle: the vague content of socio-economic rights. Constitutional drafters used vague language when crafting South Africa's "positive"[101] ESRs: For example, the text speaks of a "right to have access" to "adequate" housing;[102] "sufficient" food and water, "health care services," and "social security";[103] and the right to a "basic" education.[104] Given the complexity of constitutional drafting and the unprecedented endeavor to include ESRs in a Bill of Rights, the use of these vague terms is understandable (and perhaps provided the flexibility necessary for socio-economic rights to become fully justiciable). But such language raises practical problems: Just what suffices to constitute a "basic" education, "access" to housing or health care, or "sufficient" food or water? Without clear meaning, how can the judiciary evaluate whether or not the State is fulfilling its duties to "respect, protect, promote and fulfil" these rights?[105] How can vague rights be meaningfully adjudicated or enforced and violations remedied?

Besides these practical questions, vagueness raises a now-familiar theoretical problem rooted in separation of powers considerations: Which government branch is supposed to elucidate these terms?[106]

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[101] *See supra* notes 33–40 and accompanying text (outlining typology of ESRs).

[102] S. AFR. CONST. 1996 ch. 2, s. 26(1); *see also supra* note 34 and accompanying text (quoting provision on right of access to housing).

[103] S. AFR. CONST. 1996 ch. 2, s. 27(1); *see also supra* note 35 and accompanying text (quoting provision on right to health care, sufficient food and water, and social security).

[104] S. AFR. CONST. 1996 ch. 2, s. 29(1); *see also supra* note 39 and accompanying text (quoting provision on right to education).

[105] S. AFR. CONST. 1996 ch. 2, s. 7(2); *see also supra* Part I.C (providing overview of obligations of State and judiciary regarding Bill of Rights). One commentator, writing in 1999, queried "whether the qualifier or internal limitation of the socio-economic rights, namely, that the State's obligations are to be met subject to 'available resources,' trumps the provisions of section 7 [imposing these various duties on the State]." Bongani Majola, *A Response to Craig Scott: A South Africa Perspective*, ESR REV., Mar. 1999, *available at* http://www.communitylawcentre.org.za/Socio-Economic-Rights/esr-review/esr-previous-editions/esr-review-vol-1-no-4-march-1999.pdf (PDF file at 10, 11).

[106] Commentators are torn. One posits that "[i]t is generally desirable that the legislature should, in the first instance, give content and definition to the more far-reaching obligations attached to rights and thereby provide a baseline from which a dialogue on sufficiency can begin with the courts." Craig Scott, *Social Rights: Towards a Principled, Pragmatic Judicial Role*, ESR REV., Mar. 1999, *available at* http://www.communitylawcentre.org.za/Socio-Economic-Rights/esr-review/esr-previous-editions/esr-review-vol-1-no-4-march-1999.pdf (PDF file at 7, 8). Yet proponents of judicial enforcement of ESRs recognize that such a "wait and see" model of inter-branch cooperation requires prompt legislative action. *Id.* at 8 ("The rider to this mode of co-operation is

South African courts have hesitated. Early on, ESR advocates encouraged the Constitutional Court to clarify the scope of socio-economic rights in South Africa by adopting "minimum core obligations," a concept adapted from international human rights law norms.[107] In *Grootboom*[108] and *TAC (No 2)*,[109] however, the Court rejected these arguments, citing a lack of adequate information[110] and then conceding competence-based misgivings.[111]

Yet instead of designing some other means to confront vagueness, the Constitutional Court "has spent most of its energy devising and applying the abstract compliance-measuring standard of reasonableness" to challenge government action—or inaction—in ESR cases.[112] When using "reasonableness review" to evaluate State policies involving positive ESRs, "the central question that the court asks is

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that it applies provided there is (or has been) no unreasonable delay on the part of the legislature in dealing with the particular issue."). If unreasonable legislative delay exists, the court's ideal role is less clear. A second school of thought suggests that the judiciary must act to give meaning to ESRs through constitutional interpretation, particularly because "[i]nterpreting legal texts is what courts do best." Pieterse, *supra* note 78, at 406. Pieterse's claims are controversial; as Scott and Macklem note, "[c]ourts do not simply discover the inherent meaning of a right." Scott & Macklem, *supra* note 77, at 29. Rather, courts are actively involved in uncovering and applying "normative understandings of . . . society," such that multiple meanings are always possible. *Id.*

[107] In 1990, the CESCR proposed the notion of a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of socio-economic rights (e.g., essential foodstuffs, primary health care, basic shelter and housing, and the most basic forms of education). *See* CESCR General Comment 3, *supra* note 11, ¶ 10.

[108] *Gov't of the Republic of S. Afr. & Others v Grootboom & Others* 2001 (1) SA 46 (CC) at 64–65 (S. Afr.) (summarizing argument of amici curiae that CESCR General Comment 3's "minimum core obligation" concept should serve as interpretive tool in defining meaning of Section 26 housing rights).

[109] *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* (*TAC (No 2)*) 2002 (5) SA 721 (CC) at 737–38 (S. Afr.) (summarizing argument of amici curiae that CESCR General Comment 3's "minimum core obligation" concept should serve as interpretive tool in defining meaning of Section 27(1) socio-economic rights, including rights of access to health care, food, water and social security). For a critical review of the *TAC (No 2)* judgment and a thoughtful argument encouraging South African courts to engage with the "minimum core obligation" concept, see David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence*, 19 SAJHR 1, 11–18 (2003).

[110] The *Grootboom* Court argued:

> In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core content of a right.

2001 (1) SA at 66.

[111] *TAC (No 2)* 2002 (5) SA at 740 ("Courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the [amici curiae] should be, nor for deciding how public revenues should most effectively be spent.").

[112] Pieterse, *supra* note 78, at 407.

whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question."[113]

Unsurprisingly, the problem of vagueness persists—limiting the potential of judicial enforcement of ESRs. By declining to clarify the content of socio-economic rights (and thus also failing to define the contours of the State's correlative duties)[114] and focusing instead on reasonableness review, South African courts have placed the proverbial cart before the horse.[115] Courts must first "attempt to understand the content of the right; and only then should [they] engage in the enquiry of determining whether the measures adopted by the government were reasonable methods of progressively realising the right."[116] Without specifying the content of rights, courts cannot issue sufficiently precise mandatory orders demanding a change in government behavior. Consequently, it becomes very difficult for courts to discern whether State actors have crossed the line into contempt.[117]

There is also overlap between vagueness and separation of powers problems. Assessing jurisprudence related to the positive rights in Sections 26, 27, and 28, Cape High Court Judge Dennis Davis explains: "If the Constitutional Court does define these rights with any precision, the burden placed upon the executive by the courts is significantly increased. That is precisely what the Court's approach to these sections [to date] is designed to prevent."[118] After a dozen years, the specific content of South Africa's positive socio-economic rights remains undeveloped and unclear, making judicial enforcement of these justiciable rights quite difficult.

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[113] Sandra Liebenberg, *Enforcing Positive Socio-economic Rights Claims: The South African Model of Reasonableness Review*, *in* THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 73, 79 (John Squires et al. eds., 2005).

[114] Pieterse, *supra* note 78, at 407.

[115] Liebenberg's careful analysis of reasonableness review jurisprudence reveals that a reasonable government program to realize ESRs must provide for "short, medium and long-term needs" and be "comprehensive, coherent, coordinated"; "balanced and flexible"; "reasonably conceived and implemented"; and transparent and effectively publicized to the South African populace. Liebenberg, *supra* note 113, at 80. Yet the reasonableness standard generally fails to clarify or address the *content* of rights. In fact, "[t]he element of the reasonableness test that comes closest to a threshold requirement . . . is that a reasonable government programme must cater for those in urgent need." *Id.* What exactly is due to "those in urgent need," however, remains unspecified.

[116] Bilchitz, *supra* note 109, at 9.

[117] See *infra* note 151 and accompanying text for further discussion of contempt.

[118] DM Davis, *Adjudicating the Socio-economic Rights in the South African Constitution: Towards 'Deference Lite'?*, 22 SAJHR 301, 304–05 (2006).

C. Enforcement Costs

The third major challenge to judicial enforcement of ESRs is the problem of costs—both to litigants attempting to bring socio-economic rights cases to court and to courts trying to oversee such litigation and implement remedial orders. Because there has been virtually no documentation of the specific costs borne by either litigants or courts in South African socio-economic rights cases, it is difficult to pinpoint these costs with precision.[119] Yet even a general assessment of efforts to enforce and remedy ESRs reveals that these rights can carry onerous costs.

In the *First Certification Judgment*, the Constitutional Court rejected the idea that ESRs were inherently more costly to enforce than civil and political rights.[120] Still, given the historic neglect of ESRs in South Africa, adjudicating these rights is a complex project which requires fact-intensive analysis. Furthermore, the special facets of ESRs as written into the 1996 Constitution (i.e., as progressively realized "programmatic" rights)[121] invite courts to engage in oversight and evaluation of long-term government programs, a role distinct from what may be required for other Bill of Rights litigation. This monitoring role can involve large institutional costs[122] and potentially triggers the institutional competence concerns examined above. It also makes certain remedies unsuitable; if a court is to evaluate whether the State is fulfilling its obligations to "progressively realize" a socio-economic right "within available resources," a one-time remedy will be inappropriate.[123] An assessment of two common

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[119] Advocate Richard Moultrie explains: "This kind of research, while undoubtedly interesting, simply does not form part of [the South African] legal academic tradition." Attachment to email from Richard Moultrie, Advocate, Legal Resources Centre Constitutional Litigation Unit, to author (Jan. 10, 2008) (on file with the *New York University Law Review*).

[120] *See supra* notes 28–32 and accompanying text.

[121] The civil and political rights included in the 1996 Constitution are not framed in terms of progressive realization. *See* S. AFR. CONST. 1996 ch. 2, s. 12–23 (enumerating civil and political rights).

[122] Although it would be interesting to compare the costs of ESR litigation to the costs of other Bill of Rights litigation (including civil and political rights cases) in South Africa, no data currently exists on this topic. Accordingly, my discussion here is grounded in common-sense observations rather than empirical research.

[123] Advocate Wim Trengove explains:

> [T]he only appropriate[ ] way to put a stop to widespread violations of socio-economic rights[ ] would often be to bring about far-reaching institutional and structural reform over a period of time . . . . Reform of this kind can for obvious reasons not be brought about by [a] single Court order made once and for all.

Trengove, *supra* note 17, at 16.

South African remedies, prohibitory interdicts and mandatory orders, is instructive.

Prohibitory interdicts prevent the State from engaging in certain behavior once an act is determined to violate (or potentially violate) the Bill of Rights.[124] Such orders are necessarily limited as tools for broader social change, since typically they are defensive measures taken to protect a particular individual or group against only one form of behavior.[125] By contrast, adjudication related to ESR violations usually touches on broad patterns of government action and inaction, which cannot be adequately addressed with isolated prohibitions on a case-by-case basis.

With mandatory orders, courts instruct government officials to take action. If the order is too general, the government's obligations will remain imprecise.[126] On the other hand, a court's efforts to recommend specific legislative measures or to determine exactly which level of government should be held responsible for funding reparations can raise institutional competence concerns.[127] Furthermore, since mandatory orders also aim to settle issues "once and for all," this remedy may be untenable in the ESR context.

Given their limited, once-off nature, prohibitory and mandatory interdicts have lower costs for courts, which may in part explain their popularity. But the shortcomings of these classic remedies in ESR cases signal a need for judges to identify and operationalize new remedies, which may—at least initially—involve greater costs than traditional court orders.

ESRs also pose cost-related issues for litigants. Socio-economic rights litigation is most likely to be undertaken on behalf of people "who are dependent on the State for the provision of basic socio-economic services and who lack the political and social power to get

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[124] *See* Budlender, *supra* note 54, at 22 ("[T]he prohibitory interdict seeks to prevent some discrete act or series of acts from occurring in the future. Thus the state may be ordered to refrain from carrying out an eviction or cutting off a water supply.").

[125] *Cf. id.* at 73 (arguing that prohibitory and mandatory interdicts may suffice to remedy relatively straightforward violations of State's duty to "respect" ESRs).

[126] Roach & Budlender, *supra* note 17, at 334 ("General orders may be made either because of the nature of the duty involved (for example, a duty to act reasonably), or because the court is anxious to leave the government with as much latitude as possible to decide precisely how it will comply with its constitutional obligations.").

[127] *See* Budlender, *supra* note 54, at 40 (arguing that Constitutional Court is unlikely to select one solution from wide range of measures available to State, for fear of causing separation of powers problems); *see also supra* Part II.A (discussing "twin problems of judicial legitimacy and competence").

[these services] without judicial intervention."[128] Given South Africa's high poverty levels,[129] many individuals simply cannot "access legal representation to institute on-going litigation to enforce their rights."[130] The task thus falls to human rights NGOs and practitioners, who must also rely on limited budgets in their efforts to secure judicial enforcement of ESRs. These litigation efforts "carry with them great expense and require skills which many human rights NGO's [sic] and legal practitioners do not have."[131] These problems are exacerbated in the ESR context: "For organizations that depend on public donations . . . [some donors] express concern that the tackling of socio-economic rights amounts to involving oneself in political issues," which leads to reluctance to fund such litigation.[132]

Although ESR advocates have spent many years refuting critics' contention that socio-economic rights are inherently "different,"[133] there is some truth to claims that judicial enforcement of these rights involves special costs which attach to courts, litigants, NGOs, and human rights practitioners alike.

D. A Way Forward?

This Part has outlined both the theoretical critiques and the practical challenges associated with judicial enforcement of (and remedies for) South Africa's ESRs. Although these issues can be divided into separation of powers, vagueness, and costs problems, the categories clearly overlap to create the complex obstacle course confronting ESR advocates today. Frustrated commentators have lamented the courts' cautious use of the "remedial arsenal" at their disposal[134] and bemoaned the fact that, years after even "successful" litigation, impoverished South Africans suffer egregious deprivations of basic

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128 Trengove, *supra* note 17, at 14. Advocate Trengove further notes that "[t]he rich and powerful can look after themselves and usually invoke the Constitution only to prevent or strike down State action which interferes with their lives." *Id.*

129 *See supra* notes 8–9 and accompanying text (noting that over one-third of South Africa's population survives on equivalent of less than two dollars per day).

130 Swart, *supra* note 17, at 228.

131 Majola, *supra* note 105, at 12.

132 *Id.*

133 *See, e.g.*, Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-economic Rights*, 8 SAJHR 451, 456–58 (1992) (surveying and ultimately rejecting claims that ESRs are imperfectly justiciable due to their "programmatic," "positive," and resource-intensive quality); Pieterse, *supra* note 78, at 393–95 (rejecting arguments against judicial enforcement of ESRs premised, *inter alia*, on claims that judges lack economic expertise and are ill-suited to address complex policy questions, and listing several reasons judiciary is actually well-suited to vindicate ESRs).

134 Pieterse, *supra* note 78, at 414.

socio-economic rights.[135] Despite South Africa's remarkable constitutionalization of justiciable ESRs, meaningful access to these rights remains, for many, a distant dream. What can be done? The third and final portion of this Note offers a two-part solution designed to facilitate more effective judicial enforcement of ESRs.

III
Improved Judicial Enforcement of ESRs

Although obstacles to effective judicial enforcement of ESRs remain, the 1996 Constitution's liberal remedial provisions, coupled with the postapartheid establishment of a new national human rights commission, can address and overcome these challenges. This Part first provides a critical overview of structural interdicts before assessing how the South African Human Rights Commission can work in tandem with courts to successfully implement this remedy for socio-economic rights violations.

A. The Remedy: Structural Interdicts

As previously noted, the South African judiciary is responsible for crafting effective remedies for breaches of all Bill of Rights guarantees, including ESRs.[136] There is a wide range of remedies available, but some of the most common—declaratory relief, prohibitory interdicts, and mandatory orders—may be ineffective in the socio-economic rights context.[137] Consequently, commentators have singled out one remedy—the structural interdict[138]—which holds particular

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[135] *See, e.g.*, Marius Pieterse, *Eating Socio-economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 Hum. Rts. Q. 796, 797–800, 810–13 (2007) (applying critical legal studies approach in criticizing South African courts' treatment of justiciable economic and social rights); Swart, *supra* note 17, at 215–16 (noting that almost three years after Constitutional Court found for squatter-litigants in *Grootboom* case, residents of makeshift settlement remained confined to unsanitary and inadequate slum settlement).

[136] *See supra* Part I.C.2 (describing constitutional provisions empowering courts to enforce Bill of Rights and remedy violations thereof).

[137] *See supra* notes 65–71 (defining declaratory relief, including declarations of invalidity and declaratory orders, and noting limitations of such relief), *supra* notes 124–26 (same, for prohibitory and mandatory orders).

[138] In the United States, structural or "supervised" interdicts developed in response to the constitutional civil rights era beginning in the mid-1950s. *See, e.g.*, Nora Gillespie, *Charter Remedies: The Structural Injunction*, 11 Advoc. Q. 190, 191–98 (1989–1990) (giving overview of structural injunctions in public interest litigation in United States, beginning with desegregation cases and extending to cases involving prison and mental hospital reform, public housing, and welfare programs); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1016, 1016–53 (2004) (providing detailed history of "public law litigation"—"civil rights advocacy seeking to restructure public agencies"—and noting gradual shift in U.S. struc-

promise for enhancing ESRs' enforceability and increasing government accountability.[139]

1. Let's Make a Plan: Elements of Structural Interdicts

In essence, structural interdicts (also known as supervised interdicts) require "the violator to rectify the breach of fundamental rights under court supervision."[140] Iain Currie and Johan de Waal have isolated five elements common to structural interdicts.[141] First, the court issues a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations.[142] Second, the court mandates government compliance with constitutional responsibilities.[143]

Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a preset date.[144] This report, which should explicate the government's action plan for remedying the challenged violations,[145] gives "[t]he responsible state agency . . . the opportunity to choose the means of compliance" with the constitutional rights in question, rather than the court itself developing or dictating a solution.[146] The submitted plan is typically expected "to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached."[147]

Fourth, once the required report is presented, the court evaluates whether the proposed plan *in fact* remedies the constitutional infringement and whether it brings the government into compliance

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tural interdicts from "command and control" model to "experimentalist intervention"). Although it is beyond the scope of this Note to undertake a comparative analysis, it is helpful to understand the structural interdict in its international historical context.

139 *See, e.g.*, *S v Z & 23 Similar Cases* 2004 (1) SACR 400 (E) at 418 (S. Afr.) ("[T]he structural interdict is particularly suited to a society committed, as ours is, to the values of 'accountability, responsiveness and openness' in a system of democratic governance."); Swart, *supra* note 17, at 215 (arguing that "constitutional damages and structural interdicts are particularly suitable as remedies that would increase government accountability" in South Africa).

140 Currie & de Waal, *Remedies*, *supra* note 17, at 217; *see also* Richard Moultrie, A Structural Interdict as the Appropriate Remedy for the Constitutional Infringement 7–8 (Dec. 2006) (unpublished manuscript developed for Legal Resources Centre's Constitutional Litigation Unit, on file with the *New York University Law Review*) (describing basic characteristics of structural interdicts).

141 Currie & de Waal, *Remedies*, *supra* note 17, at 217–18.

142 *Id.* at 218; *see also supra* Part I.C.1 (providing overview of State's constitutional obligations with regard to Bill of Rights).

143 Currie & de Waal, *Remedies*, *supra* note 17, at 218.

144 *Id.*

145 Moultrie, *supra* note 140, at 7–8.

146 Trengove, *supra* note 17, at 16.

147 *Id.*

with its constitutional obligations. As a consequence, "[t]hrough the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government on the intricacies of implementation may be initiated."[148] This stage of a structural interdict may involve multiple government presentations at several "check-in" hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders. The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of "the poorest of the poor," who must make the most of rare and costly opportunities to litigate.[149]

After court approval, a final order (integrating the government plan and any court-ordered amendments) is issued.[150] Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially "amount[s] to contempt of court."[151]

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[148] Pieterse, *supra* note 78, at 414. This stage of the structural interdict also "commonly allows for the other parties to the litigation and (sometimes) for interested third parties to submit comments on the proposed plan and for the [government] to reply to those comments," thereby opening up the dialogue to other members of South African society. Moultrie, *supra* note 140, at 8.

[149] *See supra* note 130 and accompanying text (noting that ESRs pose cost-related issues for litigants).

[150] Currie & de Waal, *Remedies*, *supra* note 17, at 218; Moultrie, *supra* note 140, at 8.

[151] Currie & de Waal, *Remedies*, *supra* note 17, at 218. There is much debate in South Africa, however, over the extent to which a court can hold a government official in contempt. In 2003, the Transvaal High Court held that Section 3 of the State Liability Act 20 of 1957 prevented it from granting an order of committal for contempt of court against the State. *York Timbers Ltd v Minister of Water Affairs & Forestry & Another* 2003 (4) SA 477 (T) at 506 (S. Afr.). The State Liability Act "precludes execution against state assets because of the disruption it may cause to the performance of state functions." Currie & de Waal, *Remedies*, *supra* note 17, at 225. Although the court mused in dicta that the State Liability Act likely clashed with sections 173 and 195(1)(f) of the 1996 Constitution, it deferred this constitutional question to higher courts and a later time. *York Timbers* 2003 (4) SA at 505–06. The following year, the Supreme Court of Appeal overturned a lower court ruling providing a contempt of court remedy in cases where the provincial government did not comply with orders to pay money. *Jayiya v Member of Exec. Council for Welfare, E. Cape* 2004 (2) SA 611 (SCA) at 619 (S. Afr.) ("The State Liability Act in [Section] 3 precludes execution against the property of a provincial [government] . . . ."). At least one judge has criticized an expansive reading of this decision, claiming that forbidding all "methods of compelling state functionaries to comply with court orders" would "place[ ] the government above the law insofar as the binding nature of court orders are concerned." *Kate v Member of Exec. Council for the Dep't of Welfare, E. Cape* 2005 (1) SA 141 (SE) at 156–57 (S. Afr.). Although the State Liability Act remains intact, commentators believe an attack on its constitutionality "seems inevitable." Currie & de Waal, *Remedies*, *supra* note 17, at 225.

2. *Early Use of Structural Interdicts*

The Constitutional Court first acknowledged structural interdicts as a valid remedy in 1998, when it held that litigants seeking either a declaratory or mandatory order to vindicate a constitutional right could also obtain a court order that the government body in question "take appropriate steps as soon as possible to eliminate [the rights violation] and to report back to the Court in question."[152]

The South African High Courts and Supreme Court of Appeal have since gradually increased their use of structural interdicts. High Courts have used structural interdicts in cases involving prisoners' rights,[153] welfare benefits,[154] housing and evictions,[155] and children's rights.[156] The High Courts have also issued structural interdicts in non-ESR cases involving juvenile offenders,[157] asylum seekers,[158] and

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[152] *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* (*TAC (No 2)*) 2002 (5) SA 721 (CC) at 757 (S. Afr.) (quoting *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at 401 (S. Afr.)).

[153] *See Strydom v Minister of Corr. Servs. & Others* 1999 (3) BCLR 342 (W) ¶ 23, 1998 SACLR LEXIS 50 at *52–53 (S. Afr.) (issuing structural interdict requiring government authorities to establish schedule for electrical upgrade in Johannesburg Maximum Security Prison and to reinstate prisoners' electrical appliance privileges once upgrade completed); *E N & Others v Gov't of the Republic of S. Afr. & Others* 2007 (1) BCLR 84 (D) ¶ 35, 2006 SACLR LEXIS 21 at *64–65 (S. Afr.) (ordering State officials to immediately provide prisoners with anti-retroviral HIV/AIDS medications and submit report of steps taken to this end within short timeframe).

[154] *See Ngxuza & Others v Permanent Sec'y, Dep't of Welfare, E. Cape, & Another* 2001 (2) SA 609 (E) at 630–31 (S. Afr.) (issuing structural interdict requiring government officials to identify and list individuals whose social grants had been discontinued, provide reasons why these individuals were no longer receiving grants, identify government officials individually responsible for compliance with court order, and file affidavits in court by specified date indicating how compliance would proceed); *Magidimisi v Premier of the E. Cape & Others* 2006 JDR 0346 (B) ¶¶ 29, 33, 39, at 15–16, 21–22 (S. Afr.) (approving use of structural interdict with specific time frame for compliance in case involving government's failure to pay court-ordered money judgments from prior litigation).

[155] *See City of Cape Town v Rudolph & Others* 2004 (5) SA 39 (C) at 90 (S. Afr.) (issuing structural interdict requiring City of Cape Town to deliver report under oath within four months stating steps taken to comply with obligations to provide relief for landless squatters facing eviction).

[156] *See Centre for Child Law & Others v Member of Exec. Council for Educ., Gauteng, & Others* 2008 (1) SA 223 (T) at 230–31 (S. Afr.) (issuing structural interdict requiring boarding school to provide students with sleeping bags and impose perimeter and access control measures to increase student security, as well as ordering Minister of Education to submit reports outlining longer-term plans for such schools by specified deadlines).

[157] *See S v Z & 23 Similar Cases* 2004 (1) SACR 400 (E) at 416–19 (S. Afr.) (writing approvingly of structural interdicts in case involving detention of juvenile offenders prior to placement at reform schools, although High Court did not formally order this remedy because South African government had already agreed to submit reports on plans for juvenile offender placement).

[158] *See Kiliko & Others v Minister of Home Affairs & Others* 2006 (4) SA 114 (C) at 127–30 (S. Afr.) (determining structural interdict to be most appropriate relief before

"the public interest" more broadly.[159] Recently, South African practitioners have written amicus briefs calling for greater reliance on structural interdicts in Bill of Rights litigation.[160]

The Constitutional Court has issued structural interdicts only twice, and both cases were unlike most ESR litigation.[161] In *August & Another v Electoral Commission & Others*,[162] the Court found the Electoral Commission[163] had violated South African prisoners' right to vote.[164] Conceding the Court lacked the institutional competence to rectify the constitutional wrong,[165] Judge Albie Sachs directed the Electoral Commission to do so itself, requiring the Commission "to furnish an affidavit setting out the manner in which the order will be complied with" within two weeks.[166]

Six years after *August*, the Constitutional Court issued a second structural interdict in *Sibiya & Others v Director of Public Prosecution, Johannesburg & Others* (*Sibiya 1*).[167] In the 1995 *Makwanyane* case, the Constitutional Court had declared the death penalty incon-

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ordering Western Cape Chief Immigration Services Officer to file, by specified deadline, detailed report indicating long-term plan for receiving and processing asylum seekers).

159 *See Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others (No 1)* 2003 (5) SA 518 (C) at 591 (S. Afr.) (issuing declaratory order and structural interdict requiring rail operators to submit report before court within four months detailing measures planned to protect rail commuters from violence on trains).

160 For an example of practitioner requests for structural interdicts as the appropriate remedy for specific ESR violations, see Submissions of the Amici Curiae: Community Law Centre (UWC) and the Centre on Housing Rights and Evictions (COHRE) ¶¶ 181–97, at 75–81, *Occupiers of Olivia Road, Berea Township & Others v City of Johannesburg & Others* 2008 (5) BCLR 475 (CC), 2008 SACLR LEXIS 2 (S. Afr.) (No. CCT 24/07), *available at* http://www.communitylawcentre.org.za/Court-Interventions%20/archive-of-court-interventions/jhb-inner-city-cc.pdf (describing structural interdicts and enumerating reasons remedy most appropriate in context of this case).

161 Some South Africans have sharply criticized the Constitutional Court's hesitance to award structural interdicts. Dennis Davis, for instance, argues that by failing to issue structural interdicts, "[t]he Court has, in effect, surrendered its power of sanction of government inertia and, as a direct result, litigants have not obtained the shelter or drugs that even a cursory reading of [the Constitutional Court decisions in *Grootboom* and *TAC (No 2)*] promised in so clear a fashion." Davis, *supra* note 118, at 318.

162 1999 (3) SA 1 (CC) (S. Afr.).

163 For more information on the South African Electoral Commission and its responsibilities, see S. AFR. CONST. 1996 ch. 9, s. 190–191.

164 *August* 1999 (3) SA at 16.

165 After asserting the Commission's duty to "make the necessary arrangements to enable [the prisoners] to vote," the Court indicated that it did "not have the information or expertise to enable it to decide what those arrangements should be or how they should be effected." *Id.* at 17.

166 *Id.* Though there was an element of court supervision, the *August* order may be characterized as a "soft" structural interdict because it did not require or provide for significant Constitutional Court oversight. Indeed, the Court's role in evaluating the content of the presented affidavit was implied rather than explicitly outlined.

167 2005 (5) SA 315 (CC) at 337–38 (S. Afr.).

sistent with the interim Constitution and ordered the substitution of lawful punishments for prisoners on death row.[168] A decade later, finding that "[t]he process of the substitution of sentences has taken far too long," the *Sibiya* Court issued a structural interdict to exercise supervisory jurisdiction over the sentence-conversion process.[169]

Although *August* and *Sibiya* differed in several key ways from the ESR cases with which this Note is concerned,[170] these cases indicate the Constitutional Court's willingness to employ structural interdicts in rights-related litigation.

3. Structural Interdicts: Advantages and Limitations[171]

In ESR cases, structural interdicts offer concrete benefits to both litigants and courts. The remedy preserves an active role for the judi-

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[168] *S v Makwanyane & Another* 1995 (3) SA 391 (CC) at 452–53 (S. Afr.). *Makwanyane* did not declare the death penalty retrospectively invalid, but death sentences imposed before the judgment were to be set aside and substituted by lawful punishments. *Id.*; *see also Sibiya 1* 2005 (5) SA at 322–23 (describing these aspects of *Makwanyane* decision).

[169] *Sibiya 1* 2005 (5) SA at 337–38. The order specified submission dates, as well as what information the government was to provide to the Court. *Id.* at 338. An extended process of government reporting to the Court ensued, culminating in a final judgment and resolution of the issue in November 2006. *See Sibiya & Others v Dir. of Pub. Prosecution, Johannesburg & Others* (*Sibiya 2*) 2006 (2) BCLR 293 (CC) ¶¶ 21–22, 2005 SACLR LEXIS 39 at *23–24 (S. Afr.) (extending time frame for initial government response); *Sibiya & Others v Dir. of Pub. Prosecution, Johannesburg & Others* (*Sibiya 3*) 2006 (2) BCLR 293 (CC) ¶¶ 10–23 (S. Afr.) (No. CCT 45/04B), *available at* http://www.constitutionalcourt.org.za/Archimages/8604.PDF (reviewing government reports and concluding matter was resolved).

[170] *Sibiya*, for example, involved an extremely clear right: the right not to be punished by death. *Sibiya 1* 2005 (5) SA at 334 (noting that situation "was unique in that it was unlikely in the extreme that there would ever be a recurrence," and all that was required for resolution was replacement of now-unconstitutional death sentences). *August* concerned voting, a civil-political right not designed for progressive realization. Consequently, the Court was able (and perhaps more willing) to require immediate implementation. The right was to be exercised in one specific way (the opportunity to cast a ballot) on one particular day (the date set aside for the general election). *August & Another v Electoral Comm'n & Others* 1999 (3) SA 1 (CC) at 3, 17 (S. Afr.). A specific government body, the Electoral Commission, was responsible for the rights violation. Perhaps most important, *August* involved extending extant enfranchisement resources and procedures to a specific (and relatively small) population, rather than creating entirely new resources or procedures to accommodate a large swath of the South African population. *August* 1999 (3) SA at 16–17.

[171] The benefits listed and discussed in this subsection were developed with the assistance and insight of Advocate Richard Moultrie, with whom I brainstormed about structural interdicts as a legal intern with the Legal Resources Centre's Constitutional Litigation Unit in August 2006. Our initial ideas were documented in Memorandum from Richard Moultrie & Mitra Ebadolahi to the Const. Litig. Unit of the Legal Res. Ctr.: Some Thoughts Regarding Structural Interdicts and the General Principles that May Apply in Granting and Framing Them (Aug. 18, 2006) (on file with the *New York University Law Review*). Moultrie further developed these ideas in preparation for an amicus brief to the Supreme Court of Appeal. *See* Submissions of the Amici Curiae: Community Law Centre

ciary, yet avoids difficult separation of powers problems by requiring appropriate political actors to formulate plans for change. As such, structural interdicts circumvent institutional competence critiques; legislators and/or executive branch officials are required to take action, but are given the necessary flexibility to accommodate complex polycentric decisionmaking.

Structural interdicts preserve the courts' special role within South Africa's fledgling democracy, since the supervisory portion of this remedy allows courts to inspect proposed plans and ensure that they are not constitutionally suspect. By providing the judiciary with an effective tool to remedy Bill of Rights violations, structural interdicts bolster the political and popular integrity of the South African courts.

Structural interdicts also provide significant advantages for the political branches. The very process of formulating and presenting a plan to the courts can improve government accountability, helping officials identify which organ or department of the State is responsible for providing particular services or for ensuring access to specific rights.[172] In addition, structural interdicts "have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst [also assisting] the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties."[173] The "check-in" hearings that follow the initial interdict facilitate information sharing between qualified experts and government officials grappling with critical policy decisions and may clarify the content of the ESRs at stake. In addition, structural interdicts may help authorities comply with otherwise politically unpopular constitutional obligations. An explicit court order to satisfy constitutional obligations can support government officials against pressure from small but politically powerful interest groups opposed to certain rights.

Finally, structural interdicts may provide a more fundamentally fair outcome than other remedies in ESR litigation. By requiring the

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(UWC) and the Centre on Housing Rights and Evictions (COHRE) ¶¶ 85–98, at 42–48, *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) BCLR 643 (SCA), 2007 SACLR LEXIS 21 (S. Afr.) (No. 253/2006), *available at* http://www.communitylawcentre.org.za/Court-Interventions%20/archive-of-court-interventions/rand-properties-heads-of-arguments.pdf; *see also* Moultrie, *supra* note 140, at 12–19. I am deeply indebted to Mr. Moultrie for his insights and intellectual generosity on these points.

[172] *See, e.g.*, *Grootboom v Oostenberg Municipality & Others* 2000 (3) BCLR 277 (C) at 293 (S. Afr.) ("On the existing evidence it is less than clear which of the respondents within the hierarchy of government the duty to provide shelter [rests] . . . . It is to be hoped that the report, which the respondents will have to place before this Court, will clarify this aspect of the matter.").

[173] *Magidimisi v Premier of the E. Cape & Others* 2006 JDR 0346 (B) ¶ 29, at 15–16 (S. Afr.).

responsible government officials to formulate a plan designed to operationalize the right in general, rather than just to remedy an individual violation thereof, structural interdicts can provide relief to all members of a similarly situated class—whether or not any given individual has the resources to litigate his or her own case. As such, structural interdicts do not privilege those who can afford to litigate over those who cannot, and can prevent "queue jumping"[174] in access to ESRs.

Yet despite these benefits, structural interdicts are not flawless remedies.[175] Court supervision of government planning can lead to prohibitive enforcement costs, resource diversion, or waste, which may explain South African courts' reluctance to issue this otherwise useful remedy. A second and perhaps more serious problem is the possibility that the government actors responsible for implementing a presented plan will take no action after the plan is court approved—or, worse yet, fail to submit a plan to the court in a timely fashion.[176] Given the difficulties of contempt proceedings,[177] litigants may find themselves back at square one: Although their rights have been recognized with a declaration and a court order issued for a plan of action to be promulgated, litigants have no further follow-up mechanism to ensure that their rights are meaningfully granted if government officials do not abide by a structural interdict. Such stalemates also threaten to undermine the judiciary's credibility. Worried about judicial competence, unclear as to the content of vague rights, and concerned about limited resources, courts may continue to avoid

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[174] "Queue jumping" refers to the concern that parties can use litigation to secure scarce socio-economic resources out of turn (i.e., in a manner that conflicts with extant government planning schemes or that dislodges others waiting for the same resources). It is particularly problematic in the context of access to land for housing; squatters overtaking vacant lots earmarked for future housing developments may be "jumping ahead" of others waiting for access without squatting. *See, e.g.*, *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Res. Ctr., Amici Curiae)* 2004 (6) SA 40 (SCA) at 54 (S. Afr.).

[175] Critics in other jurisdictions have questioned the viability and desirability of structural interdicts. Scholars like Robert Nagel and Owen Fiss have debated the institutional legitimacy of structural interdicts, which may blur the line between the traditional "judicial" function and more political action. *See, e.g.*, Gillespie, *supra* note 138, at 212–15 (citing OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 60 (1978), and Robert F. Nagel, *Controlling the Structural Injunction*, 7 HARV. J.L. & PUB. POL'Y 395, 398–99 (1984)). U.S. commentators have also claimed that structural injunctions permit too much judicial discretion and are costly remedies that reflect "moral hubris and intellectual confusion" by meddlesome judges. *Id.* at 218–19 (citation omitted).

[176] *See, e.g.*, *Ngxuza & Others v Permanent Sec'y, Dep't of Welfare, E. Cape, & Another* 2001 (2) SA 609 (E) at 631 (S. Afr.) (providing example in which government failed to comply with court request for affidavits by preset deadline).

[177] *See supra* notes 117, 151 and accompanying text (observing that orders are often imprecise, making contempt finding challenging, and noting that courts have limited ability to enforce contempt orders against government agencies).

orders requiring judicial supervision without additional institutional support from other actors.

It is for these reasons that judicial enforcement of ESRs is not sufficient by itself to guarantee socio-economic rights in South Africa. Rather, collaboration between the courts and other State bodies appears necessary. The South African Human Rights Commission (SAHRC) has the institutional resources and expertise needed to aid courts in implementing structural interdicts. The SAHRC can help government actors develop remedial plans before such plans are presented in court and oversee plan implementation after the follow-up court hearing has occurred. The SAHRC can also notify the courts when government actors breach their own plans. The next Part examines the Commission and discusses its potential role in South Africa's struggle to implement ESRs.

B. A Helping Hand: The Human Rights Commission

As postcolonial states emerged in the late 1980s and early 1990s, many adopted laws creating national institutions designed to protect and promote human rights norms.[178] In South Africa, the post-apartheid transition led first to constitutional and then to legislative provisions establishing a human rights commission. This Part provides a brief overview of the SAHRC before proposing a specific role for the Commission in enhancing judicial enforcement of ESRs.

1. Overview of the Commission

Chapter Nine of the Final Constitution of 1996 established six "State Institutions Supporting Constitutional Democracy"[179] in South Africa. Of these so-called Chapter Nine Institutions, the SAHRC is often regarded as "the first among equals."[180]

The SAHRC is charged with promoting respect for human rights and the "protection, development and attainment of human rights," as

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[178] By 2000, Human Rights Watch counted twenty-four African countries with provisions for national human rights commissions. *See* HUMAN RIGHTS WATCH, PROTECTORS OR PRETENDERS? GOVERNMENT HUMAN RIGHTS COMMISSIONS IN AFRICA 1 (2001), *available at* http://www.hrw.org/reports/2001/africa/overview/summary.html.

[179] The six State Institutions Supporting Constitutional Democracy are the Public Protector; the South African Human Rights Commission (SAHRC); the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission. *See* S. AFR. CONST. 1996 ch. 9, s. 181–194.

[180] Jonathan Klaaren, *South African Human Rights Commission*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 24C-2, 24C-2 (Stuart Woolman et al. eds., 2d ed. 2005). Despite its preeminent status, however, there "has been a curious dearth of empirical and critical work on the South African Human Rights Commission." *Id.* at 24C-3.

well as with monitoring and assessing "the observance of human rights in the Republic."[181] To fulfill these responsibilities, the SAHRC can investigate and report on the observance of human rights, "take steps to secure appropriate redress where human rights have been violated," conduct research, and educate the public.[182] Unlike other Chapter Nine Institutions, the SAHRC has express litigation powers to initiate cases or join pending cases as amicus curiae.[183] The Human Rights Commission Act (HRCA)[184]—the Commission's implementing legislation—grants the Commission broad investigative powers, including authority to subpoena individuals,[185] to enter and search premises, and to remove relevant evidence from such premises.[186] The SAHRC may also investigate individual complaints of human rights abuses filed before it. However, its findings in these matters are not binding on the parties, and if ignored, it must approach the courts for enforcement assistance.[187] Finally, the Com-

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[181] S. AFR. CONST. 1996 ch. 9, s. 184(1).

[182] *Id.* s. 184(2).

[183] *See* Human Rights Commission Act 54 of 1994 (HRCA) s. 7(1)(e) (noting that Commission "may bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons"); *see also* Klaaren, *supra* note 180, at 24C-8 ("In terms of its establishment Act, the SAHRC has express litigation powers."). Generally, however, the Commission litigates only "if the legal principle established would promote human rights or if the decision would impact on a large segment of society." Karthy Govender, *The South African Human Rights Commission*, *in* THE POST-APARTHEID CONSTITUTIONS, *supra* note 20, at 589.

[184] The HRCA was enacted prior to the creation of the Final Constitution of 1996 to implement the interim Constitution's preliminary proposal for a national human rights commission. Sections 184(2) and (4) of the Final Constitution, respectively, provide "the powers, as regulated by national legislation, necessary" for the SAHRC to fulfill its responsibilities, and indicate that the Commission "has the additional powers and functions prescribed by national legislation." S. AFR. CONST. 1996 ch. 9, s. 184(2), (4). Although the Commission evolved between the interim and Final Constitutions, the HRCA remains the primary source of the Commission's legal authority, along with the Constitution itself. *See* Klaaren, *supra* note 180, at 24C-6 ("The powers and functions of the SAHRC flow primarily from the Final Constitution and from the Commission's establishment legislation.").

[185] HRCA Section 9 governs investigations. The SAHRC may

> require any person by notice in writing . . . in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation: Provided that such notice shall contain the reasons why such person's presence is needed and why any such article or document should be produced.

HRCA s. 9(1)(c). Failure to comply with Section 9 can subject a summoned individual to a fine or term of imprisonment. *Id.* s. 18(a)–(j).

[186] HRCA Section 10 sets forth provisions governing the entrance to and search of premises, as well as the attachment and removal of articles from said premises, in the course of SAHRC investigations. *Id.* s. 10(1)–(3).

[187] *See* Klaaren, *supra* note 180, at 24C-7 (noting that although Commission decisions are not binding, they occasionally have been treated as such).

mission is authorized to publish any of its investigative findings in addition to its regular reports.[188]

Chapter Nine Institutions are considered "organ[s] of state,"[189] and are accountable to the public through, for example, constitutionally required annual reports to the National Assembly.[190] However, they are *not* "within the national sphere of government"[191] and are designed to be financially and administratively autonomous.[192] In other words, Chapter Nine Institutions are politically independent.[193]

Structurally, the SAHRC is divided into two sections:[194] the Commission (responsible for policy formulation, led by an appointed Chairperson and staffed with up to ten other expert Commissioners)[195] and the Secretariat (responsible for policy implementation, headed by a Chief Executive Officer).[196] The Secretariat contains six operational programs: Legal Services; Research and Documentation; Education, Training and Advocacy; Information and Communication;

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188 *See* HRCA s. 15.

189 Klaaren, *supra* note 180, at 24C-13.

190 S. AFR. CONST. 1996 ch. 9, s. 181(5) ("These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.").

191 Klaaren, *supra* note 180, at 24C-13.

192 *Id.* at 24C-13 to -14 (reviewing Constitutional Court decisions defining contours of Chapter Nine Institutions' "independence"). Govender notes that although the SAHRC is housed for budgetary purposes under the Department of Justice, "political departments . . . do not bear responsibility and political accountability for [Chapter 9] institutions." Govender, *supra* note 183, at 580.

193 *See* S. AFR. CONST. 1996 ch. 9, s. 181(2) ("These institutions are independent . . . ."). Each institution, including the SAHRC, is constitutionally mandated to be impartial and to "exercise [its] powers and perform [its] functions without fear, favour or prejudice." *Id.*

194 Klaaren, *supra* note 180, at 24C-5 (noting that Commission sets out policy while Secretariat implements it).

195 Section 3(1) of the Human Rights Commission Act 54 of 1994 (HRCA) establishes the terms of membership for "[t]he members of the Commission referred to in section 115(1) of the [interim] Constitution." That section of the interim Constitution states that the SAHRC shall "consist of a chairperson and 10 members." S. AFR. (Interim) CONST. 1993 ch. 8, s. 115(1). Although Chapter 9 of the 1996 Constitution does not specifically address the number of Commissioners, some descriptions of the SAHRC note that the Commission may consist of up to ten Commissioners. *E.g.*, SouthAfrica.info, Human Rights Commission, http://www.safrica.info/public_services/citizens/your_rights/sahrc.htm (last visited Sept. 27, 2008). The SAHRC itself notes that it "derives its powers from the Constitution and the [HRCA]." S. Afr. Human Rights Comm'n, About the SAHRC, http://www.sahrc.org.za/sahrc_cms/publish/cat_index_88.shtml (last visited Sept. 27, 2008). However, the SAHRC's website currently lists only five Commissioners. S. Afr. Human Rights Comm'n, Commissioners, http://www.sahrc.org.za/sahrc_cms/publish/cat_index_61.shtml (last visited Sept. 27, 2008).

196 *See generally* S. Afr. Human Rights Comm'n, About the SAHRC, Structure, Secretariat, http://www.sahrc.org.za/sahrc_cms/publish/cat_index_62.shtml (last visited Sept. 27, 2008) (presenting background information, mission statement, basic structure, functions, and governing principles of SAHRC).

Parliamentary Liaison and Legislation and Treaty Body Monitoring; and Finance and Administration.[197] Provincial SAHRC offices also exist to ensure wide public access to the Commission's services.[198] Between 2001–2002 and 2006–2007, the SAHRC's budget increased from 32.7 million rand to 49.2 million rand; it is projected to be 60.6 million rand for 2008–2009.[199]

The President of South Africa, on recommendations from the National Assembly, appoints the SAHRC's expert commissioners;[200] removal is effected only after a finding of "misconduct, incapacity or incompetence" by a National Assembly committee and the adoption of an Assembly resolution calling for removal.[201]

The HRCA prohibits any other person or "organ of state" from interfering with the SAHRC's duties and functions and demands that "[a]ll organs of state shall afford the Commission such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the Commission."[202]

For the past decade, the SAHRC has focused primarily on two action areas: combating racism and promoting socio-economic rights.[203] Yet besides publishing periodic Economic and Social Rights Reports,[204] the SAHRC has failed to fulfill its potential as an institu-

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[197] *Id.*

[198] *See* S. Afr. Human Rights Comm'n, Contacts, http://www.sahrc.org.za/sahrc_cms/publish/cat_index_19.shtml (last visited Sept. 27, 2008) (listing regional offices).

[199] *See* PARLIAMENT OF THE REPUBLIC OF S. AFR., REPORT OF THE *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions: A Report to the National Assembly of the Parliament of South Africa 183–84 (2007), *available at* http://www.parliament.gov.za/content/chapter_9_report.pdf [hereinafter REPORT ON CHAPTER 9 INSTITUTIONS]. By way of comparison, the projected 2008–2009 budget for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is 18.5 million rand, *id.* at 142, and 44.2 million rand for the Commission on Gender Equality, *id.* at 161.

[200] Specifically, the National Assembly is constitutionally required to recommend persons "nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly" and then approved by a majority of all Assembly members. *See* S. AFR. CONST. 1996 ch. 9, s. 193 (establishing appointment procedures).

[201] *See id.* s. 194 (establishing removal procedures). Although this section provides that the "President . . . must remove a person from office," the real removal power resides in the National Assembly, which may effectively dictate presidential action by adopting the requisite resolution. *Id.* s. 194(3)(b) (emphasis added). Commissioner removals may be subject to judicial review. *See generally* Govender, *supra* note 183, at 575–79 (providing detailed discussion of nature of removal action and arguing that judicial-type processes are required to ensure fair and independent removal decisions).

[202] Human Rights Commission Act 54 of 1994 (HRCA) s. 4(2), (3).

[203] Klaaren, *supra* note 180, at 24C-4.

[204] The SAHRC has published six ESR reports to date, released on a sporadic schedule (1997–1998, 1998–1999, 1999–2000, 2000–2002, 2002–2003, and 2003–2006). The reports synthesize case law, legislation, and information on various ESRs received from government agencies, and typically contain individual chapters dedicated to each major socio-

tion capable of advancing ESRs. A recent public opinion poll indicates that only twenty-nine percent of South Africans without a formal education, and only forty-five percent of those with a primary education, are even aware that the Commission exists.[205] These figures are some indication that the Commission is failing to champion the interests of South Africa's most marginalized populations adequately.[206] The next Part proposes a new role for the SAHRC—one in line with the Commission's constitutional and statutory mandate—in improving judicial enforcement of economic and social rights.

2. *The Commission's Potential Role in Enforcement of ESRs*

The foregoing discussion established structural interdicts' limitations and the SAHRC's powers and areas of expertise. This Part posits that the Commission's involvement in ESR cases where a structural interdict is issued can make this remedy more effective, ultimately enhancing judicial enforcement of socio-economic rights in South Africa.

The proposal is as follows: When a court decides that a structural interdict is the appropriate remedy in an ESR case, it should order government actors[207] to formulate a plan for future compliance with the SAHRC's assistance. The SAHRC would thus help government actors craft an action plan that adequately remedies the rights violations identified in the declaratory portion of the court order.[208] In this way, the SAHRC may alleviate institutional competence concerns; if courts are confident that the Commission and the appropriate arm of government will work together to find a concrete, viable solution,[209]

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economic right. The SAHRC analyzes budgets dedicated to particular ESRs, critiques extant policies, and offers various recommendations for change. All reports are available at S. Afr. Human Rights Comm'n, Economic and Social Rights, http://www.sahrc.org.za/sahrc_cms/publish/cat_index_28.shtml (last visited Sept. 27, 2008).

[205] *See* REPORT ON CHAPTER 9 INSTITUTIONS, *supra* note 199, at 259.

[206] Since the Commission's mandate includes an individual complaints mechanism, and since people who are unaware that the Commission exists will not lodge such complaints when their rights are violated, these figures indicate that the Commission is failing to reach some of the weakest South Africans—the population the SAHRC should target most.

[207] Although this discussion assumes ESR violations are committed by government actors, the proposal for greater SAHRC involvement can be extended to improve judicial enforcement against nongovernmental rights violators as well.

[208] That is, at step one of the structural interdict. *See supra* note 142 and accompanying text.

[209] Of course, any such solution must account for polycentric, budget, timeframe, and related considerations. *See supra* notes 89–94 and accompanying text.

then judges can simply focus on accurately identifying a rights violation.[210]

Once a plan is prepared, the SAHRC can ensure that the government provides sufficient and accurate information to the court. Given its expertise in ESRs, the Commission can also help the court identify potential weaknesses in the government proposal presented for evaluation.[211]

Perhaps most importantly, the Commission can follow up on plan implementation after a government proposal is court-approved. It can do so, for instance, by appointing a liaison to oversee government action (or lack thereof) and to report to the court at regular intervals.[212] The SAHRC would thereby alleviate the court's burden of ongoing supervision in ESR cases and reduce the judiciary's enforcement costs, all while holding government officials accountable to proposed plans. If the government misses deadlines, the Commission liaison notifies the court, which can facilitate the initiation of contempt or constitutional damages proceedings.[213] The SAHRC should also issue a declaration explaining the government's failures and publicizing intransigence or incompetence. The threat of such "bad press" may make government actors more conscientious in advancing ESRs.

On the whole, the proposal would improve the status quo. Presently, government actors can neglect to implement court-approved plans, forcing litigants either to reappear in court or to live with an unenforced order merely declaring that they "have" socio-economic rights. By contrast, with structural interdicts and the SAHRC's involvement, various government branches and State organs would work together to create meaningful plans of action, progressively realizing ESRs.

Several considerations merit discussion. First, one may wonder whether the SAHRC itself has the institutional legitimacy to participate in judicial proceedings or to take government actors to task. However, the Commission is constitutionally empowered to "protect"

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[210] Courts thus retain their constitutional authority to declare rights violations (step one) and mandate government compliance with constitutional responsibilities (step two). *See supra* notes 142–43 and accompanying text.

[211] This evaluation is step four of the structural interdict. *See supra* notes 148–49 and accompanying text.

[212] *See* Klaaren, *supra* note 180, at 24C-10 ("[A]n enhanced supervisory role for the SAHRC may be necessary to ensure effective rights enforcement.").

[213] As noted *supra* note 151, it has thus far been impossible to hold intransigent South African officials in contempt. That said, the Commission's role in publicizing government responses to court orders may increase public awareness of noncompliance and create the necessary popular support to change South Africa's contempt rules in a way that would improve government accountability.

and to "promote" ESRs; these mandates include remedies and enforcement.[214] The Chapter Nine Institutions, including the SAHRC, "are a central part of a uniquely South African scheme of constitutional structuring and separation of powers," one that envisions a role for independent institutions as well as the judiciary in enforcing human rights.[215] The Constitution thus establishes "the complementarity of the SAHRC and the Constitutional Court."[216] Each institution is "designed to protect and to promote respect for human rights."[217] Although the SAHRC is independent, its Commissioners are appointed by democratically elected legislators, further bolstering its legitimacy. Finally, both the Final Constitution[218] and the HRCA[219] require other branches of government to cooperate fully with the Commission as it seeks to fulfill its mandate. Since the SAHRC is staffed by experts appointed on the basis of demonstrated knowledge of particular rights (or by committee members appointed by these experts themselves), it also has the competence necessary to participate in judicial enforcement of ESRs.

Budget limitations must be acknowledged and rectified if this proposal is to be viable. The SAHRC's involvement will lessen the courts' institutional enforcement costs but increase the Commission's expenses. The establishment of a new enforcement department within the Secretariat, the staffing of this department with special court liaisons, and the research and monitoring assistance the Commission is to provide to the courts will not be cheap. Yet the government is constitutionally obligated to appropriate sufficient funds for the SAHRC to fulfill its mandate;[220] if this proposed enforcement role is viewed as

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[214] *See supra* notes 55–56 and accompanying text (explaining content of duties to "protect" and "promote"); *see also* Klaaren, *supra* note 180, at 24C-11 ("As creatures of the Final Constitution, the SAHRC and the other Chapter 9 Institutions enjoy a status and an authority that can potentially override unconstitutional legislative provisions.").

[215] Klaaren, *supra* note 180, at 24C-11.

[216] *Id.* at 24C-12.

[217] *Id.*

[218] *See* S. AFR. CONST. 1996 ch. 9, s. 181(3) ("Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.").

[219] *See* Human Rights Commission Act 54 of 1994 (HRCA) s. 4(3) ("All organs of state shall afford the Commission such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the Commission."); *see also id.* s. 6 ("The Commission may, at any time, approach either the President or Parliament with regard to any matter relating to the exercising of its powers or the performance of its duties and functions.").

[220] The Constitutional Court has held that "independence" includes financial independence, which requires sufficient funding for an institution to discharge its obligations and duties. *See* Govender, *supra* note 183, at 580 (citing *New Nat'l Party of S. Afr. v Gov't of the Republic of S. Afr. & Others* 1999 (3) SA 191 (CC) (S. Afr.)).

part of that mandate (which, as argued above, it should be), then additional resources must be made available.

Even with additional resources, the SAHRC may need to adjust the relative energies dedicated to its various activities. For instance, some research efforts may need to be shifted from report generation to the monitoring and enforcing of remedies. In key cases involving large numbers of marginalized litigants, this allocation of time and capabilities may actually go further toward fulfilling the SAHRC's mandate.

Finally, some may fear that involvement with judicial enforcement of ESRs will affect the SAHRC's independence. For instance, the appointment or removal of Commissioners might become politicized, or the Commission's budget might be threatened or cut. Again, however, the constitutionally mandated structure of the Commission guards against such transgressions. Since appointed Commissioners must be approved by a majority of the National Assembly (i.e., democratically elected legislators), South African voters retain a political check on the process.[221] Removals are sharply limited and subject to judicial review.[222] The legislature is constitutionally required to fund the SAHRC; if made public, the withholding or cutting of funds for obviously political reasons could generate political pressure for change. If these political checks fail, threat of suit against government officials for encroaching on the SAHRC's independence (thus violating the Constitution) might also be available.

Of course, the successful implementation of these proposals will require the creation of adequate procedural mechanisms—both to protect the rights of third parties not before the court and to regulate the outsourcing of certain judicial functions to other institutional actors.[223] Standing rules and class certification guidelines, for example, may safeguard third party rights.[224] Meanwhile, lessons learned through public interest litigation efforts elsewhere may pro-

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[221] *See supra* note 200 and accompanying text.

[222] *See supra* note 201 and accompanying text.

[223] I am indebted to Professor Meg Satterthwaite for bringing these considerations to my attention.

[224] Charles Sabel and William Simon describe another approach. They posit that in more recent U.S. public interest litigation, the terms of remedies are provisional and

> are expected to be renegotiated in light of experience. Thus, a critical element of the [remedy] is the establishment of participatory processes for such renegotiation. The task of identifying affected interests and inducing their participation does not need to be fully accomplished at the outset. New constituencies will appear in the course of implementation, and because the rules are revisable, these constituencies will have an opportunity to challenge them.

Sabel & Simon, *supra* note 138, at 1097–98. As such, the flexibility of the adopted *remedy* may also serve to protect third-party interests.

vide South Africa with helpful models of how the SAHRC and courts can work together in the future.[225]

In the end, neither the structural interdict nor the involvement of the SAHRC alone will suffice to strengthen judicial enforcement of ESRs; each approach has undeniable limitations. Furthermore, if government actors continue to violate their duties vis-à-vis ESRs even after structural interdicts are granted and the SAHRC becomes involved, contempt or damages actions will be necessary. Despite these potential limitations, this Note has suggested two mechanisms which can provide the structure and oversight needed to meaningfully remedy ESR violations.

CONCLUSION

South Africa's 1996 Constitution gave great hope to economic and social rights advocates, both inside and outside the country. In the ensuing twelve years, the nation has made important progress in clarifying the scope of these justiciable rights. Yet lingering concerns over enforceability have prevented South African courts from taking the steps necessary to protect litigants fully. This Note has proposed a solution for improving judicial enforcement of economic and social rights in South Africa. With the assistance of the South African Human Rights Commission and the use of structural interdicts, the South African judiciary can do its part to realize the dreams of post-apartheid South Africa—and the watching world.

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[225] *See, e.g.*, Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1177–79 (1999) (listing various procedural devices developed in U.S. public interest litigation enabling courts "to utilize the knowledge of other legal actors, to gather facts, and to marshal expertise needed for the enforcement of positive rights").