

Human Rights as Demands for Communicative Action

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Abstract

A key issue with human rights is how to allocate duties correlative to rights claims. But the philosophical literature, drawing largely on naturalistic or interactional accounts of human rights, develops answers to this question that do not illuminate actual human rights problems. Charles Beitz, in recent work, attempts to develop a conception of human rights more firmly rooted in, and helpful for, current practice. While a move in the right direction, his account does not incorporate the domestic practice of human rights, and as a result remains insufficiently instructive for many human rights challenges. This paper addresses the problem of allocating

correlative duties by taking the practices of domestic courts in several countries as a normative benchmark. Upon reviewing how courts in Colombia, India, South Africa, Indonesia, and elsewhere have allocated duties associated with socio-economic rights, the paper finds that courts urge parties to move from an adversarial to an investigative mode, impose requirements that parties argue in good faith, and structure a public forum of communication. The conclusion argues that judicial practice involves requiring respondents to engage in communicative, instead of strategic, action, and explores the implications of this understanding of human rights.

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Can social and economic rights be enforced? From one perspective, the answer is obviously yes. The great majority of national governments provide, finance, and regulate health care, education, social protection, housing and other basic services for large blocks of citizens; and many of those citizens have available to them judicial, administrative, and political means to assess the adequacy of their legal entitlements.

But the question is more vexing when it is understood as: Can social and economic rights be enforced *as human rights*? Moving to an understanding of social and economic entitlements as human rights complicates the enforcement question in two ways. First, it generates coordination problems. This occurs because a human rights conception increases the number of agents who are bearers or potential bearers of the duties correlative to the social and economic rights of any given rights holder. Not only citizens' own states, but foreign governments, compatriots, foreign citizens, NGOs, and other foreign and domestic private actors become potentially responsible for fulfilling human rights. At the same time, the human rights conception also means that, from the perspective of the duty bearer, potential claimants to whom duties are owed include not only citizens and others nearby but every human being. These two changes make enforcement more challenging because the duties to fulfill human rights are then widespread, but unallocated. Rights holders are unclear to which duty bearer they should take their claims. For duty bearers, incentives to free ride on the contributions of others increase.

Second, it leads to disputes about what is a fair allocation of the duties to respond to human rights problems. Duty bearers reasonably argue that the responsibilities for responding to human rights problems should be fairly allocated; but the procedures, standards, and authority for allocating those responsibilities are entirely unclear. Some actors respond to certain human rights problems out of altruism or a sense of duty. But after a point, they often ask why others are not doing their fair share. "Compassion fatigue" sets in. Even in situations where there is general agreement that people are

suffering devastating and avoidable violations, the problem of determining the fair allocation of duties limits the scale of response.

Stated most bluntly, social and economic human rights are difficult to enforce because the duties associated with them are indeterminate.¹ For these reasons (and others), many have argued that social and economic rights are not really human rights; and that, if they are in fact understood as such, they will not be fairly and successfully enforced. But if the philosophical literature has expressed caution and misgivings, many have not noticed. Instead of going slow, practice is forging ahead. A number of international treaties, national constitutions, statutes, and social movements do express social and economic interests as rights. And now many courts, particularly in low- and middle-income countries where the social and economic needs are most clearly manifest, are enforcing them, often on the basis of constitutional claims and occasionally on the basis of international legal instruments.

How is judicial practice solving coordination problems? Schelling famously observed that his students could find each other in New York City even without determining beforehand where to meet (they went to the clock terminal at Grand Central), and developed an account of “focal points” (Schelling 1980: 54). So it is possible to coordinate action without full information about the assignment of specific tasks. Perhaps courts and other human rights practitioners are allocating the moral obligations associated with indeterminate duties analogously, using partial understandings of the habits and practices of various actors (but on the basis of intersubjective understanding as well as the iterative assumptions that underlie focal points). In addition to the coordination question, there is the normative one: when courts distribute the duties associated with human rights, are the resulting allocations fair? Rawls famously argued that courts are among the most crucial sites for the “derivation of citizens’ rights, liberties, and opportunities.” He noted that courts give “public reason vividness and vitality in the public forum” and that the court’s role “is part of the publicity of reason and is an aspect

¹ We use “indeterminate” rather than the more fraught term “imperfect.” Robert Goodin (2011) attempts to show, on the assumption that the content of the duty has been specified, that the establishment of institutions that consolidate imperfect duties can solve the problem of allocating duties.

of the wide, or educative, role of public reason” (Rawls 1996, p. 236-7). Perhaps along those lines, courts (along with other actors, such as NGO litigants) are harnessing legal procedures for the performative task of generating agreement on human rights and a fair allocation of duties. A key virtue of the rule of law is its capacity to create and sustain shared norms for social routines. Perhaps courts are now applying this capacity to human rights.

This paper will argue that the practical conception of human rights, when focused on domestic courts, can illuminate how to allocate the responsibility for fulfilling human rights claims and how to develop new institutions that can fulfill human rights claims on a sustainable basis. The paper first reviews how writers sympathetic to social and economic human rights have responded to the problem of allocating duties. It finds that the theoretical answers provided by these writers do not illuminate how the allocation of duties for fulfilling human rights claims can be made effective or fair. Charles Beitz, in recent work, argues that a theoretical account more closely engaged with human rights practice would be more useful. In the second section, the paper concurs, but argues that that Beitz’ account leaves out domestic practice and, as a result, remains insufficiently norm-guiding. Third, the paper examines the obligations related to social and economic rights that courts in Colombia, India, South Africa, Indonesia, and elsewhere have imposed on states and private parties in areas such as conflict and internal displacement, the right to food, the right to clean air, and constitutional spending requirements. The paper finds that when courts attempt to address the task of fairly allocating duties (rather than simply bypassing the challenge, which they also do), they force parties to move from an adversarial to an investigative mode, impose requirements that parties argue in good faith, and structure a public forum of communication. These are, the paper argues in the fourth and concluding section, ways of stating that the obligations associated with social and economic rights are duties to engage in communicative, in addition to, strategic action.

Before continuing, it is worth emphasizing that there exist other objections to the enforcement

of social and economic rights in the literature. These include concerns that social and economic rights are too costly to fulfill, are too demanding to monitor and assess, substitute legal principles for political deliberation and self-determination, and tend to degenerate into consumer rights that are hijacked by the middle and upper classes. We believe that these objections, too, can be answered, at least in part; but we do not here directly address those other challenges.

Although the examples of human rights issues that we provide involve, for the most part, social and economic rights, we think this same argument could be applied to civil and political rights, as well, and therefore to human rights more broadly. There are two reasons for this. First, as Shue (1996) noted, so-called “positive” and “negative” rights both entail positive and negative duties, and the positive duties associated with “negative” rights can be indeterminate. For instance, the right to life entails not only the perfect duty not to murder but also the imperfect duty to rescue those whose life security is threatened. So the secondary and tertiary duties associated with the right to life are indeterminate.² But second, and more significantly, even the primary duties associated with traditional civil and political liberties are often indeterminate. This is because the primary negative duties associated with civil and political rights have also grown in number and complexity as our understanding of causality has developed. Lichtenburg (2010) analyzes, for instance, the complexity of indeterminate primary duties associated with the right to life and political self-determination (e.g., don’t buy “blood diamonds” from conflict zones). As a result, we employ the broader term “human rights,” and not just social and economic rights, when describing the rights that must confront the indeterminate duties objection.

Finally, our focus is on courts. We so focus because judges are explicitly addressing the challenge of indeterminacy, and we believe that judicial practice is useful for understanding how to distribute the obligations associated with social and economic rights claims. But a full account of domestic human rights practice would take account of alternative arenas, including legislatures, social

² For Shue, the primary duty relating to basic rights consists in the (mostly negative) duty to “respect” or refrain from harming; but, because many will predictably fail to meet this duty, there are also “secondary” duties to “protect” people from harm done by third parties, and to assist people whose basic rights have been violated.

movements, and citizen engagement. This essay constitutes a start in this area. It is also noteworthy that this paper brings together two streams of literature that, for the most part, have not systematically engaged with each other: the philosophical literature on the correlative obligations associated with human rights (e.g., Shue 1988; Shue 1996; Pogge 2002; Beitz 2009; O'Neill 2000), and the legal literature on judicial remedies associated with complex constitutional claims (e.g., Tushnet 2009; Fredman 2008; Sabel and Simon 2003; Liu 2008; Sunstein 2004). We think that the problems and approaches of these two lines of thinking can usefully inform each other.

Duties Associated with Social and Economic Rights

Consider Shue's example of a flower contract (Shue 1996, 41-46).³ Shue imagined a small village whose inhabitants were mostly subsistence farmers but who also gained income from labor, working occasionally for a somewhat wealthier, though still poor, local landowning family that grew beans. A company from the capital then offered the landowning family a contract in which they would receive rental income for a ten-year lease on their land as well as an annual salary if they would agree to oversee the production of flowers for export instead of beans for local consumption. In addition, the company encouraged the family to purchase equipment that would reduce their need to hire local labor. Landowning families in nearby villages received similar offers, which they all accepted. In the subsequent year, the price of beans rose as the supply dwindled; the demand for labor fell as agricultural productivity improved; and the household consumption of those villagers who depended on part-time labor fell.

Although Shue did not make these additional stipulations, suppose that the landowning family did not increase its demand for local goods and services as its income rose, instead spending its

³ This example is typical of social and economic rights claims, in which the standard problem involves a surplus of eligible candidates, rather than a shortage. For this reason, the example is, for present purposes, more illustrative than Singer's (1972) famous example involving a person who was passing a child drowning in a pond but refused to dive in because he did not want to get his clothes muddy. The moral demand on Singer's stranger was more specific because there was only one causally effective action – diving in and rescuing the child.

incremental income on education for their children in the capital, that personal rivalries and civil conflict had eviscerated traditions of mutual support in the village, and that poor infrastructure and long distances made it difficult for some of the most vulnerable villagers to migrate. Further imagine (though Shue did not) that as a result of all this a few families in the village fell into destitution, and that protein deficiencies developed in a few of their girls, one of whom became pregnant and gave birth to a child with extremely low birth weight. The child struggled against a variety of untreated infections before dying at the age of four.

Under most accounts of social and economic rights, the child's death in this story is an exemplary instance of a human rights violation. But whose duty was it to prevent the child's death, what should they have done, and who is liable for it ex post? The causal chain might have been interrupted at any of several points, by any of several actors. The company in the capital might have chosen to offer the flower contract to just one or two families at a time, or used more labor-intensive horticultural methods, or included minimum wage requirements in its contract with the landowning family; the family might have refused the flower contract, or refused to buy the mechanical equipment; the parents of the destitute families might have been more vigilant about their children's nutrition, or attempted to distribute family food more evenly among their boys and girls; the pregnant girl might have avoided sex or used effective contraception. The state is not mentioned in this version of the story, but, obviously, it too could have done some things: the social protection ministry might have reached this area with its safety net scheme that only covers formal-sector workers in urban areas, the health ministry could have made treatments for childhood infections more readily accessible, the labor ministry might have facilitated unionization or collective action on the part of the flower laborers, or the courts might have required the state not to discriminate in the rollout of its safety net program or refused to enforce the contract on human rights grounds. The consumers of flowers in the foreign market might have staged a protest boycott, the government of the country in which the multinational is

based might have required the company to undertake a labor rights impact assessment, governments in markets that import the flowers might have reduced the subsidies to their own grain producers so that the landowning family in the story could continue producing beans not only for subsistence but export. Of course, one could imagine the moral blame also accruing to others who were not involved in the direct causal chain, but whose actions of omission or commission contributed to the background situation that made this death likely: a church whose rhetoric may have kept the young mother from using contraception, a bond trader whose choices contributed to the global financial crisis that slowed growth and increased poverty in the country, a lawyer who successfully obtained a patent for a medication that could have saved the child had it not been exclusively available at a high price under a brand label. The list goes on.

If that child's death was a human rights problem, how should the obligation to respond have been distributed among those various candidate duty bearers? Proposals for how to allocate the burdens associated with responding to social and economic rights need to satisfy two basic criteria. First, they need to be *effective*. That is, they need to fulfill the human rights claim in question, while also avoiding too high a cost and significantly negative spillovers on the human rights of the duty bearers or of third parties. Because, in the example, the number of combinations of actions and partial actions sufficient for saving the child is large, duty bearers have to coordinate their responses. But significant uncertainties can block or limit action, even if the duty bearers are motivated by human rights obligations. For instance, the family offered the contract might not have been confident that, had they refused, other similar families would do the same; or, had they refused, that corrupt politicians or local "big men" would not have extracted the income from their workers in some other way. Even morally motivated agents might, under circumstances like these, choose not to fulfill their duties because they are properly concerned about their own longevity and well-being (Fruttero and Gauri 2005), and might choose to save their resources for more effective action at a point in the future when coordination

issues can be more easily overcome.

O'Neill (2000: 105) forcefully expresses the view that the lack of identifiable and well-allocated duties to respond will undermine the effectiveness of social and economic rights claims: "Somebody who receives no maternity care may no doubt assert that her rights have been violated, but unless obligations to deliver that care have been established and distributed, she will not know where to press her claim, and it will be systematically obscure whether there is any perpetrator, or who has neglected or violated her rights." Generically, there are at least two kinds of coordination problems: i) informational (agents cannot observe whether other agents are contributing); ii) credibility (agents cannot be sure others will contribute in the future). There is a growing political economy literature on solving coordination problems in basic service delivery (e.g., Jan 2003; Keefer and Khemani 2005; Garman et al. 2001; Ahmad et al. 2005; Chaudhury and Devarajan 2006), but here the simple point is that, when duties are indeterminate, situations of strategic interdependence arise among eligible, morally motivated agents.

In addition to effectiveness, there is the problem of *fairness* in the allocation of duties. If the mother of the low-birth weight child in the story had approached the ministry of social welfare, it might have said that it did not have the resources to extend social insurance to rural areas without weakening social insurance in the cities; if she had approached the family who accepted the flower contract, they might have said that they needed the money to pay for their child's university education; if she had approached a visiting dignitary from a rich country that failed to regulate the multinational that had invested in the flower company, he might have said his country would regulate its multinationals in that way only when other countries agreed to do the same; and if she had approached a foreign tourist who happened to have purchased flowers from the company, the tourist might have said that surely purchasing one bouquet could not by itself have caused the child's illnesses. In short, any duty bearer could reasonably have asked, as Beitz and Goodin (2009: 16) note, "Why me?" Even morally

motivated agents can, arguably, refrain from fulfilling human rights duties on the grounds that duties should be fairly allocated, and that fairness requires a certain amount of reciprocity among eligible duty bearers.

What are the existing approaches to allocating duties to respond to human rights claims? One line of argument emphasizes that even when duties are indeterminate, they remain duties nonetheless, and that, as a result, social and economic rights do generate real obligations to respond, even if the duties are not precise. Sen (2004: 339), for instance, argues that the existence of a human right entails a “duty to give reasonable consideration to what one can sensibly do for the rights, and the underlying significant and influenceable freedoms, of others.” The duty associated with a human right is “an acknowledgment that if one is in a plausible position to do something effective in preventing the violation of such a right, then one does have an obligation to consider doing just that” (Sen 2004: 340-41).

Shue (1988), too, proposes a response in this vein, though with more bite. He argues that although the duties associated with social and economic rights are imperfect, they are no less stringent than perfect duties. In particular, although it may be impossible to justify why person B in a rich country owes adequate nutrition to person A in a poor country, it is still the case that person B owes adequate nutrition to *someone like A*, to some person, in other words, who also suffers from malnutrition. Shue (1988: 703) contends that person B, however, is “most definitely not at liberty to help no one whose rights remain unfulfilled.” Person B will be at liberty to decide whether to send support to A, to someone like A, or to work indirectly through institution building, given that “among the most important duties of individual persons will be indirect duties for the design and creation of positive-duty performing institutions that do not yet exist and for the modification or transformation of existing institutions that now ignore rights and those doing their duties” (Shue 1988: 703).

This obligation to give “reasonable consideration” and the obligation to support *someone* in

need seem close to the obligation associated with charity.⁴ Developing this idea, Beitz proposes an account of “strong beneficence,” to be distinguished from a standard conceptualization of charity, in which giving is good but not giving is not necessarily blameworthy. Beitz (2009) argues that social and economic rights provide reasons for action that are related to beneficence, and particularly so when the interests at stake are maximally urgent, there exist capable and eligible agents to respond to the interests, and the cost of action is slight or moderate. He notes that, in the case of anti-poverty rights in the world today, these conditions are satisfied.

Does this kind of answer provide standards for effectively and fairly allocating duties to respond? On the one hand, it is not normatively inert. Many of the best known recent human rights social movements arose in circumstances in which charity/reasonable consideration was the main driver of action, and some managed to coordinate duty bearers and allocate burdens with some success. In the global HIV/AIDS movement, developing country national governments, state and municipal governments, rich country governments, pharmaceutical companies, religious leaders who once moralized HIV/AIDS, international financial institutions, particular politicians, private firms, citizens of wealthy countries, tourists, the media, and many others managed to achieve a strong response, in at least some arenas and countries, and at least in relative historical terms (Gauri and Lieberman 2006). The recent anti-sweatshop movement is analogous in its diversity of actors, which include multi-national firms, suppliers to those firms, rich and poor country governments, the IFIs and the WTO, consumers, and the media. For these two human rights problems, then, O’Neill’s appears incorrect that it was “systematically obscure whether there [was] any perpetrator, or who [had] neglected or violated [their] rights.”

⁴ These two grounds for duties related to human rights are, potentially, activated in different circumstances. Sen’s understanding of reasonable consideration might apply to situations in which the interests are not “maximally urgent.” For instance, if a whistle blower in a rich country unjustly loses a government job under a set of procedures that do not involve anything like “due process of law,” his human rights may have been violated, and I may perhaps be under some obligation to give reasonable consideration to assisting him – if I am in a position to help – but it is not a situation in which interests are maximally urgent. But for present purposes, the situation does look like a claim involving beneficence, even if it is not “strong beneficence” as Beitz defines it.

But the absence of systematic obscurity is a long way from the clear allocation of duties. While it is true that the global HIV/AIDS movement managed to overcome some of the collective action problems associated with unallocated duties, it was likely exceptional in that regard (Leclerc-Madlala 2006). Many other human rights problems, and many other right-to-health causes, fail to do so, and fail at least in significant part due to coordination challenges (consider trade barriers) and disputes about the fair allocation of duties (consider the response to climate change). And of course, even for the global HIV/AIDS movement, there are many remaining challenges related to coordination (e.g., the development of a vaccine) and allocation of burdens (e.g., intellectual property for anti-HIV/AIDS drugs).

A second approach to allocating obligations among duty bearers is to emphasize the need for new institutions. Sen, for instance, emphasizes the role human rights play in generating political agitation and legislation. Ultimately, for those who might be in a position to respond to social and economic human rights, the associated duties “are often aimed precisely at institutional change” (Sen 2004: 347). In other words, a human right suggests “the need to work towards changing the prevailing circumstances to make the unrealized rights realizable, and ultimately, realized” (Sen 2004: 348). Beitz (2009) takes a similar view, arguing that even though there may not yet exist (conceptual and political) mechanisms that appropriately allocate duties to protect and fulfill anti-poverty rights, this could change: there is nothing inherent in social and economic goods preventing such an evolution (or revolution). Furthermore, and again in parallel with Sen, Beitz notes that even if anti-poverty rights lack “well-specified counterpart” obligations, they are not, therefore, normatively inert. Rather, they can establish reasons for action that, while not fulfilling livelihood and other social and economic rights at the moment, lay the groundwork for such fulfillment in the future. Institutions can “transform ‘imperfect’ duties into ‘perfect’ ones” by “aggregating the various reasons that pertain to different relationships governed by the institutions into a single set of policies” (Beitz and Goodin 2009: 15, 17).

Does this help meet the imperfect duties objection? Mostly, it shifts the indeterminacy of the duty to respond to human rights to an equally indeterminate duty to build new institutions. The same questions apply. Who is most responsible for building these institutions? Which beneficiaries should these arrangements prioritize? How to coordinate? Some have proposed criteria for allocating these duties to build new institutions. Shue (1996: 170) suggests that the design of institutions requires a complex combination of strategic and moral reasoning because “institutional design must combine judgments about what it is fair to expect people to do, what it is efficient to ask people to do, and what it is possible to motivate people to do,” and contends that “ability to pay” is a relevant criterion when determining how to allocate responsibilities for secondary duties associated with basic rights. Pogge (2002), who develops an account that emphasizes the negative duty not to harm, whether directly, or indirectly by affirming a global institutional order that harms the poor, recognizes that the resultant duty to reform institutions generates indeterminate duties. He argues that such duties are stronger for “the most influential” citizens in a society (Pogge 2002: 64), but also contends that the obligations be allocated equally among people in similar positions: “How much should we contribute to such reform and protection efforts? I would think: as much as would be necessary to eradicate the harms if others similarly placed made analogous contributions (regardless of what they actually contribute)” (Pogge 2002: 245).

These criteria for allocating duties agree with moral intuitions. They also help identify eligible duty bearers. But the categories of “most influential citizens” and those with most “ability to pay” include large numbers of people, for whom problems of coordination and fairness arise. And it is not clear which rights holders the new institutions should be designed to support. What kinds of institutions, and for whom? Because the institutions to be built would likely serve many goals, not only advancing social and economic rights, their design would affect the interests of a variety of other individuals and organizations, who would also need to participate or be consulted, further complicating the

coordination and fairness problems.

A third kind of response to the indeterminacy of duties involves the existence of special relationships between some duty holders and some rights bearers. For instance, Beitz (2009) argues that human rights may help motivate agents whose reasons for action are not general and exceptionless but who nevertheless, as the result of some special relationship to those whose rights are violated, have obligations to respond to anti-poverty rights violations. These specific relationships may include current harmful interaction (as when an exploitative trade relationship directly impoverishes a poor country), historical injustice (a former colonizer may have a duty to improve life for inhabitants of its former colony, even if it is not presently causing any harm), non-harmful exploitation (when a rich country trades with a poor country and provides the poor country with less than its fair share of the advantages of trade), and political dependence (when termination of economic relations is asymmetrically costly for the poor country, which is then not in a position to defend its interests) (Beitz 2009: 171). In other words, human rights, which for Beitz are middle-level principles of justification in political discourse, serve to summarize and focus a variety of ethical and moral concerns associated with poverty.⁵

This approach does offer a kind of answer to the “Why me?” query. It can help explain why the United States might have a stronger duty in Guatemala than, say, Australia (historical injustice), or why the flower company should have seen to it that the family paid its workers higher wages (non-harmful exploitation). But there are several forms of special relationships that can give rise to social and economic rights claims, and some of the special relationships are very widely applicable. For example,

⁵ In this respect social and economic rights are no different from civil and political rights. Beitz notes that the right to free speech, for instance, summarizes a variety of obligations that several different actors might have for supporting freedom of expression. Beitz does not offer these examples, but one can see that the reasons for a government not to limit speech might differ from those underlying academic freedom in a university, which in turn differ from the openness to communication and reciprocity necessary for a good marriage. The reasons are different, but the right to free speech summarizes them and points to, using Sen’s phrase, the same underlying freedom implicated in each instance.

almost any large and profitable firm in a low-income country can be thought to engage in non-harmful exploitation (because the profits to capital are much higher than the wages paid to unskilled labor). These two facts lead to the conclusion that it is not clear which of the eligible duty bearers are under particularly strong obligations. For instance, which of the eligible duty bearers should respond to female poverty in rural Sierra Leone: the beneficiaries of former slave traders and the governments that supported them, as well as the Liberian parties that fomented the civil war from 1991-2002 (historical injustice); private firms in the extractive industries (non-harmful exploitation, or arguably current harmful interaction); the many rural Sierra Leonean men who fail to pay child support (current harmful interaction); or donors who set the governance agenda in the country (political dependence)? So the “why me” query and the coordination problems remain, albeit slightly ameliorated.

In short, theorists sympathetic to social and economic rights have offered some answers on how the indeterminate duties associated with social and economic rights might be allocated, but the answers are not fully satisfying. We believe that answers to the allocation problem typically provided in philosophical analysis are too abstract. A more thoroughgoing engagement with the actual practice of human rights is necessary for the development of an understanding on how duties to respond should be allocated. The next section characterizes our conception of the practical understanding of human rights.

Human Rights as a Domestic Practice

Our understanding of human rights draws on Beitz’ important account (2009) of a “practical conception.” Like Beitz, we think that, generally speaking, useful normative accounts best begin with a description of the goals of participants in an extant political and discursive practice. In the case of human rights, the participants include state governments, sub-national governments, international bodies, international and domestic civil society organizations, individual activists, firms, judges, lawyers, and engaged citizens. From these participants’ use of human rights, which is observed in the

claims they bring to the relevant political, legal, and social forums, one infers an understanding of the content of human rights and, most relevant for purposes of this essay, of the kinds of obligations human rights entail. Beitz notes that a practical conception of human rights does not suggest that there is a consensus among participants about what human rights mean; rather, he argues, the concept of human rights identifies, for participants, a class of claims and reasons that *could* count as valid, even if they disagree about how those claims and reasons apply in a given situation, and about how varying human-rights-based claims relate to each other.

Like Gilabert (2011), however, we do not think that the practical conception can do entirely without a more abstract “humanist” account. More abstract moral reasoning about rights is necessary for establishing the plausibility of any specific right (such as those enumerated in the Universal Declaration of Human Rights), and for preventing the political or “practical” conception from degenerating into conventionalism. A movement back and forth between the specific struggles in which human rights practitioners are engaged and abstract principles may generate a “reflective equilibrium” in which varying understandings on the part of participants in the practice are assembled in a process of “constructivist interpretation,” and in which the best account of the avowed and implicit goals of the practitioners constrains the manner in which the practice occurs (James 2005).

But we think that Beitz’ account of human rights as a practice, while an important move in the right direction, does not helpfully address the allocation question, for two reasons. First, it focuses largely on issues of international concern, almost to the exclusion of human rights as a domestic practice. Beitz presents human rights as requirements to protect individual interests against predictable dangers, applicable in the first instance to states, but that also, when states fail, give external actors reasons to assist and/or interfere in the domestic affairs of states. It is evident that human rights play a significant domestic role in his account. They apply in the first instance to states and governments. He indicates their domestic role elsewhere, as well. For instance, he writes that “domestic contestation and

engagement,” which includes political mobilization, social consciousness raising, and litigation, is the fourth of his five main mechanisms through which human rights are enforced (Beitz 2009: 37-8). But his account does not spend much time on domestic practices in developing its understanding of the role, substance, and normativity of human rights, focusing instead on what state failure to respect, protect, and fulfill human rights means for international obligations. When he discusses the responsibilities for responding to anti-poverty rights, he focuses on the distribution of the “second-level” (i.e., international) duties rather than the domestic ones (Beitz 2009, p. 166). Overall, Beitz emphasizes the international practice of human rights much more than the domestic practice. Second, and partly as a consequence of its focus on international issues, Beitz’ model is insufficiently normative. It does not use human rights practice to guide the process of allocating duties to respond. Indeed, his account of anti-poverty rights (Beitz 2009: 161-174), in which a discussion of how to allocate duties is included, consists largely of a critique of the philosophical literature, rather than an examination of how human rights practitioners themselves conceptualize and allocate the duties correlative to human rights claims.

Without discounting the role that human rights play at the international level, we emphasize their domestic role for three reasons. First, the domestic practice is longstanding and, arguably, prior to the international practice. If human dignity is a cornerstone concept for contemporary human rights, that virtue found its first explicit political expression in the 18th century constitutions. The writing of the UDHR drew significant inspiration from the domestic constitutions of key states. As Habermas (2010: 479) puts it, “The investment of the law with a moral charge is a legacy of the constitutional revolutions of the eighteenth century.” Second, the domestic role of human rights is increasingly consequential. The great majority of national constitutions, especially recent ones, include some account of basic social and economic rights. In many countries, social movements against caste, landlessness, hunger, illiteracy, ethnic exclusion, and poverty increasingly use the discourse and framing of human rights.

Third, the problem of the indeterminacy of duties is seen more clearly at the domestic level. At the international level, responses to human rights claims are blocked not only by the indeterminacy of the duties to respond but by the absence of political authority altogether. The allocation of *some* of the duties to respond to human rights is possible in the absence of political authority, as the HIV/AIDS example above suggests. But largely speaking, the international arena suffers from the absence of an authority able to allocate and enforce certain duties even if all were to agree upon them in principle. In the domestic setting, such entities exist (e.g., the state, courts, certain strong private actors), and as a result, it is possible for debates over duties to respond to move toward how those duties ought to be allocated, and focus less on the authority and legitimacy of the actor managing the allocations. For instance, in India the debate over the right to food does not center on whether or not the state has the authority to distribute grains and other resources, but rather on the fairness of those allocations, their costs, and their effects on incentives. It is in the domestic arena that the problem of allocating duties to respond is seen more clearly. It may be the case that as global governance matures, the challenges at the international level will come to resemble those at the domestic level. At that point, an examination of international practice, which is more common in the philosophical literature (and among the authors examined above), may become more instructive.

The Practice of Human Rights in Domestic Judiciaries

Over the past three decades, courts around the world have become increasingly involved in what were previously considered purely political matters: politics in general has become more judicialized (Tate and Vallinder 1995; Hirschl 2008). This is also true in the area of social and economic rights, where there has been a sharp increase in judicial enforcement of what were once merely nominal constitutional rights. In Costa Rica, Colombia and Brazil, the courts hear, and generally support tens of thousands of cases a year on social and economic rights, particularly

regarding claims for social transfers and medications and other health services (Hoffman and Bentes 2008; Yamin and Parra-Verra 2010; Wilson et al. 2006). The South African courts famously challenged the HIV/AIDS policies under President Mbeki (Roux 2009; Berger 2008). The Indian Supreme Court and High Courts annually rule on hundreds of Fundamental Rights and Public Interest Litigation related to social and economic rights (Sathe 2002; Shankar and Mehta 2008; Khosla 2011). The literature on this relatively new phenomenon is now large (summary assessments include (Tushnet 2009; Gauri and Brinks 2008a; Langford 2009; Yamin and Gloppen 2011).

It is not easy to summarize the behavior of a large number of courts in dozens of countries, operating in different legal traditions with different constitutions. The salient arguments vary from court to court. But the interest here is on remedies for social and economic rights claims, rather than the content of the rights or the jurisprudential doctrines used. And for that purpose it is possible to identify two significant patterns in the adoption of remedies and the allocation of duties.

First, when courts attempt to address the indeterminacy of duties for fulfilling constitutional social and economic rights, they focus on the establishment of new institutional arrangements. When crafting remedies, they generally do not focus exclusively on the archetypal response to which social and economic rights lay claim – state provision of a good or service – but assess a variety of background relationships that affect whether individuals have “secure access” (Pogge 2002: 45) to a crucial good or service. Examples of these include, for example, whether the right to health entails an entitlement to obtain civil damages for substandard care (*Indian Medical Association v VP Shantha* AIR (1995) 6 SC 651, India), to prosecute a criminally negligent provider (*Juggankhan v State of MP* AIR 1965 SC 831, India), limit excessive pricing for medications (*New Clicks South Africa (Pty) Limited v Dr Manto Tshabalala-Msimang NO and Another* (2004), South Africa), limit the length or extent of patent protection for medications (*Pharmaceutical Society of South Africa and others v Ministers of Health and Another*, South Africa), receive reimbursement or financing for a specific

procedure under the terms of a private insurance contract (among many in Brazil, Acórdão no. 2002.001.26562, Rio de Janeiro), grant bail from prison to receive medical treatment (*Ojuwe v. Federal Government of Nigeria* 3 Nig. Weekly L. Reps. 913, 2005, Nigeria), and limit pollutants in the environment (*Suo Moto v State of Rajasthan and Others*, Rajasthan High Court 2004, India). Only in the Latin American countries is the archetypal claim – a demand against the state for a good or service – the modal case.

Considered more generally, when courts craft remedies for social and economic rights claims, they modify the legal rules governing relationships among three classes of actors: the state, private providers, and citizens. Rules governing state-provider behavior typically involve regulation; rules involving demands from clients to the state typically involve state provision or financing of a good; and rules governing the horizontal relationship between providers and clients, and which clients themselves typically enforce through torts or other actions in private law, modify private obligations.⁶ When courts rule in these cases, they directly address the conditions under which rights can be satisfied, and only indirectly the provision of particular goods, or the redress of particular violations.

Some courts, particularly those with the most developed jurisprudence on social and economic rights, attempt to modify institutions or rules that hinder secure attachment to social and economic rights, even if those run somewhat further afield from the claim that litigants present. For instance, a court-ordered remedy for the failure of individuals to receive constitutionally entitled social grants in South Africa involved re-centralizing management of the program (*Mashavha vs. President of the RSA*, 2004 (12) BLCR (CC), South Africa). In one of a series of Indian pollution cases, *M.C. Mehta v. Union of India*, some court orders similarly focused not on the substantive claim but on the conditions under which contempt proceedings can be initiated against public officials for failure to close down polluting industries.

⁶ In previous work, we summarize these kinds of cases in a typology we call a social and economic rights triangle (Gauri and Brinks 2008b).

In other words, social and economic rights cases involve demands to change the primary rules governing the production and distribution of social and economic goods and resources, as well as demands to change the secondary rules that govern the acceptability, interpretation, application, scope, and authority of those primary rules. In the language used above, these are efforts to transform indeterminate into more determinate duties by establishing new rules of the game, or new institutions. Often, precisely because establishing new rules generates burdens on various parties, courts do not fix the new rules at once but set in process a procedure in which parties negotiate about them. Sabel and Simon (2003: 1056, 1062), writing about United States courts, described the process this way:

Destabilization induces the institution to reform itself in a process in which it must respond to previously excluded stakeholders. . . . In the typical pattern of the new public law suit, a finding or concession of liability triggers a process of supervised negotiation and deliberation among the parties and other stakeholders. The characteristic result of this process is a regime of rolling or provisional rules that are periodically revised in light of transparent evaluations of their implementation.

Second, and consistent with some of the suggestions in the philosophical literature cited above, courts often demand that targets of litigation, especially the state, give “reasonable consideration” to social and economic rights when formulating policy. The level of scrutiny entailed in “reasonable consideration” can vary from a minimal, administrative law rationality test, to a more substantive examination of whether the target of the litigation is genuinely attempting to respond to a social and economic rights claim. The famous South African Constitutional Court decision on the right to housing, *Government of the Republic of South Africa vs. Grootboom* (2001 (1) SA 46 (CC)), required the state to “unlock the system” for those who have the ability to pay for housing (through regulation so that monopolies and other market failures do not impede secure access to housing), and required the state to come up with a *reasonable* program of social support for those who are unable to pay or are facing emergencies. The context was one in which the local government had failed for many years to develop emergency assistance plans for residents threatened by natural disasters or demolitions. Although it took several additional years for the Wallacedene community that brought the case to obtain housing,

the case did lead municipalities to develop plans and budgets for housing emergencies (Langford 2011).

This mode of review is common (Liebenberg 2010; Tushnet 2009). For instance, a series of cases before the Indonesian Constitutional Court, beginning in 2005, demanded the government comply with the constitutional requirement, which specifies that the government devote 20% of its expenditures to education while, in 2005, only some 7% of expenditures were being spent on education. The Constitutional Court agreed with the litigants and ruled that the budget did not comply with constitutional requirements, but instead of invalidating the budget, in its remedy, the Court directed the government to increase its allocation later that year during mid-year adjustments. In succeeding years, litigants brought nearly identical cases before the Court, and the Court continued to ask the executive to give “reasonable consideration” to the constitutional requirements when formulating budgets. These cases contributed to a debate between Indonesian society and the state regarding the appropriate level of educational spending. Indonesian educational expenditures as a share of total expenditures went from 7% to nearly 12% in the next few years (Susanti 2008). Similarly, the Indian courts routinely ask the state to give further consideration to social and economic rights, and to present new programs that do so, in areas such as pollution control, the right to food, employment, prison conditions, and women’s rights (Desai and Muralidhar 2000).

But when disputes arise about how to allocate the duties to respond, what do courts do? To put it most generally, they take steps to structure communication among the potential duty bearers. This move is possibly implicit in the earlier two responses – facilitating the establishment of new rules requires bargaining and collaboration among affected parties, and requiring reasonable consideration usually entails an iterative series of communications between the targets of the litigation before the court. But sometimes courts are more explicit about the communicative task.

In decision T-025 of 2004, the Constitutional Court of Colombia ordered government authorities to develop new plans, allocate additional resources, and establish new processes for responding to the

basic human rights of the country's two to four million people internally displaced as a consequence of the armed conflict. The context for the ruling included the widespread practices of blockades, confinements, terrorism, installing anti-personnel mines, sexual assault, kidnappings, extra-judicial killings, extortion, and other acts of violence during an internal conflict that had pushed many rural Colombians away from their homes, resulting in a situation in which many were living without shelter and without access to basic services. A study found that average calorie consumption among internally displaced persons (IDPs) was 43% of recommended standards, mortality rates were six times the national average, and 54% of between the ages of 10 and 25 were not in school. The government had in 1997 passed legislation intended to deal with the IDP crisis, but implementation remained problematic: an estimated one million IDPs were unregistered, budget allocations were insufficient, different government authorities avoided the problem while others claimed a lack of capacity to address it. The state authorities had allegedly turned over large tracts of land intended for the IDPs to paramilitary bosses. Subsequently, more than twenty Colombian parliamentarians were arrested, and seventy others investigated, for complicity in massacres of peasants (Arango 2009: 117).

With the political channels insufficiently unresponsive, in 2004 some 1150 families filed 108 different *tutelas* (legal demands for the protection of fundamental constitutional rights), which the Constitutional Court consolidated into T-025. (Overall, some 1200 *tutelas* on the IDP issue had been filed against government authorities in the preceding five years) ("Decision T-025" 2004). In consolidating the individual cases and alluding to the others, the Court recognized the existence of a broader, systemic problem, and declared there to exist an "unconstitutional state of affairs" (*estado de cosas inconstitucional*). The Court had seven times previously made such a declaration, which involve "generalized violation of several constitutional rights affecting a significant number of people" ("Decision T-025" 2004: 41). Most relevant for the purposes of this paper, the term explicitly refers to a situation in which rights violations exist, but in which a single identifiable violator is not apparent.

These declarations also entail “the existence of a social problem whose resolution requires the intervention of several entities, demands the adoption of a complex and coordinated set of actions, and exacts a level of resources that implies an important additional budgetary effort” (“Decision T-025” 2004: 41). The Court also approvingly cited a previous declaration of this state of affairs as “a problem of humanity that must be jointly addressed by all persons, starting, logically, by State officers” (“Decision T-025” 2004: 15).

The Court addressed the systemic problem by communicating the declaration to the President and other senior government officials, ordering officials directly responsible for the problem to develop programs and timetables for actions and allocations requisite for addressing constitutional violations confronting IDPs in the country, warning other government officials to take heed, ordering the direct provision of basic services to plaintiffs, involving the Public Ombudsman in monitoring, and retaining jurisdiction of the case. In subsequent orders, the Court held public hearings, required the participation of IDPs themselves in consultations, required government agencies to collaborate on a single status report, spurred a number of congressional debates and a civil society follow-up commission, and experimented with new remedies as appropriate (Cepeda 2009). The Chief Justice of the Court later characterized the Court’s work as efforts to “provide a common basis for dialogue among all relevant actors” (Cepeda 2009: 21), and to “exercise judicial control over the *rationality* of the process, as opposed to the content of the policy itself” (Cepeda 2009: 27). State resources spent on IDPs increased by a factor of four between 2004 and 2009, and the quality of policy making has improved as a result of the Court’s ruling. At the same time, the government agencies have since then repeatedly failed to meet policy targets, with the result that most IDP families appear still not to have returned to their homes or been granted new ones (Arango 2009: 138).

In detailed studies of this case, Rodriguez Garavito (2011) interviewed involved parties and found evidence that they began to understand human rights claims and obligations in new ways, and

that this contributed to a new allocation of duties. A Ministry of Education official describing the case said that it “allowed us in government to solve who does what, and to determine which tasks need to be carried out collaboratively by everyone” (Rodriguez Garavito 2011: 16). An official in the national planning office said, “We finally started to understand that what interested the Court was not culpability but that the [displaced] person was actually getting sustained support for going to school and for decent housing. And at that point we started to measure things” (Rodriguez Garavito and Rodriguez Franco 2010).

The Indian courts have also, famously, developed new communicative procedures in Public Interest Litigation (PIL), a process designed to allow courts to respond to fundamental rights violations of individuals and groups who have difficulty representing themselves in court. By design (if not always in practice), PIL moves judicial process away from an adversarial model to one in which all of the parties attempt to find a joint solution to a pressing human problem (Fredman 2008; Gauri 2011). Often, the Indian courts have appointed Commissioners to oversee orders involving complex policy matters and, like the Colombian Constitutional Court, have required government officials to report back with new plans at defined intervals. The Supreme Court of India hears some 300 PIL cases per year; and the High Courts hear many more (Gauri 2011) .

A paradigmatic instance of Indian PIL involves the “right to food” litigation in the Supreme Court. In 2001, the People’s Union for Civil Liberties filed a PIL arguing that the Indian government was failing to fulfill its constitutional and statutory obligations to prevent famines. In particular, the government was not, despite a drought in Rajasthan, releasing grain stocks that had been accumulated expressly to respond to famine threats. The Supreme Court agreed with the claimants, retained jurisdiction of the case in order to oversee implementation, and appointed two Commissioners to oversee the implementation of eight state-level statutory food distribution schemes, which it converted into constitutional entitlements. In a series of orders stretching over nine years, the Court identified

agencies responsible for compliance, empowered local village councils to request information regarding the schemes, required states to fully utilize their grain reserves, asked the state and central governments to publicize the court's orders through state-run media, and proscribed governments from eliminating or restricting the schemes without the consent of the Court ("People's Union of Civil Liberties versus Union of India and Others, Writ Petition (Civil) No. 196 of 2001" Court Order 8 May 2002; Banik 2010).

The mode of intervention placed significant emphasis on structuring the means of communication. For instance, the Second, Third, Fourth, Fifth, and Sixth Reports of the Court-appointed Commissioners in the case included long sections on access to information, which the Commissioners believed were crucial for enforcement.⁷ These typically called for opening records for food and employment schemes, dissemination of information on food prices, dissemination of the courts orders, and the implementation of the Right to Information Act. In the Second Report, the Commissioners noted: "We wish to emphasize that the approach of the commissioners is not fault finding. The States and Union Territories must take us as a friend and cooperate in a common endeavor to tackle the issue of food insecurity" (Saxena 2002). The Commissioners' reports also include letters sent from the Chief Ministers to central government officials, and provide substantial information about grain prices, the extent of poverty, and wages in various states.

A number of the Court's orders were extremely detailed and set time limits by which various officials were to undertake a variety of specific actions. But the Court did not, for the most part, understand these orders to be determinate duties to be enforced by the threat of contempt orders or other sanctions. Rather, the Court used them to assess the seriousness of the official response. For instance, although the first Court order in 2001 required states to establish the midday meals scheme in the 25% of the poorest districts, by 2002, it was clear that the states of Uttar Pradesh, Jharkhand, and

⁷ These reports are available on the website of the Right to Food Campaign: <http://www.righttofoodindia.org/index.html>.

Bihar had not met this target. But the subsequent Court order, in 2002, did not hold them to this target as a specific duty; rather, it interpreted the target as one potential indicator of the seriousness of the states' response, calling it an indicator of a "meaningful beginning." Similarly, the first sentence of the Order dated September 17, 2001, notes that the Court is not convinced of the "right earnestness" of the responses on the part of the Central Government and the States. When the Court turned its attention, in the order dated January 27, 2010, to homeless shelters in Bihar, as part of the broad set of actions necessary to fulfill the right, it stated that "all the concerned authorities are directly to seriously make efforts to comply with this order." Conversely, the Court's order of August 8, 2010, praised a Central Government for its "serious endeavor" to respond the Court's queries.

When courts such as these attempt to enforce social and economic rights, they often employ a mode of communicative rationality that can be characterized as follows. First, they attempt to move parties from an adversarial to an investigative mode in an effort to find a new definition of a problem and its solutions. Second, they impose requirements that parties argue in good faith, reserving their most vehement admonitions and penalties for communication that is not "serious" or information that is inaccurate. Third, and related, these courts structure a public forum of communication by empowering new actors, facilitating or requiring the flow of information in the public sphere, and imposing report requirements. The obligations to reform institutions and to respond to rights are not allocated precisely, but are jointly created through an ongoing process.

There are, of course, many instances in which courts attempt to enforce social and economic rights peremptorily. For instance, the large majority of the medications provision cases in Latin America are resolved without an elaborated and reasoned justification for the decision, and often with an implicit or explicit penalty against state officials for failure to comply. In other instances, courts do not include all relevant interests in their orders, as in the failure of the Indian Supreme Court to include the interests of auto-rickshaw drivers when it forced the conversion of commercial vehicles to

compressed natural gas in a famous case on vehicular pollution in Delhi (Rajamani 2007), or issue excessively detailed orders to executive agencies. Even in cases like these, however, it is not uncommon for courts, over time, to experience moral and political pressure to include relevant interests, and develop procedures for public communication. For instance, Brazil's apex court, the Supreme Tribunal Federal, after watching judges grant tens of thousands of individualized remedies in medications cases over the years, decided that a public dialogue was crucial, and held six days of public and televised hearings on the case in April and May 2009.⁸

Overall, in the context of domestic judicial practice in many countries, duties to respond to human rights claims are being allocated, increasingly, by compelling communication among potential duty bearers and by structuring the modes of communication among them. The fairness of the allocation seems to rest on the processes by and through which new social routines and institutions are established.

Human Rights as Demands for Communicative Action

For Habermas, communicative action entails “the concept of reaching understanding as the cooperative negotiation of common definitions of the situation” (Habermas 1984: 1 137). It depends on “the use of language oriented to mutual understanding” (Habermas 1996: 18). It is sharply distinguished from other modes of action, such as the normative (in which participants conform to social standards), the dramaturgical (which involves the presentation and expression of self), and, especially, strategic action (in which an actor's choice includes in her “calculation of success the anticipation of decisions on the part of at least one additional goal-directed actor”) (Habermas 1984: 85-86). Unlike strategic action, communicative action generates an inter-subjectively shared understanding in which actors engage as participants, rather than as calculating observers. Above all,

⁸ Transcripts are here:
<http://www.stf.jus.br/portal/cms/verTexto.asp?servico=processoAudienciaPublicaSaude&pagina=Cronograma>

communicative action requires a commitment to using natural language in a serious and sincere manner, which entails the readiness of speakers to back up their propositions with actions and justifications (“redeem” or “vindicate” their validity claims) if their interlocutors challenge them:

In seeking to reach an understanding, natural-language users must assume, among other things, that the participants pursue their illocutionary goals without reservations, that they tie their agreement to the intersubjective recognition of criticizable validity claims, and that they are ready to take on the obligations resulting from consensus and relevant for further interaction (Habermas 1996: 4).

Communicative action constitutes an alternative route to social coordination, additional to strategic and related game-theoretic accounts; but it requires the suspension of the strategic attitude: “Naturally, the binding energies of language can be mobilized to coordinate action plans only if the participants suspend the objectivating attitude of an observer, along with the immediate orientation to personal success, in favor of the performative attitude of a speaker who wants to reach an understanding with a second person about something in the world” (Habermas 1996: 18).

Without claiming to have provided an authoritative interpretation of Habermas’ account of communicative action, we want to argue that something like that account underlies the mode through which certain courts allocate indeterminate obligations to respond to human rights claims. Reading their opinions and orders, one can see that their most exacting demand from respondents is seriousness and sincerity in the way they respond to human rights claims, rather than immediate actions. They encourage a movement away from an adversarial, interest-based perspective to one that is more participatory and collaborative. The use of something like communicative action is necessary because what Habermas calls “normative action,” rooted in shared rules and enforced by social sanctions, is not available when extant institutions have not established the rights and duties associated with perfect obligations. For these purposes, courts are struggling to define a new set of relationships in the hopes that, when participants are guided by natural language in a joint process of defining a situation, the “definition of the situation establishes an order” (Habermas 1984: 1 100). In this mode, courts take care

to structure the process of communication among participants.

Does this process solve the problems of coordination and fairness associated with indeterminate duties? To some extent, it seems to do so. Courts facilitate a process through which rights holders and duty bearers (at least those whose interests have entered the court room) confront each other in an encounter open to the human situation existing between them. As they define new relationships, they simultaneously develop new rules and acknowledge new rights and responsibilities. Shue (1988: 702) recognized this problem, but as a hypothetical, and without the partially successful experience of courts to illustrate this process by which duties are perfected: “The acknowledgment of duties across borders and the design of institutions to implement them may both be part of the same process.” As we have argued, this is not primarily an international problem but also one that pervades (and is most clearly seen) in the domestic context, where political authority exists but where multiple eligible duty bearers create problems for the assignment of duties for fulfilling human rights.

This communicative process does appear to mitigate coordination problems. It is worth noting that Habermas’ account of strategic action may at times have been too egoistic and dismissive, at least in *The Theory of Communicative Action*, and that strategic coordination is as necessary for rational action as communicative action (Johnson 1991). The communicative process helps divulge intelligible and accurate information in a public context, which in turn helps litigants exact credible and observable commitments from respondents. This is evident in court cases in which states had alleged that fulfilling social and economic rights was too expensive or that the harms suffered by litigants were minor, such as the Delhi Vehicular Pollution case in India, in which the state had claimed it would be too expensive to clean the air in Delhi, or the *Treatment Action Campaign* case in South Africa, in which the state had claimed it would be too expensive to provide the anti-retroviral nevirapine to prevent mother-to-child transmission of HIV (Brinks and Gauri 2008).

Habermas notes that this mode of interaction is only weakly normative: “Communicative reason

thus makes an orientation to validity claims possible, but it does not itself supply any substantive orientation for managing practical tasks – it is neither informative nor immediately practical” (Habermas 1996: 5). It is weakly normative precisely because two parties do not yet exist in a relationship of duties and rights with respect to each other. If they did, there would exist (at least an informal) institutional relationship between them. But the practice of courts, at least in some instances, suggests a process through which indeterminate duties can guide and coordinate action to establish those rights, duties, and institutions.

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