

Realizing Economic and Social Rights in Nepal: The Impact of a Progressive Constitution and an Experimental Supreme Court

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*This paper examines Nepal's experience of realizing social and economic rights in a post-conflict context and under an ambitious and progressive new Constitution. As an understudied jurisdiction in legal literature, Nepal's post-conflict judicial experience illuminates that contrary to traditional critics who argue that social and economic rights are non-justiciable, a robust and experimental role conception embraced by the Court positions it to be an important actor for realizing socio-economic rights in Nepal, but only if it acts in alignment with civil society and other institutions. Situating the experience of Nepal within recent legal literature from developing countries, this paper will explain that the Supreme Court of Nepal can be characterized as robust and experimental in its approach to socio-economic rights adjudication, with elements similar to the Indian and Colombian courts. While there are many reasons for this approach, this paper concludes that two explanations are the most salient for understanding social and economic rights, and discusses both in detail. First, a context of dysfunctional institutions gives the Court license to produce robust and experimental judgments, meant to catalyze action in moments of impasse. Second, Nepal's recent history of social movements and civil society activism reduces the anti-democratic or anti-majoritarian difficulty in adjudicating social and economic rights, making such rights claims more palatable. Alliance between the Court, civil society and other governmental institutions appears most important for one emerging area of adjudication: economic development projects. This paper will also study the implementation record of this Court through a case study on *Lakshmi Dhikta v. Government of Nepal*, a landmark suit about poor women's right to access abortion services. *Lakshmi Dhikta* will further add insights to the claim that robust and experimental judgments can bolster the realizability of social and economic rights but*

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only when civil society, including international donor communities, and other government institutions work in alignment for implementation of human rights judgments.

INTRODUCTION

More than three-quarters of the world's constitutions contain at least one formally justiciable economic, social, or cultural right (ESCRs).² Only 17 constitutions do not incorporate any justiciable or aspirational ESCRs, and the majority of constitutions include nine or more.³ Economic, social and cultural rights (hereby called “socio-economic rights”) are rights claims about basic material interests, like rights to access food, water, housing, health care, social security, labor protection, and education. These rights can be contrasted with what are known as the ‘first generation’ of human rights, i.e. civil and political rights such as the right to speech and vote (which may have material implications, but are traditionally classified differently⁴). The constitutionalization of social and economic rights, as elaborated below, provides a unique opportunity to study the realization of these ‘second generation’ human rights around the world.

Writing about socio-economic rights adjudication in South Asia, Hon. Dr. Anand Mohan Bhattarai, Justice of the Supreme Court of Nepal, has stated, “[South Asian] judges have long ago shed their traditional role of norm interpretation and embraced a norm-making function.”⁵ Indeed, South Asian Courts have produced a rich jurisprudence and history of socio-economic rights adjudication through activist judicial systems. But comparative constitutional and socio-economic rights literatures have largely overlooked and understudied the South Asia region, with the exception of India.⁶ This, despite the potential of South Asia to offer insights into the relationship between law and politics, state-building and separation of pow-

2. Evan Rosevear et. al., *Justiciable and Aspirational Economic and Social Rights in National Constitutions*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* 37, 37–65 (Katharine G. Young ed., 2019). Justiciable is taken to mean simply that the constitutions contain ESCRs and courts can adjudicate them.

3. *Id.* at 37.

4. See, e.g., *infra* Section 1.A.

5. Anand M. Bhattarai, *Access of the Poor to Justice: The Trials and Tribulations of ESC Rights Adjudication in South Asia*, NJA L.J. 1, 29 (special issue 2012).

6. An exception in scholarly literature is Iain Byrne and Sara Hossain, *South Asia: Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 125, 125–43 (Malcolm Langford ed., 2008) (noting that socio-economic rights in South Asia have been understudied and providing a broad overview on the jurisprudence of these rights in Bangladesh, Pakistan, Sri Lanka, and Nepal). See also Rosalind Dixon & Tom Ginsburg, *Introduction*, in *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 1, 1–20 (2014) (“The newly revitalized field of comparative constitutional law has tended to let North America and Europe dictate the agenda [. . .] But Asia has also been home to vibrant constitutional discourses for 150 years . . .”).

ers, and the realizability of socio-economic rights through constitutional justiciability.⁷

Since the year 2000, 64 new constitutions have been promulgated in 46 different countries⁸ — Nepal being one of them. The poorest country in South Asia and one of the poorest in the world, Nepal promulgated its Constitution in 2015 after arguably 65 years of struggle.⁹ This struggle includes a decade-long protracted Maoist insurgency, massive ethnic identity-based movements in the Southern borders, and a devastating earthquake that took more than 8,500 lives. Mark Tushnet characterizes Nepal as having had “one of the most intense constitution-making processes in the world”¹⁰ that involved multiple political stalemates and compromises. The 2015 Constitution established Nepal as a country of federalism, republicanism, and secularism. The centuries-old monarchy ended, and Nepal moved closer to its vision of an inclusive democracy.

Importantly, both the Interim Constitution of 2007 and the subsequent Constitution of 2015 adopted certain socio-economic rights as fundamental rights. Designation of these rights as fundamental was a break from previous Nepali constitutions as well as from constitutions of neighboring jurisdictions like India and Bangladesh, where many of these rights have the status of Directive Principles of State Policy (henceforth written as “Directive Principles”), intended to “act as a guide to the executive in governing

7. MARK TUSHNET, *UNSTABLE CONSTITUTIONALISM LAW AND POLITICS IN SOUTH ASIA* (2015) (stating that South Asian can offer insights into the relationship between law and politics, state-building and separation of powers). Note that there are important similarities and differences among the legal systems of South Asia. Many South Asian legal systems, like those of India and Pakistan, have been directly influenced by their former colonial British counterparts. South Asian countries have had a public interest litigation movement since at least the 1980s. This makes the South Asian courts a rich site for the study of rights adjudication and arguably sets this region apart from courts in East Asia, where constitutions and the courts may not commonly be sites of social struggles. South Asian constitutions also share a “socialist vision of post-colonial states” (although Nepal has never been formally colonized) and tend to see neighboring jurisdictions as sources for jurisprudence and lessons. See Sujit Choudhry, *Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia*, 7 INT’L J. CONST. L. 577 (2009); Rosalind Dixon & Tom Ginsburg, *Introduction*, in *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 1, 1–20 (2014); Jona Razzaque, *Linking Human Rights, Development, and Environment: Experiences from Litigation in South Asia*, 18 FORDHAM ENVTL. L. REV. 587 (2007); Iain Byrne and Sara Hossain, *South Asia: Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 125–43 (Malcolm Langford ed., 2008) (providing a broad overview on the jurisprudence of these rights in Bangladesh, Pakistan and Nepal).

8. Rosevear et. al., *supra* note 2, at 47; Sujit Choudhry, *Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia*, 7 INT’L J. CONST. L. 582, 577 (2009).

9. Hari Phuyal, *Nepal’s New Constitution: 65 Years in the Making*, THE DIPLOMAT (Sept. 18, 2015), <https://thediplomat.com/2015/09/nepals-new-constitution-65-years-in-the-making/> [<https://perma.cc/D2QN-7XAQ1>]. See also PRASHANT JHA, *BATTLES OF THE NEW REPUBLIC: A CONTEMPORARY HISTORY OF NEPAL* 295 (2015) (describing the fight for a democratic Constitution in Nepal since 1951, and how entrenched elites were skeptical of this demand in the initial post-conflict phase in 2008).

10. TUSHNET, *supra* note 7, at 5. For an overview of Nepal’s constitution-making process, including a historical timeline, see International Institute for Democracy and Electoral Assistance, *Nepal’s Constitution Building Process: 2006 – 2015* (2015).

the country but [that] do not have the same status as enforceable rights.”¹¹ The move away from Directive Principles and towards fundamental and justiciable rights is consistent with recent global trends, whereby the number of constitutions with aspirational rights have declined and those with justiciable or “mixed rights” (justiciable and aspirational) have increased.¹² The rights to live in a healthy and clean environment,¹³ access to basic education,¹⁴ employment and proper work practices,¹⁵ basic healthcare services,¹⁶ food,¹⁷ and appropriate housing¹⁸ are all enshrined under the section of fundamental rights in Nepal’s new Constitution of 2015, which largely mirrors the Interim Constitution of 2007. Hence, taking Nepal as a case study is an opportunity to examine the implications of moving away from approaching socio-economic rights as Directive Principles and toward fundamental, justiciable rights.¹⁹

The adoption of justiciable socio-economic rights in the Interim and the new Constitutions makes Nepal’s constitutional provisions, at least on paper, some of the most progressive and ambitious in the world.²⁰ Taking Nepal’s Court as its case study, this article asks important questions about the fulfillment of socio-economic rights: To what extent can a country realize the socio-economic rights enshrined in this ambitious Constitution? How is this realizability complicated because of conditions of institutional chaos or actions of civil society? What is, and should be, the role of the Court, as one actor among others, in this context?

As an understudied jurisdiction of the world, Nepal’s post-conflict experience illuminates how, contrary to traditional critics who argue that social and economic rights are non-justiciable, a robust and experimental role conception embraced by the Court positions it to be an important actor for realizing socio-economic rights — but only if it acts in alignment with

11. Byrne and Hossain, *supra* note 6, at 126.

12. Rosevear et. al., *supra* note 2, at 49.

13. Constitution of Nepal, Art.30(1).

14. *Id.* at Art. 31(1).

15. *Id.* at Arts. 33(1), Art.34(1).

16. *Id.* at Art. 35(1).

17. *Id.* at Art. 36(1).

18. *Id.* at Art. 37(1).

19. These socio-economic rights are cloaked under a spirit of inclusion and substantive equality: for example, Article 42 states, “Citizens who are economically very poor and communities on the verge of extinction, shall have the right to special opportunity and facilities in the areas of education, health, housing, employment, food and social security, for their protection, progress, empowerment and development.” Like other constitutions of South Asia, Nepal’s constitutions have reflected norms of substantive equality and non-discrimination.

20. Note, however, that the paper is not arguing that the Nepali Supreme Court has consistently been as progressive as the texts of subsequent constitutions might have allowed them to be. The Court, for example, in *Chanda Bajracharya v. Secretariat of Parliament*, gave the following reasoning: “There [is a natural] . . . difference between man and woman . . . [which] naturally [exists in] Nepalese society as well . . . Existing law and [the] constitution have been recognized in [accordance with] the culture, tradition, values and norms of the society throughout [our] long history. If such laws [are] changed randomly, the structure and system of society may [be disrupted].” Byrne and Hossein, *supra* note 6 at 131.

civil society and other institutions. This article's focus is not primarily on the Court's jurisprudence, nor on interpretive approaches to texts, but on the role of courts in realizing rights. The Court itself is situated in a larger web of actors rather than as a completely autonomous and unaffected actor at the center.²¹

This article proceeds in five parts. Part I engages with traditional criticisms of social and economic rights, and highlights responses to critics as well as recent understandings from developing countries. Traditional legal literature has argued that there is something qualitatively different about social and economic rights that calls into question their justiciability and realizability. By contrast, however, more recent legal literature from developing countries has called into question these assumptions and moved the conversation toward practical implementation and realizability. Part II situates the Nepali experience within these debates by explaining that the role conception of the Nepali Court is robust and experimental, drawing on elements from other developing country courts like India and Colombia. Part III explains how this role conception came to be, focusing on two explanations that are most salient for understanding social and economic rights. First, a context of dysfunctional and unstable institutions gives the Court license to produce robust and experimental judgments, meant to catalyze action in moments of impasse. Second, Nepal's recent history of social movements and civil society activism reduces the anti-democratic or anti-majoritarian difficulty in adjudicating social and economic rights. This section also emphasizes an emerging area of adjudication: economic development projects, for which the Court's alignment with civil society and other institutions is likely to be even more important. Parts IV and V focus on the implementation record of *Lakshmi Dhikta v. Government of Nepal*, a 2009 landmark suit about poor women's right to access abortion services, adjudicated based on rights appearing in the 2007 Interim Constitution, and later entrenched in the 2015 Constitution. *Lakshmi Dhikta* demonstrates that robust and experimental judgments can bolster the realizability of rights, but only if the Court is in alignment with the actions of other government institutions and civil society sustains its advocacy momentum. Finally, these sections discuss how the international donor and civil society communities have a particularly salient role to play for the realization of social and economic rights in poor countries through the power of their purse, and their contributions to building global momentum for human rights.

21. See KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 3, 13, 139 (2012) (explaining that courts are actors among a web of other actors).

I. DEBATES ABOUT SOCIO-ECONOMIC RIGHTS

A. *Theoretical Criticisms of Justiciability and Realizability of Socio-Economic Rights*

American and some international legal literature has traditionally been skeptical of the justiciability and realizability of socio-economic rights. Unlike civil and political rights, socio-economic rights have been said to be uniquely challenging for legal enforcement and justiciability by several scholars.

Some of the traditional critiques of socio-economic rights can be explained as follows. First, that socio-economic rights are ‘positive rights,’ meaning they entail positive obligations for state action, with budgetary and policy implications that the court does not have expertise to make judgments about.²² By contrast, civil and political rights were understood to be about restraints on state action, not positive obligations and thus were ‘negative rights’ that were easier and more appropriate for courts to adjudicate.²³

Second, strong articulations of such positive rights were deemed to be ideologically controversial measures²⁴ that would instigate a backlash on the legitimacy of the courts. The East and the West adopted different economic doctrines, and the centralized socialism of the East deemed government intervention benign.²⁵ In the United States for contrast, the fundamental values of the country tend to favor individual enterprise over government intervention, and considered social rights as mostly benefiting minorities.²⁶ Normatively, the argument is that courts should not ‘interfere’

22. See, e.g., Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 862 (2001), who argues that in the US context, separation of powers forbids courts from encroaching on positive rights (“While we espouse an independent judiciary in this nation, the reality is that courts are loathe to displease the elected branches or to tread upon their constitutional turf. An order requiring those branches to fund and to offer economic assistance to the poor is the sort of action that the judiciary is unlikely to make or to enforce.”).

23. Malcolm Langford, *The Justiciability of Socio-Economic Rights: From Practice to Theory*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 8, 3–45 (Malcolm Langford ed., 2008).

24. Başak Çali and Anne Koch, *Explaining Compliance: Lessons Learnt from Civil and Political Rights*, in SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 46, 43–74 (Malcolm Langford, César Rodríguez-Garavito and Julieto Rossi eds., 2017).

25. Langford, *supra* note 23, at 7–8. See also Cass Sunstein, *We Need to Reclaim the Second Bill of Rights*, THE CHRONICLE OF HIGHER EDUCATION, 50(40), B9–B10, who argues that Franklin Delano Roosevelt had a vision for positive economic rights in the United States, such as rights to adequate housing and health care, as exemplified in his proposed Second Bill of Rights, but that this vision remains unfulfilled.

26. Langford, *supra* note 23, at 11 (quoting CASS SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004), pp. 127–138.). See also Cass Sunstein, *We Need to Reclaim the Second Bill of Rights*, THE CHRONICLE OF HIGHER EDUCATION, 50(40), B9–B10 (“But Roosevelt’s hopes have not been realized. Much of the time, the United States seems to have embraced a confused and pernicious form of individualism, one that has no real foundations in our history. That approach endorses rights of private property and freedom of contract; it respects political

with free markets and individualism by giving positive rights declarations. Countries following this line of argument are more likely to see socio-economic rights as ideologically and normatively controversial. Some scholars have argued that legal scholars have tended to focus on the South African Constitutional Court partly because it has been less activist than other global south courts and has an approach more familiar to its United States and global north counterparts.²⁷

Lastly, critics argued that since judicial enforcement of socio-economic rights has budgetary implications and is intrusive on the legislative branch, such adjudication has an anti-democratic or counter-majoritarian difficulty.²⁸ These ‘rights’ are for the domain of politics, not law.²⁹ Positive rights are not easily administrable, so they are proper for the executive and administrative domains, not for the courts. In fact, where administrative and budgetary capacity is poor, states cannot afford to guarantee positive rights.

International law has reflected some of these criticisms and a general wariness of socio-economic rights. In 1966, the choices to separate the International Covenant on Economic, Social and Cultural Rights from the International Covenant on Civil and Political Rights and to create two different interpretation regimes for these two sets of rights reflect, apart from the political disputes of the cold war, the criticism that economic, social and cultural rights (ESCR) are “too vague and ill-defined to be justiciable,” and that courts are not in a position to judge compliance of those rights.³⁰ Implications of treating these rights differently included an absence of national institutions committed to the promotion of these rights, little formal legal texts, and a dearth of scholarship on the implications of the recognition of these rights on an international level.³¹ What followed was different treatment for these two different sets of rights also at the level of national constitutions, from Western European to post-colonial countries: socio-economic rights were often relegated to “directive principles” of state policy whereas civil and political rights made more justiciable.³²

An optional protocol that enabled an international monitoring body to examine individual complaints about ESCRs came into force only in 2013,

liberty, but claims to distrust “government intervention” and to insist that people must largely fend for themselves.”).

27. CÉSAR RODRÍGUEZ-GARAVITO & DIANA RODRÍGUEZ-FRANCO, *RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM ON SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH* 11–12 (2015).

28. Mark Tushnet, *Preface* to *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* xi (2008).

29. Langford, *supra* note 23, at 9.

30. Oliver de Schutter, *Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* 534, 527–623 (Katharine G. Young ed., 2019).

31. Phillip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9(3) *HUM. RTS. Q.* 333, 332–81 (1987).

32. Langford, *supra* note 23, at 7.

compared to the existence of such a body for civil and political rights since 1985.³³ Western European and North American states maintained that civil and political rights were ‘first generation’ and economic, social and cultural rights were ‘second generation’; the United States argued that the latter set of rights were qualitatively different from civil and political rights, and more resembled goals of social and economic policy rather than strictly rights.³⁴

Breaking with traditional scholarship, jurisprudence from the South African Courts started becoming milestone cases for socio-economic rights adjudication, like *Soobramoney v. Minister of Health* in 1997,³⁵ *Government of the Republic of South Africa v. Grootboom*³⁶ in 2000, and *Minister of Health and Others v Treatment Action Campaign & Others* (‘TAC’) in 2002.³⁷ With justiciable socio-economic rights in the post-apartheid Constitution, South Africa’s Constitutional Court often wrote pro-rights judgments, developing a ‘reasonable’ standard of review to judge the government’s fulfillment of its positive socio-economic duties,³⁸ a standard that was adopted in the Optional Protocol to the International Covenant on Economic Social and Cultural Rights in 2008. However, the South African Court also gave due deference to the legislative branch, by often leaving the decision of appropriate relief and remedy to the elected branches instead of the court.³⁹ This dialogic model of adjudication has generated a rich literature on the justiciability of socio-economic rights.⁴⁰

B. Brief overview of alternative literature from developing countries

Scholars have furthered our understanding about the justiciability of socio-economic rights by answering these criticisms in a variety of ways.

33. Cali and Koch, *supra* note 24, at 46.

34. *Id.* at 46.

35. (12) BCLR 1696 (CC). This case is about a terminally ill patient who brought a constitutional claim alleging violation of the right to access health care services when the government hospital refused to provide renal dialysis treatment. The Constitutional Court held that the failure to provide him treatment was not a violation of the South African Bill of Rights, and that obligations related to health rights depend on resources available.

36. 2001(1) SA 46 (CC) (S. Aft.). Plaintiffs, who had been evicted by the government to build long-term housing, brought a constitutional claim alleging violation of the right to housing. The Court ruled that the State was obliged to provide shelter to children and their parents, who were currently homeless.

37. 2002 (10) BCLR 1033(CC). HIV positive pregnant women brought a constitutional claim alleging violation of the right to access health care services when the government-imposed restrictions on the provision of anti-retroviral drugs. The Court ruled in favor of plaintiffs, mandating the State to provide the drugs and to present to the Court the government’s plan on how it would administer them.

38. For an overview of the South African landmark cases and their jurisprudence, see Sandra Liebenberg, *Adjudicating Social Rights Under a Transformative Constitution*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 81-91, 75-101 (Malcolm Langford ed., 2008).

39. See, e.g., TUSHNET, *supra* note 4, at 242-44.

40. See e.g., *id.* (calling this ‘weak-form’ judicial review, where courts pronounce that certain rights have been infringed, but leave the elected branches of the government to formulate remedies and relief).

Some argue that these criticisms might be philosophically or normatively attractive, but not practically pressing in many developing countries. Malcolm Langford writes that there has been so much development in jurisprudence of socio-economic rights all over the world that the question has shifted from whether socio-economic rights are justiciable to the degree to which they are justiciable.⁴¹ In Nepal, too, since socio-economic rights have been enshrined in the Constitution, and many public litigation cases have moved ahead, a more useful intellectual question is how to make these rights realizable rather than to ask whether they are justiciable rights in the first place.⁴²

Other scholars have questioned underlying assumptions about institutions and separation of powers. David Landau has redirected attention to the institutional context of judicial functioning. He points out that well-functioning institutions, separation of powers, and a robust constitutional culture may not exist in developing countries or post-conflict situations.⁴³ These features may result in a different role for institutions and a different approach to separation of powers than what exists in Western liberal democracies. Cesar Rodriguez-Garavito and Diana Rodriguez-Franco challenge the accuracy of the assumption that an ideal democracy is one where the legislature and executive are democratically legitimated and subject to accountability mechanisms but the judicial branch is not.⁴⁴ In such contexts, it is even more imperative to focus, not on whether socio-economic rights are justiciable, but rather on how socio-economic rights can be made realizable vis-a-vis volatile political contexts. Cesar Rodriguez-Garavito and Diana Rodriguez-Franco argue that when there are “institutional blockages,” conditions of structural impasse in contemporary democracies that lead to the absence of public policies, courts are the appropriate institutions to intervene and catalyze action.⁴⁵

Others have questioned the assumption that there is something qualitatively different about economic, social and cultural rights compared to civil and political rights, particularly in the implementation phase. Responding to the criticism that ESCRs are uniquely ‘positive’ rights that require positive state action, Cali and Koch point out that there are abundant examples of civil and political rights that “can be realised only through active, lengthy and complex state engagement,” for example developing effective

41. Langford, *supra* note 23, at 29.

42. By ‘realizable’, I mean the practical implementation and attainment of these rights. By contrast, ‘justiciable’ means that these rights are subject to adjudication by courts.

43. For example, Landau argues that the dialogic or weak-form of judicial review exercised by the *Grootboom* Court in South Africa was made possible by a political and institutional context, namely that of “a coherent dominant party that shares the same overarching constitutional vision as its constitutional court.” He questions whether the dialogic model is transportable to other jurisdictions with different contexts. David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT’L L.J. 319, 334 (2010).

44. RODRÍGUEZ-GARAVITO & RODRÍGUEZ-FRANCO, *supra* note 27, at 27.

45. *Id.* at 17, 28.

investigation and prosecution capabilities, institutional reform, and consultations with marginalized communities.⁴⁶ Many public interest cases have both civil, political as well as socio-economic rights implicated, and many courts give judgments that recognize their interdependence: the case of *Lakshmi Dhikta*, analyzed below, is one such example. Similarly, ESCRs are not uniquely controversial as many civil and political rights cases have generated strong ideological contestations across political factions, for instance in cases about discrimination based on gender and social orientation or non-refoulement.⁴⁷

II. ROBUST AND EXPERIMENTAL ROLE OF NEPAL'S SUPREME COURT

This section offers some answers to these theoretical criticisms by studying the Nepali Court's role conception in its own terms. The focus is not only or primarily on jurisprudence, but on the institutional features and role conception of the Court as well as on regional transplantation of constitutional norms across South Asia.

The Nepali Supreme Court's approach to socio-economic rights adjudication can be characterized as robust and experimental.⁴⁸ This characterization is used to mean, first, that the Court is not deferential to the legislative branch nor merely dialogic when it comes to socio-economic rights adjudication. It often writes judgments with strong rights and remedies. Second, "experimental" is also used to denote a willingness to experiment with a significant range of remedies and forms of relief. Characterizing the Nepali Supreme Court as "experimental" is also apt because the Court shows characteristics of a multitude of typologies in legal scholarship, as explained below. The Court's institutional features and approach have elements of both "weak-form" and "strong-form" judicial review, elements of an "engaged" court, as well as that of a "managerial" court.

A. *Elements of Weak Form and Strong Form Judicial Review*

Jurisdictional and procedural rules as well as institutional features enable the Nepali Supreme Court to adjudicate fundamental rights with elements of both weak form and strong form judicial review.⁴⁹ According to the Con-

46. Cali and Koch, *supra* note 23, at 47–48.

47. *Id.* at 48.

48. For an encyclopedic overview of the Court's key decisions related to socio-economic rights, see RAJU PRASAD CHAPAGAL, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, REVIEW OF THE LEGISLATIVE FRAMEWORK AND JURISPRUDENCE CONCERNING THE RIGHT TO ADEQUATE FOOD IN NEPAL (2014).

49. Under Mark Tushnet's typology, strong-form judicial review "is a system in which judicial interpretations of the Constitution are final and unrevisable by ordinary legislative majorities" and their decisions have a "normative finality." An example is the Supreme Court of the United States. A weak-form judicial review, by contrast, relies on a dialogic relationship between the branches of government, and judicial interpretations "can be revised in a relatively short term by a legislature . . ." Tushnet, *supra* note 28, at 24–34.

stitution, the Supreme Court has the final power to interpret the Constitution and the law.⁵⁰ Citizens of Nepal have a constitutional right to file a writ petition directly to the Supreme Court in cases of fundamental rights violations,⁵¹ and the Court has extraordinary jurisdiction to declare the law void either *ab initio* or from the date of its decision.⁵² For enforcement of fundamental rights, the Supreme Court has extraordinary jurisdiction to “issue necessary and appropriate orders to enforce such rights or settle the dispute.”⁵³ The Court can issue writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto.⁵⁴ It can hear appeals of cases that are a “subject of public interest litigation.”⁵⁵ Such institutional features give the Court power to adjudicate rights with a strong form judicial review.

Yet, there are also elements in the constitutional structure that do not make the Supreme Court the final arbiter of fundamental rights. Many socio-economic rights in the Constitution come with some structural limitation clauses: Some of these rights are subject to prescriptions “as provided by law”⁵⁶ which means that these rights would depend upon further statutory provisions passed by the legislature. The language of “as provided by law” also suggests that constitutional rights could be limited by future legislation and therefore the Court’s pronouncements are not the final interpretation of these rights. At the time of its promulgation, the Constitution gave the legislature a three-year deadline to make legal provisions to enforce these rights that were subject to law.⁵⁷ In September 2018, the legislature met the 3-year deadline and passed 16 Acts to enforce many of these fundamental rights.⁵⁸ However, many of these Acts make these rights subject to further regulations, thereby creating one more step on the part of the executive before these rights can be practically realized. Thus, this constitutional structural brings in both the legislative and the executive as arbiters over

50. Constitution of Nepal, Art. 128(2).

51. An example is the case of *Bajuddin Miya and Others*, where the plaintiffs invoked extraordinary jurisdiction of the Court through a writ petition to receive compensation for the destruction of their crops by wild animals. Note the similarity of this mechanism to those found in most Latin American countries, commonly known as *amparo* or *tutela*, that allow citizens to directly petition courts.

52. Constitution of Nepal, 2015, Art. 133(1).

53. *Id.* at Art. 133(2).

54. *Id.* at Art. 133(3).

55. *Id.* at 133(5).

56. *See, e.g.*, Art. 31(3) (“The physically impaired and citizens who are financially poor shall have the right to free higher education as provided for in law.”).

57. There was some confusion on the legal interpretation of this provision. *See* Malcolm Langford and Ananda Mohan Bhattarai, *Constitutional Rights and Social Exclusion in Nepal*, 18 INT’L J. ON MINORITY & GROUP RTS. 387, 409 (2011) (“Does this now make all of the ESC rights subject to provision within law? Or is it a midway provision such that it only restricts judicial authority if laws are made within two years. Or, if read literally, is it just a legal obligation to take measures to realise these rights within two years 100 and to avoid the problem of the lack of law as seen in the jurisprudence.”).

58. Editorial, *President Authenticates 16 Fundamental Rights Bills*, The Himalayan Times (Sept. 19, 2018), <https://thehimalayantimes.com/nepal/president-bidya-devi-bhandari-authenticates-16-fundamental-rights-bills/> [https://perma.cc/92MW-AAJH].

the meaning of fundamental rights in the Constitution, rather than allow only a strong form judicial review by the Court.

B. *Elements of an Engaged Court*

Following India's footsteps, the Nepali Supreme Court has emulated proactive engagement with fundamental rights. Katharine G. Young explains that the Indian Court can be characterized as an "engaged" court because of three institutional features: the existence of socio-economic rights as Directive Principles, that these Directive Principles guide the Supreme Court in its interpretations, and a robust Public Interest Litigation ("PIL") tradition.⁵⁹

As other courts in South Asia, the Nepali Court has been influenced by these institutional features and jurisprudence. The Indian Court paved the way for socio-economic rights adjudication under its "right to life" jurisprudence, which influenced other Courts in South Asia, including Nepal.⁶⁰ Although many socio-economic rights are aspirational Directive Principles under India's constitution, the Supreme Court has derived many socio-economic rights from the "right to life" clause, writing that it is a "most precious human right" and must be "interpreted in a broad and expansive spirit."⁶¹ The Nepali Court too started giving teeth to various socio-economic rights by subsuming them under the "right to life" doctrine, like the right to clean drinking water,⁶² right to breastfeed,⁶³ right to a clean environment,⁶⁴ among others. At that time, socio-economic rights were Directive Principles of State Policies, rather than fundamental rights as they currently are. Even then, the Nepali Supreme Court stated that they are not "vacuus jargons" and that the "government may be required to give effect to them."⁶⁵ This approach has been a characteristic of many courts in South Asia, not just in Nepal.⁶⁶

59. YOUNG, *supra* note 21, at 200-02. For other broad overviews of the Indian Court that supplement this role conception, see S. Muralidhar, *India: The Expectations and Challenges of Judicial Enforcement of Social Rights*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 102-24 (Malcolm Langford ed., 2008); Poorvi Chitalkar and Varun Gauri, *India: Compliance with Orders on the Right to Food*, in SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 292-99 (Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi eds., 2017).

60. Bhattarai, *supra* note 5, at 4-5, 28 ("The [South Asian] courts began to take public interest petitions by widening locus standi, opening jurisdiction for representative suits and letters, legal aid, and design of several annotative tools for remedies and reporting mechanisms. The Indian Judges made a seminal contribution in developing constitutionalism, and constitutional jurisprudence on the principle of reasonableness and on a repertoire of equality and right.")

61. See *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

62. CHAPAGAI, *supra* note 48, at 103-04.

63. *Id.* at 105.

64. *Id.* at 108.

65. Bhattarai, *supra* note 5, at 5.

66. *Id.* at 4-5.

Nepal has also borrowed liberal standing rules and a PIL practice from the Indian Courts.⁶⁷ Starting in the 1980s, the public interest litigation movement in India sensitized judges to the need to improve access to justice for poor and marginalized populations that, in turn, spread the “same language of social justice” across South Asia.⁶⁸ The Nepali Court has also held that “a basic feature of any competent judicial system is to ensure justice through the provision of legal aid to everyone, including the poor and disabled.”⁶⁹ Plaintiffs can sue any “state agency,” defined as “any agent through which the State exercises its powers, including those of both national and local government” for alleged violations of fundamental rights.⁷⁰ Such liberal jurisdictional and procedural rules make the Court conducive to adjudicate rights in a robust manner. These institutional and jurisprudential developments across South Asia has made it easier for the Nepali Court to follow suit and embrace an engaged approach toward socio-economic rights adjudication.

International instruments have given support to the Court’s engaged posture. The Constitution borrows some language directly from the International Covenant on Economic, Social and Cultural Rights (ICESCR). For example, the Constitution mirrors Art. 13(2)(a) of the ICESCR, which states that “[p]rimary education shall be compulsory and available free to all,” by stating in Art. 31(2) that “[e]very citizen shall have the right to compulsory and free basic education.”⁷¹ In addition to the ICESCR, Nepal is party to other major international human rights agreements including the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) without reservations.

The Supreme Court has cited these international instruments in numerous cases, such as *Bajuddin Miya and Others v Government of Nepal*, a right to food case (explained below), where the Court cited Article 11(2) of the ICESCR (fundamental right to be free from hunger), and *Prakash Mani Sharma*,⁷² a case where the Nepali Supreme court cited many provisions of CEDAW. Another feature of the Court has been to focus on the interlinkages of rights, as in the case of *Shanti Balampaki v. Government of Nepal*⁷³ adjudicated in 2018, where the Court linked ICESCR’s Article 10 (special

67. *Id.* at 6–7. However, in 2012, the Court changed some rules that now have restricted access to the Courts, for example by making legal representation mandatory. Mara Malagodi, *Challenges and Opportunities of Gender Equality Litigation in Nepal*, 16(2) INT. J. CONST. L. 527, 533 (2018).

68. Bhattarai, *supra* note 5, at 28.

69. Byrne and Hussain, *supra* note 6, at 129.

70. *Id.* at 129.

71. For secondary education, the Constitution goes further than ICESCR, mandating “free education up to the secondary level” under Art.31(2), in contrast to ICESCR’s mandate to make secondary education “generally available and accessible” through progressive introduction of free education.

72. *Prakash Mani Sharma and Others v Ministry of Women, Children and Social Welfare and Others* in Human Rights and Gender Justice (Supreme Court, Vol. 3 No. 2, 2066).

73. *Shanti Balampaki v. Government of Nepal*, 072-WO-0484 (on file with author).

protection and assistance for mothers, family and children) to the Constitution's Article 38 (rights of women) and to other state obligations under international treaties like CEDAW. A constitutional culture that is free to cite international law as authority thus enables the Court to engage with domestic constitutional and international treaty obligations.

C. Elements of a Managerial Court

Katharine G. Young characterizes “managerial” courts as those that exercise a heightened review of government action and a structured or mandatory form of relief, often with elements of ongoing judicial supervision.⁷⁴ These types of courts might prescribe substantive content of the right as well as exercise a regular control of the enforcement of the judgment.⁷⁵

Nepal's Supreme Court judgments on socio-economic rights often have a “managerial” component to them, where rights are given substantive content and the remedies detailed and complex. For instance, in the 2008 case of *Bajuddin Miya and Others v Government of Nepal*, in which farmers brought a claim against the government for failing to stop animals that escape from a government-controlled wildlife reserve from destroying their crops every year,⁷⁶ the Supreme Court held that the government violated the farmers' right to food under the Interim Constitution.⁷⁷ What makes this an example of the managerial characteristic of the Nepali Court is that the Supreme Court elaborated on the substantive content of the right to food by stating that this right entails the right to food security and the right to be free from hunger, and stated that the State cannot shirk from its Constitutional duties by claiming that there are no current laws or policies addressing the harm under question.⁷⁸ Not only that, the Court set out a set of five-point judicial guidelines as interim measures until the government drafted legislation to address this issue. The Court mandated the government to constitute a permanent committee to process compensation claims to affected farmers; receive complaints from affected farmers; conduct inquiry into those complaints; and award compensation.⁷⁹

74. YOUNG, *supra* n. 21, at 155 (characterizing “managerial review” as consisting of a “heightened review of government action and a structured and/or mandatory form of relief that requires a continuing, ground level, day-to-day control”).

75. Young explains, as an example, the judicial managerialism shown by the United States Supreme Court in the aftermath of the *Brown v. Board of Education* case. *Id.* at 156–57.

76. CHAPAGAI, *supra* note 48, at 101–02. Petitioners claimed that since there were no barriers in many areas of the wildlife reserves, animals like elephants would often escape and destroy sugarcane fields of local farmers. At the time, there were no laws and policies about mitigating harms caused by escaped animals from government-controlled wildlife reserves. The government, in its written reply, argued that the writ petition should be quashed because there were no national laws and policies on this matter.

77. *Id.*

78. *Id.*

79. CHAPAGAI, *supra* note 48, at 101–02.

Another example is the 2012 case of *Sudarshan Subedi and Others*, where disability rights public interest litigation groups brought a claim for social security allowance, housing and effective implementation of existing laws. The Court issued a mandamus requiring the Government to provide sustenance allowance to be effective within three months, to designate at least one social welfare official in every district to be effective within six months and to inform the Supreme Court on the implementation status within seven months,⁸⁰ which shows the court's intent to catalyze or compel action in other branches of government when there has been little to none. What makes both of these cases managerial is also that the Court did not take the approach of progressive realization according to available governmental resources, but mandated immediate provisional action.

III. EXPLAINING THE ROBUST AND EXPERIMENTAL COURT

Among many factors that can explain the experimental role the Nepali Court, two are particularly important for purposes of understanding the realizability of socio-economic rights adjudication in Nepal. First, there is little clear-cut separation of powers principles in practice because institutions have been dysfunctional and politicized for much of Nepal's modern history, and the Court sees itself as an important actor responding to this chaotic institutional context. Second, social movements have contributed to the experimental role of the Court, which is explained later in this chapter. I will first get into the institutional dysfunction below.

A. *Dysfunctional Institutions Undermine Separation of Powers*

Dysfunction of governance institutions play a major role in shaping the Supreme Court's approach to socio-economic rights adjudication. In Nepal, there is no clear-cut separation of powers principles in practice because institutions have been dysfunctional and politicized for much of Nepal's modern history. In this context, the Court is not able to aspire for stability or consistency in its jurisprudence; rather, the Court has often adjudicated rights in an experimental way, in hopes of catalyzing or compelling actions in other branches of government in the face of executive or legislative inaction.

The constitution of 1990, written to mark Nepal's transition into democracy, was the fifth such document in just 42 years.⁸¹ Despite this democratic progress, parties were unable to institutionalize power, resulting in frequent changes in government and deep cleavages along ethnic and religious lines.⁸² A 10-year Maoist civil war ensued, explained below, that

80. *Id.* at 110-11.

81. Ganga B. Thapa & Jan Sharma, *From Insurgency to Democracy: The Challenges of Peace and Democracy-Building in Nepal*, 30(2) INT. POL. SCI. REV. 205, 208 (2009).

82. *Id.*

culminated in the Interim Constitution of 2007. Today, Nepal continues to have fragmented political parties and personality-driven political leadership.⁸³ This political legacy was the backdrop for the 2015 Constitution and delayed its implementation. For instance, just one year after the promulgation of the Constitution, a new government was formed and it was the ninth new government in just the past eight years.⁸⁴

The judicial system must be seen as part of this volatile context, what Mark Tushnet has characterized as “unstable constitutionalism” in South Asia.⁸⁵ By this, he means that there is a commitment to constitutionalism but a constant struggle to settle on a stable institutional structure.⁸⁶ Two justices of the Supreme Court of Nepal have noted that even though the “foundation for [an] independent judiciary was laid in the 1950s, a clear delineation of the judicial power was [only] made by the 1990 constitution.”⁸⁷ In this volatile context, some judges in South Asia have justified their proactive role, seeing themselves as fulfilling the social justice and socialist text and spirit of their respective constitutions in the face of institutional chaos.⁸⁸

The case of *Amrita Thapa and Others v. Office of Prime Minister and Council of Ministers and Others*,⁸⁹ brought under the 2007 Interim Constitution, is symbolic of this role conception. When this case was brought in 2008, the Maoist insurgency had ended, the monarchy had recently been abolished and Nepal had a newly promulgated Interim Constitution with many civil, political and socio-economic rights. These constitutional rights needed further legislation to come into effect. At the same time, there was a Constituent Assembly tasked with writing the Constitution, but it was moving with halting progress. In other words, Nepal was in a tense, post-conflict period of high uncertainty and residues of recent upheavals.

The claimants asked the Supreme Court to direct the government to enact laws around rights like education, health, environment, food and social security that were deemed fundamental under the Interim Constitution. The Government responded with a classic separation of powers defense: that the petition should be quashed because lawmaking was the legislature’s jurisdiction. The Supreme Court, however, sided with the claimant and is-

83. *Id.* at 216.

84. Kamal Dev Bhattarai, *Nepal’s Unending Political Instability*, THE DIPLOMAT (July 26, 2016), <https://thediplomat.com/2016/07/nepals-unending-political-instability/> [https://perma.cc/Q9GN-L27K].

85. TUSHNET, *supra* note 7.

86. *Id.*

87. Kalyan Shrestha and Dr. Anand Mohan Bhattarai, *Role of the Judiciary in the Enforcement of Economic, Social and Cultural Rights: Experience From Nepal*, in HUMAN RIGHTS AND CONFLICT 429, 431 (Inke Boerefijn et al eds., 2011).

88. Bhattarai, *supra* note 5. See also CHAPAGAI, *supra* note 48 (quoting Raju Prasad Chapagai and Others, a case about implementing the Mother’s Milk Substitute Act, “Judiciary should not refrain from intervening in such a sensitive issue merely because of levelling these provisions as a matter of public policy.”).

89. CHAPAGAI, *supra* note 48, at 113-14.

sued a directive order, stating that it was the duty of the legislature to make effective those rights deemed fundamental under the Interim Constitution, and therefore it should enact laws to give effect to the enumerated socio-economic rights. The Court noted that the slow-moving constitution-writing process could not be a pretext to avoid or cause delay in enacting laws.

This case is emblematic because it shows the willingness of the Supreme Court to exercise a strong-form judicial review. These judgments favor fundamental rights, not despite but precisely because the larger political and institutional context is volatile. In periods of high uncertainty such as these, the Court issues strong orders with the intent to catalyze or compel action in other branches of government when there has been little to none.⁹⁰

Case studies from other jurisdictions show that this type of role conception in the face of institutional chaos is not uncommon. The Colombian Constitutional Court, for example, has been an activist court in the face of poorly functioning political institutions.⁹¹ Although such a response from the Court may seem contrary to separation of powers principles, David Landau has argued that this role conception “makes sense” in its institutional context marked by executive overreach, legislative abdication and dysfunctionality.⁹² Cesar Rodriguez-Garavito and Diana Rodriguez-Franco illustrate this point through an analysis of the 2004 Judgment T-025⁹³ of the Colombian Constitutional Court concerning internally displaced people. They show that prior to this Constitutional Court intervention, there was an entrenched institutional deadlock on this issue, with a “lack of coordination between the agencies” and “inactivity on the part of state entities.”⁹⁴ In this context, the Supreme Court’s strong rights judgment — in which the Court ruled that the government’s failure to provide humanitarian and other socio-economic services to internally displaced peoples was unconstitutional and issued procedural orders to address the situation — had an “unlocking effect,” acting as a pressure to unlock the state’s intransi-

90. Interview with Hon. Anand M Bhattarai, January 15, 2019, and Hon. Kalyan Shrestha, January 17, 2019.

91. Landau, *supra* note 43, at 321. For example, in the late 1990s, responding to a mortgage crisis that threatened middle-class homeowners, the Colombian Constitutional Court has held legislative-style hearings with citizens, experts and private sector representatives to craft a “dominant” role in shaping housing policy. *Id.* at 320.

92. *Id.* at 321, 343 (“I argue that the Court’s most effective response, which has dominated its more recent work, has been legislative substitution. Here, the Court, at least at some times and on some issues, steps in and performs core legislative functions [. . .] Legislative substitution involves substantively checking the executive’s policy choices itself, rather than relying on the legislature to do so. Similarly, it involves injecting new policies into the system across a range of issues, and monitoring those policies to ensure they are implemented.”).

93. This case was an aggregation of writs of protection (*tutelas*) brought by 1150 family groups among the internally displaced population in Colombia, against several municipal and national public institutions and official. Plaintiffs claimed that the government had failed their duty of care toward internally displaced populations, and failed to provide services related to humanitarian aid, housing, healthcare and others. The Court ruled that the government’s failure to provide such services was unconstitutional and issued procedural orders to address the situation.

94. RODRÍGUEZ-GARAVITO & RODRÍGUEZ-FRANCO, *supra* note 27, at 64.

gence.⁹⁵ Such a role conception at work can also be seen in the Nepali case of *Lakshmi Dhikta*, analyzed below.

Literature on ‘transitional constitutionalism’ has similarly highlighted that periods of post-conflict transition are different and can change traditional understandings of constitutionalism.⁹⁶ In post-conflict transitional periods, courts and judges are often ushered into highly political arenas, and courts may tend to disregard principles like separation of powers to prioritize political agendas.⁹⁷ In transitional periods, traditional views about the constitution as an authority to restrain state power over individuals and that operates with a separation of powers, do not necessarily apply; rather, transitional constitutionalism is about reform, transformation or even “reconstructing social structures.”⁹⁸

B. Social Movements Lower Anti-Democratic Difficulty

The second reason why the Nepali Supreme Court is not preoccupied with deference in socio-economic rights adjudication is that several successive social movements have lessened the counter-majoritarian or anti-democratic difficulty for socio-economic rights adjudication in Nepal. The general Nepali public is not unwelcoming to the idea that basic socio-economic and equality claims can be recognized as ‘rights.’ When the legislature or executive do not effectively represent or act on these issues, it does not necessarily become anti-democratic for the judicial system to step in then.

This is an important factor because cultural understandings of what counts as harm, and what kinds of values guide a society, aids or obstructs adjudication of certain claims as ‘rights.’ As Malcolm Langford writes, it is a sociological phenomenon that “[t]he permeation of human rights ideals into a particular context is closely associated with societal repulsion at, or experience of, particular manifestations of human indignity.”⁹⁹ He points as an example to the horrors of the Second World War that helped propel the recognition of ‘rights’ in the Universal Declaration of Human Rights.¹⁰⁰

In Nepal, the general acceptance of socio-economic rights and equality claims is a result of a longstanding history of discrimination along ethnicity, religion, gender, and class lines, and a recent history of social move-

95. *Id.* at 28.

96. RUTI G. TEITEL, *Transitional Justice and the Transformation of Constitutionalism*, in GLOBALIZING TRANSITIONAL JUSTICE: CONTEMPORARY ESSAYS 181–82, 181–207 (2014).

97. See, generally, Catherine Turner, *Transitional Constitutionalism and the Case of the Arab Spring*, 64 INT’L COMP. L. Q. 267 (2015) (discussing the tension between liberalism and transitional constitutionalism); Jiunn-Rong Yeh and Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, 4 NAT’L TAIWAN U.L. REV. 145 (2009) (discussing how constitutional developments in new democracies have changed understandings of constitutionalism).

98. Yeh and Chang, *supra* note 97, at 149.

99. Langford, *supra* note 23, at 9.

100. *Id.*

ments against these forces. Historically, an upper-caste, centralized class has dominated Nepali society and politics, systematically marginalizing many indigenous, non-Hindu, non-Nepali-speaking communities.¹⁰¹ Dalits, the traditionally-called “untouchable” caste, who are often restricted to low-status occupations like sweepers and cobblers, are the poorest segments of Nepali society, owning only one percent of the national wealth.¹⁰²

At the same time, many in the country have lived under abject poverty for much of modern history, often along these marginalized ethno-religious lines. Until the 1950s, the monarchy placed the country under near-total isolation from the rest of the world, with devastating effects on human development, including a complete ban on education,¹⁰³ widespread food shortages and abject poverty. Land, the primary socio-economic resource in Nepal, was regulated under a feudalistic land tenure system until the mid-twentieth century, characterized by “state ownership, a powerful landed elite, and limited peasants’ rights.”¹⁰⁴ This monopoly over land has had a direct link to marginalized communities’ ability to access basic social and economic rights like food and housing.¹⁰⁵ Starting in the 1950s, Nepal pursued import substitution strategies that favored urban areas over the rural poor, and depressed agricultural industries that many rural poor relied on.¹⁰⁶ By the mid-1980s, 44 percent of households were landless and GDP growth stagnated to about 3 percent per annum.¹⁰⁷ The government took a liberal turn in the late 1980s, opening up markets that improved growth in the urban sectors while keeping agriculture stagnant, and further entrenching income inequality.¹⁰⁸ Unemployment rate reached 17 percent in the mid-1990s¹⁰⁹ and 62 percent of the population was living under poverty of less than \$1.90 a day in 1995.¹¹⁰ Today, about 90 percent of Dalits,

101. When Nepal lost a significant part of its territory to the British East India Company in 1816, Nepali rulers felt the need to have a strong, Hinduism-based nationalism to cement Nepali identity and exceptionalism. Not only did the founding king of the country devise a proto-constitution called the Ditya Upadesh that established Nepal as a Hindu Kingdom, the monarchy perpetuated an ethno-religious system of domination into the twentieth century. For example, the introduction of democracy in the early 1950s continued Hinduism’s dominance and the Constitution of 1962 declared Nepal as a Hindu country. See JHA, *supra* note 9, at 295; Mahendra Lawoti, *Competing Nationhood and Constitutional Instability: Representation, Regime, and Resistance in Nepal*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA (Mark Tushnet & Madhav Khosla eds., 2015).

102. Elisabeth Wickeri, *No Justice, No Peace: Conflict, Socio-Economic Rights, and the New Constitution in Nepal*, 2(2) DREXEL L. REV. 427, 442 (2010).

103. Thapa & Sharma, *supra* note 78.

104. Wickeri, *supra* note 102, at 430.

105. *Id.* at 433.

106. Kishor Sharma, *The Political Economy of Civil War in Nepal*, 34 WORLD DEV. 1237, 1241–42 (2006).

107. *Id.* at 1242.

108. *Id.* at 1242–43.

109. *Id.* at 1244.

110. *Nepal Poverty & Equity Data Portal*, The World Bank, <http://povertydata.worldbank.org/poverty/country/NPL> [https://perma.cc/WB9L-PXD6]; due to massive increase in out-migration and the resulting remittances sent home, the poverty level reduced further to 15 percent in 2010.

traditionally and derogatorily called the “untouchable” castes, still live under the poverty line.¹¹¹

This history of systematic inequality and marginalization, often along ethno-religious and gender lines, made it plausible for the general population to demand that the government address these social and economic inequalities. It is in this context that the Maoists were able to rally and organize an armed, protracted civil war. The original 40-point demand that the Maoists made before they launched their armed rebellion reflects this intersection of ethno-religious marginalization and economic deprivation: they demanded, among other issues, giving land to landless tillers, employment guarantee and unemployment compensation, minimum wage, debt relief for farmers, free healthcare and education, property rights for daughters, and ethnic autonomy.¹¹² Characterizing their armed rebellion as “agrarian,” the Maoists seized land and redistributed it among tenant farmers and landless groups, often resorting to bombings, beatings and killings.¹¹³

With this history, it then becomes unsurprising that the Interim Constitution of 2007, adopted following the Maoist insurgency, embraced socio-economic rights and equality as explicit values of the nation state.¹¹⁴ When the government signed the Comprehensive Peace Agreement with the Maoists in 2006 to signal the end of the decade-long guerilla insurgency, both parties agreed to adhere to human rights and humanitarian law, including economic and social rights under section 7.5.¹¹⁵ This Peace Agree-

111. Wickeri, *supra* note 102, at 442.

112. Om Astha Rai, *What was it all for? Revisiting the 40-point Demand of the Maoists 20 Years Later*, NEPALI TIMES (Feb. 2016), <https://archive.nepalitimes.com/article/nation/revisiting-maoist-demands,2860> [https://perma.cc/P3S5-T9PS].

113. Wickeri, *supra* note 102, at 464. Wickeri also points out that the Maoist insurgency had a detrimental impact on human rights conditions during and after the civil war. She writes, “During the conflict, numerous rights violations were perpetrated— including arbitrary killings, detentions, rapes, torture, and disappearances—on both Maoist and government sides. Socio-economic rights violations, however, were also rampant: while denial of these rights contributed to growing tensions and escalating conflict in Nepal, so too did conflict escalate rights violations. The result is that at the end of the ten-year conflict in 2006, much of Nepal’s population lived out of reach of those rights guaranteed in international covenants or domestic law.” *Id.*

114. Mara Malagodi contrasts the 2007 Interim Constitution with the 1990 Constitution: while the latter centered around the “dominant Parbatiya upper-caste Hindu males,” the latter broke with this tenor and “adopted a more inclusive approach to sociocultural diversity . . .” Malagodi, *supra* note 67, at 530. Yet, this progress in the post-conflict context might be limited in the sector of social and economic rights. Elisabeth Wickeri criticizes the transitional justice program of Nepal for privileging civil and political rights over economic, social and cultural rights. Wickeri, *supra* note 102, at 465 (“ . . . post-conflict and transitional justice programs worldwide have tended to limit themselves to civil and political rights concerns, even where ESR issues have been recognized as factors contributing to the causes of the conflict. In Nepal, this general principle holds, though in fact the [Comprehensive Peace Agreement] and subsequent documents setting the framework for post-conflict transition do include numerous references and commitments to ESR.”).

115. The Comprehensive Peace Agreement, under section 7, committed both parties to respect and protect individuals’ right to livelihood, food security, health, education, private property, among others. United Nations Peacemaker, *Comprehensive Peace Agreement between the government of Nepal and the Communist Party of Nepal*, November 22, 2016, <https://peacemaker.un.org/nepal-comprehensiveagreement2006> [https://perma.cc/TWN8-2ZSA].

ment went on to become the basis for the Interim Constitution of 2007. During the Constitution-drafting process, there were ten thematic committees formed within the Constituent Assembly, one of which was the Committee on Fundamental Rights and Directive Principles that looked at the constitutionalization of human rights.¹¹⁶ The Chairperson of this Committee stated in an interview that the determination of fundamental rights was driven by recent social movements and “suggestions from the people,” which clustered around claims about food, shelter, clothing, education, health, and security, as well as by international practice and commitments.¹¹⁷ Besides this Committee, six other committee reports contained elements of human rights, signaling widespread importance placed in constitutionalizing these norms.¹¹⁸ By this time, the Maoists had compromised on many of their more radical demands that started the protracted armed rebellion, but elements for a rights-based regime were laid.¹¹⁹

This experience is not unique to Nepal. Historically, socio-economic rights have been more likely to gain legitimacy in countries that have had social justice movements and revolutions, for example in Latin America, South Africa and India, than in countries that have had movements aimed at civil and political rights.¹²⁰ Many of the landmark human rights cases from around the world have been backed by robust social movements and civil society activism.¹²¹ Social movements shape constitutional law by, for instance, changing judges’ views about what the constitution means.¹²² The Constitutional Court in South African view their post-apartheid Constitution as a “transformative” one, aimed at redressing a racist and unequal

116. Basant Adhikari, *Constitutional Recognition of Human Rights: A Reflection on the Constituent Assembly Discourse in Nepal*, in PARTICIPATORY CONSTITUTION MAKING IN NEPAL: ISSUES OF PROCESS AND SUBSTANCE 169 (Vol. 1) (Budhi Karki and Roshan Edrisinha eds.).

117. *Interview with Binda Pandey, Chairperson, Committee on Fundamental Rights and Directive Principles*. INSEC Online, <http://inseconline.org/en/interview/binda-pandeythe-chairperson-of-the-constituent-assembly-committee-on-fundamental-rights-and-directive-principles/> [https://perma.cc/X3F2-95C3] (“We determined the fundamental rights on the basis of constitutional practices of Nepal, international practice and our commitments, continuous movements of Nepali people especially the [People’s Movement that overthrew the monarchy] and the issues established by them and on the basis of the suggestions collected from people [. . .] The suggestions brought to the committee by all the 40 suggestions-collecting- groups . . . showed that people have demanded food, shelter, clothing, education, health, security and their participation. Of the demands suggested by the people, many of them were not provisioned even in the Interim Constitution. So, the suggestions given by the people had naturally heartened us in increasing the number of fundamental rights.”).

118. Adhikari, *supra* note 116, at 169.

119. JHA, *supra* note 9, at 309-31 (explaining that the Maoists shed many of their initial demands, like parliamentary control over the judiciary, and the constitution-writing process was far from ideals of democracy and transparency, but “[t]he ambit of fundamental rights was exponentially expanded, and a rights-based regime, and welfare obligations, for the state were made binding.”).

120. Langford, *supra* note 23, at 11.

121. For example, civil society in Ghana mobilized to recognize the right to health under the Ghanaian Constitution. YOUNG, *supra* note 21, at 234.

122. Tushnet, *supra* note 28, at 35.

history.¹²³ This role conception came about in the context of a longstanding history of institutionalized racism after which the ruling political party and civil society supported the protection of equality and substantive rights, including socio-economic rights.¹²⁴ As the *Lakshmi Dhikta* case study below will show, in Nepal, too, social movements and activism have played a key role in realizing rights like poor women's access to abortion.¹²⁵

C. Emerging Issues: Economic Development

An emerging issue in Nepal, and potentially in similarly-situated post-conflict countries, is that of a counter-majoritarian or anti-democratic difficulty in cases where rights are framed to clash with economic development projects of the government.

The rights-versus-development tension can play out at two levels. First, the text of the Constitution itself reflects this tension: Article 30's right to clean environment, for example, states a limitation clause that reads, "Provided that this Article shall not be deemed to obstruct the making of required legal provisions *to strike a balance between environment and development* for the use of national development works" (italics added). Notice the mandate to "strike a balance" between environmental protection and national (economic) development. The writers of the Constitution seem self-conscious of the need to achieve socio-economic rights in a post-conflict context for one of the least developed countries in the world, hungry for economic development.¹²⁶

Second, this difficulty plays out in the policy space. The government may be balancing competing economic goals, and the Court inevitably becomes

123. See, e.g., *Rates Action Grp. v. City of Cape Town* 2004 (12) BCLR 1328 (c) (S. Afr.) ("Our Constitution provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity").

124. Sandra Liebenberg, *Adjudicating Social Rights Under a Transformative Constitution*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS 76 (Malcolm Langford ed.).

125. However, it is important to note that despite a shared history of struggle against identity-based oppression, the Nepali Constitution is not a "transformative" constitution in the way the post-apartheid constitution of South African arguably is. The Nepali Constitution was a bitter site of contestation and compromise. The period of the promulgation of the new Constitution of 2015 was met with massive protests from Madhesi ethnic communities and women's groups for still failing to sufficiently include their demands into the text of the Constitution. Prashant Jha explains that although there was unprecedented diversity and minority representation in the Constituent Assembly (CA) tasked with writing the Constitution, the Maoists and political leaders did not treat it as a historic CA, and there slowly grew cynicism and apathy among the citizens toward this CA, especially among ethno-religious minorities. JHA, *supra* note 9, at 295–313. Mahendra Lawoti explains that contemporary constitutional instability in Nepal is due to identity politics, namely its inability to create consensus around issues of inclusion of ethno-religious minorities like Madhesi and indigenous communities. Lawoti, *supra* note 101, 86–123. For comparison, see *id.* (explaining the "transformative" nature of the South African constitution). R

126. See also Byrne and Hossain, *supra* note 6, at 142 (describing the case of *Mohan Kumar Karna* where the court held that there is a statutory duty to provide free education for certain disadvantaged groups but every democratic state should be able to determine its own education policy based on its level of economic development). R

an actor guiding this balance. Katharine G. Young points out that socio-economic rights today co-exist with liberal markets and democracies, and therefore can be seen as promises to “alleviate the wrongs that a market-oriented world perpetuates.”¹²⁷ Because of this redistributive potential of socio-economic rights, it is perhaps no coincidence then that some of the most active judiciaries in socio-economic rights jurisprudence hail from fast-growing or emerging economies, like Colombia, India, and South Africa.¹²⁸ There is thus a productive tension between socio-economic rights and market-oriented liberalization and economic growth: can these rights act as safety nets or redistributive authority for those left out by rapid liberalization? How can courts balance between these competing claims?

For a smaller country like Nepal, this tension between socio-economic rights and market liberalization is likely to become acute in the near future. Nepal has liberalized its economy since the 1990s but more recently, the political leadership of the country has reinvigorated a liberalized vision of development and economic prosperity. In a post-conflict context, Nepal is keen on graduating into middle income status through market liberalization¹²⁹ but, as explained above, it also has an experimental and active judiciary that is equally keen on realizing the Constitution’s socio-economic vision. One justice of the Nepali Supreme Court is conscious of this tension, writing that “market forces,” the “upper middle class” and “national and international industrial and trade lobby” in South Asia may be adversaries for socio-economic rights adjudication in the South Asian context.¹³⁰ He points out that in cases involving “mega projects” with large investments that aim to achieve economic development, courts in South Asia have broken character and adopted a differential role, instead of the normally engaged once.¹³¹

127. YOUNG, *supra* note 21, at 234.

128. RODRÍGUEZ-GARAVITO & RODRÍGUEZ-FRANCO, *supra* note 27, at 12. For an example of how socio-economic rights claims can be framed as safety-nets for those left out of growing economic power, see India’s ‘right to food’ litigation in the context of the country’s unprecedented high economic growth. Poorvi Chitalkar & Varun Gauri, *India: Compliance with Orders on the Right to Food*, in SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 307 (Langford et. al. eds.) (“Reflecting the overall sense of optimism, a strong ‘India Shining’ narrative emerged - highlighting the rise of the middle class, enhanced economic opportunities and openness to business. Contrasted against this booming growth story, India’s widespread hunger came to be seen as an uncomfortable and untenable reality.”)

129. See, e.g., *Nepal Braces for Graduation From an LDC*, UNITED NATIONS DEV. PROGRAMME, https://www.np.undp.org/content/nepal/en/home/operations/projects/poverty_reduction/snpc/nepal-braces-for-graduation-from-an-ldc.html [https://perma.cc/SPL7-33AZ].

130. Bhattarai, *supra* note 5, at 29.

131. Bhattarai, *supra* note 5, at 2 (giving the examples of a nuclear power plant case in India, irradiated milk in Bangladesh and the power grid in Pakistan). See also Jona Razzaque, *Linking Human Rights, Development, and Environment: Experiences from Litigation in South Asia*, 18 FORDHAM ENVTL. L. REV. 587, 595–97 (2007) (explaining that the Courts in India, Pakistan and Bangladesh have been litigating economic development cases vis-à-vis human rights and environment since the 1980’s. Razzaque also describes the 2006 public interest litigation case of the Narmada dam in India, in which the Supreme Court took a deferential stance, allowing the construction of the Narmada dam despite un-

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This tension can be seen in a series of around thirty recent writ petitions filed at the Supreme Court, and exemplified by the case of *Sanu Shrestha v. Government of Nepal*, a claim brought by a resident whose land was acquired by the government for infrastructure projects. As part of its signature public infrastructure policy, the current government of Nepal is constructing major roads and highways in and around Kathmandu, the capital city of the country. Several citizens have filed writ petitions claiming that the government has not effectively compensated and taken consent of the owners of private property on which these roads are being built. Although this is primarily cases about private property rights, the Court, in giving a pro-claimant judgment in *Sanu Shrestha*, added that these cases also implicate issues around residents' right to housing, children's right to education that might be disrupted by the government's land acquisition, and citizens' right to equality.¹³² Moderating this strong rights judgments, the Court encouraged parties to seek relief via mediation and negotiations rather than through an adversarial approach.¹³³ Media coverage of these cases have criticized the Supreme Court's stance for encouraging citizens to physically obstruct road expansion projects in other areas, and for increasing the costs of these projects from U.S. \$1.4 million to U.S. \$14.3 million.¹³⁴

Thus, a primary emerging challenge to the Court is about balancing an ambitious rights mandate with the resource constraints and development priorities in one of the poorest countries in the world. While it remains to be seen how the Court will balance these demands, part of the answer will depend, as the rest of this paper shows, on the posture of other institutions of the government as well as the courts' relationships with civil society and the media.

IV. IMPLEMENTATION AND IMPACT

To what extent are the decisions of this activist Court implemented, and rights realized? What are the key explanations of compliance of social and economic rights judgments? These questions are important for several reasons. First, literature on socio-economic rights has focused mostly on theoretical debates about socio-economic rights *as rights*, with the result that the

resolved issues about rehabilitation and resettlement of displaced indigenous peoples and the environment).

132. *Sanu Shrestha v. Gov't of Nepal*, 0073-WF-0003, ¶¶ 18, 22(3).

133. *Government Told to Compensate Owners for Acquired Land*, HIMALAYAN TIMES (June 28, 2018), <https://thehimalayantimes.com/kathmandu/govt-told-to-compensate-owners-for-acquired-land/> [https://perma.cc/6WYT-UYXY].

134. See, e.g., Prithvi Man Shrestha, *Court Verdict on Nagdhunga-Kalanki Road Expansion Has Knock-On Effect on Other Projects*, KATHMANDU POST (Apr. 16, 2019), <http://kathmandupost.com.np/news/2019-04-16/court-verdict-on-nagdhunga-kalanki-road-expansion-has-knock-on-effect-on-other-projects.html> [https://perma.cc/7KUQ-YXG8]; *Supreme Court Verdict to Escalate Cost of Road Expansion Projects*, HIMALAYAN TIMES (Mar. 23, 2019), <https://thehimalayantimes.com/nepal/supreme-court-verdict-to-escalate-cost-of-road-expansion-projects/> [https://perma.cc/S23U-C6MT].

implementation of these rights remains understudied.¹³⁵ Courts and institutions, on the other hand, face practical challenges of implementing these rights; implementation of judicial decisions is a problem in the South Asian context as a whole.¹³⁶ Judges in the Nepali Supreme Court, in particular, have interests beyond the development of jurisprudence and case law - they want to better understand the enforcement of their judgments.¹³⁷ Second, low rates of compliance of remedies make socio-economic rights appear “pretentious” and call into question their status as rights.¹³⁸ This is related to the traditional criticisms leveled at these rights as being ‘qualitatively different’ from civil and political rights and therefore unenforceable, as explained above in this paper. Thus, from a theoretical as well as practical standpoint, studying the implementation of activist and experimental judgments on socio-economic rights is important.

A. Introduction to *Lakshmi Dhikta*

The case of *Lakshmi Dhikta v. Government of Nepal*, a 2009 Supreme Court judgment described as “a milestone in Nepal’s jurisprudential development”¹³⁹ for recognizing poor women’s right to access abortion, offers a window into understanding the implementation of socio-economic rights in the Nepali context. The plaintiff was a poor woman from the far-Western region of Nepal named Lakshmi, who was unable to afford an abortion when she became pregnant for the sixth time because she could not pay Rs. 1130 (approximately U.S. \$11) demanded by the government health facility.

Although this case has primarily been interpreted in popular and academic literature as a women’s rights case,¹⁴⁰ *Lakshmi Dhikta* is an apt case

135. RODRÍGUEZ-GARAVITO & RODRÍGUEZ-FRANCO, *supra* note 27, at 7–9. See also Chitalkar and Gauri, *supra* note 59, at 289 (“[T]here is as yet relatively little systematic enquiry into the effectiveness of India courts’ interventions on social and economic rights”).

136. See Byrne and Hossain, *supra* note 6, at 143.)

137. Interview with Justice Sapana Pradhan Malla and Justice Anand Mohan Bhattarai. See also Chitalkar and Gauri, *supra* note 59, at 302 (“Because non-compliance is costly to courts, they employ tactics to increase the likelihood of their decisions being obeyed”).

138. Katharine G. Young, *Waiting for Rights*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 656 (2019).

139. Melissa Upreti, *Towards a Transformative Equality in Nepal: the Lakshmi Dhikta Decision*, in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE 299, 279–300 (Rebecca J. Cook et. al. eds., 2014).

140. For example, the judgment relies heavily on Article 20 of the Interim Constitution, the section on women’s rights and mentions several civil and political rights. Its remedies have been praised for following CEDAW’s recommendations. *Id.* For a comparative study of reproductive rights cases from different jurisdictions, see Luisa Cabal & Suzannah Phillips, *Reproductive Rights Litigation: From Recognition to Transformation*, in SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK, 399–435 (Malcolm Langford et. al. eds.). A more recent case from 2018 concerning women’s reproductive rights brought under Article 38 of the current Constitution is that of *Shanti Balampaki*. See *Shanti Balampaki v. Gov’t of Nepal*, 072-WO-0484 (on file with author). The petitioner, a woman employee of a District Health Office with an infant of less than two years old, was transferred by the government without request or consent to another District. The Supreme Court ruled that state organs cannot transfer female employees with infant children without her consent, and the bulk of their

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study of socio-economic rights implementation for several reasons. First, *Lakshmi Dhikta* was about poor women's accessibility to and affordability of abortion services and as such, foregrounds socio-economic status as it intersects with gender. A 2002 amendment to Nepal's national abortion laws had already created partial liberalization to abortion, and the Interim Constitution in force at that time had recognized reproductive rights and women's rights as fundamental rights.¹⁴¹ Yet, these services were not accessible and realizable for poor and rural women in Nepal because of their socio-economic status. The goal of civil society in bringing forth this case was to "ensure that abortion services are available to all women, irrespective of their socioeconomic status . . .," thus showing that civil society members framed this litigation as a social and economic rights case as well as a gender equality case.¹⁴² The Supreme Court also recognized this social and economic aspect of abortion, writing: "The right to abortion can be realized only if it is accessible and affordable."¹⁴³

Second, this case changes the abortion demand from not being just negative duties but positive duties to create a new abortion bill, increase access of poor women to abortion, raise awareness and so forth. This feature is key to understand the implementation capacity of social and economic rights.

Third, the motivation of civil society in bringing this case was to highlight the importance of implementation of laws. Law reform (for example introducing amendments to existing laws) was hardly enough: women needed "clear and adequate frameworks for service provision and funding."¹⁴⁴ The Supreme Court agreed, writing: "The purpose of creating guarantees of equality, freedom, justice and other fundamental rights in the constitution and legislation is not merely declaratory and people must be able to benefit from them in practice." (pg. 9) This sensitivity toward practical realizability, both in the way the case was litigated as well as the opinion of the court, makes this a useful case study for our purposes.

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B. Impact of the Judgment

Following *Lakshmi Dhikta*, there has been substantial improvement in abortion services in Nepal, but the recognition of abortion rights has been

reasoning was that the State has undertaken obligations to respect the right of women to be a mother and to respect her role in reproduction as a social function. The Ministry of Health, in its written reply as Respondent, unsuccessfully argued that government health workers' primary duty is public service and therefore their personal interests are subservient to that of the larger public interest.

141. Upreti, *supra* note 139.

142. Upreti, *supra* note 139, at 284.

143. *Lakshmi Dhikta Case Summary and Translated Excerpts*, CENTER FOR REPRODUCTIVE RIGHTS, <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Lakshmi%20Dhikta%20-%20English%20translation.pdf> [https://perma.cc/AM3G-DBP4] ("Abortion is a health concern; the right to health has been guaranteed as a fundamental right and should be regarded as a survival right.").

144. Melissa Upreti, *Abortion Law Reform in Nepal*, 126 INT'L J. OF GYNECOLOGY & OBSTETRICS 193 (2014).

more successful than their realization in practice, resembling a classical gap between ‘law in books,’ and ‘law in action.’ This section will explain that whereas the impact of *Lakshmi Dhikta* has been substantial for jurisprudence and law reform efforts, it has been modestly successful for the material realization of abortion services for poor and rural women. This modest success should not be taken to mean that there is little role for the Court to play in realizing socio-economic rights, as the rest of the chapter will further explain.

The judgment is a prototypical example of the robust and experimental approach of the Court, explained in Part II of the paper. The Court declares strong rights and moderate remedies: it makes justiciable women’s rights, under article 20, and right to health, under article 16, and links these rights to the rights to privacy, non-discrimination and others. It also cites to international standards for women’s reproductive health and used human rights language. On remedies, it states that abortion cannot be a criminal offense so it mandates the legislature to form new legislation on abortion¹⁴⁵; it states that a woman should be compensated if she is forced to carry on a pregnancy to term due to unavailability or inaccessibility of abortion services (13); it requires the government to increase the number of licensed service providers and medical institutions; ensure equitable distribution of services across the country; establish appropriate standards for service fees and provide free services when appropriate, and monitor the quality of services provided.¹⁴⁶

Lakshmi Dhikta has had substantial impact on law reform efforts. In 2018, almost a decade after the judgment, the government enacted the Right to Safe Motherhood and Reproductive Health Act (“Act”) that follows the Court orders to completely decriminalize abortion and explicitly recognizes women’s right to reproductive health. The Act also codifies many of the other remedies explicated in *Lakshmi Dhikta*, including providing governmental funds to cover abortion costs and free abortion services when appropriate. One of *Lakshmi Dhikta*’s impact on jurisprudence is the linkage of civil and political rights with social and economic rights. It cites to both women’s rights as well as the right to health,¹⁴⁷ and links reproductive rights to other rights like privacy and non-discrimination,¹⁴⁸ strengthening the interlinkages of these rights.

The material impact on women’s reproductive health is harder to trace to *Lakshmi Dhikta*, particularly because of the lengthy time lag between the

145. *Lakshmi Dhikta Case Summary*, *supra* note 143, at 12–13 (“It is objectionable and extremely unsuitable to keep the provision on abortion . . . within a harsh and rigid criminal law framework currently done in the Chapter on Life. As such, it is necessary to introduce comprehensive and special piece of legislation to address the issue.”).

146. Upreti, *supra* note 139, at 297.

147. *Lakshmi Dhikta Case Summary*, *supra* note 143 (“Abortion is a health concern; the right to health has been guaranteed as a fundamental right and should be regarded as a survival right.”).

148. *Id.*

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decision and positive steps taken by the government toward implementation of abortion rights. The government started providing abortion services free of cost since the enactment of the Safe Abortion Services Guidelines in 2016,¹⁴⁹ a full seven years after the *Lakshmi Dhikta* decision. Safe abortion services are now present in all 75 districts of Nepal with over 2,000 trained providers, more than fifteen years after partial legalization and ten years after *Lakshmi Dhikta*.¹⁵⁰

However, there are still practical barriers that hinder full realization of abortion services. A recent government report about abortion writ large revealed that the number of women receiving safe abortion services has increased in the period 2017–2018, but that this number is still less than one-third of the total estimated abortion that occurred in Nepal in 2014.¹⁵¹ An NGO report about abortion services from 2019 revealed that although awareness about the legalization of abortion has increased, the awareness levels were still low among uneducated women in rural areas.¹⁵² The report also stressed that although abortion services are made available free of cost, abortion services remain unrealized due to other practical factors. These factors include the cost of travel to and from health facilities, an inability or unwillingness to take time away from responsibilities at home and at work, and social factors like stigmatization of abortion, especially for young and unmarried women.¹⁵³ In its periodic review of Nepal in 2014, the Committee on Economic, Social and Cultural Rights noted with concern that approximately 5 percent of maternal deaths are still cause by unsafe abortion or antepartum hemorrhage, and recommended the government to increase awareness about the legalization of abortion.¹⁵⁴ More recently, a popular national daily has criticized the slow implementation by government agencies responsible for the Right to Safe Motherhood and Reproductive Health Act that followed *Lakshmi Dhikta*.¹⁵⁵

Thus, the impact of *Lakshmi Dhikta* has been substantial for law reform and for human rights jurisprudence in Nepal, and modestly successful for practical and material realization of abortion rights. Its biggest impact was the enactment of the Safe Motherhood and Reproductive Health Act in 2018, that codifies many of the remedies handed down by the Court, al-

149. BEYOND BEIJING COMMITTEE, IDENTIFYING BARRIERS TO ACCESSIBILITY AND AVAILABILITY OF SAFE ABORTION SERVICES AMONG YOUNG WOMEN IN MAKWANPUR (2019).

150. Wan-Ju Wu et. al., *Abortion Care in Nepal, 15 Years After Legalization: Gaps in Equity, Equity, Access and Quality*, 19(1) HEALTH HUM. RTS. 221, 222 (2017).

151. BEYOND BEIJING COMMITTEE, *supra* note 149, at 2.

152. *Id.* at 2.

153. *Id.* at 3.

154. Concluding Observations of the Committee on Economic, Social and Cultural Rights, OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/NPL/CO/3&Lang=en [https://perma.cc/L8UF-WCWU].

155. *Women Still Unable to Enjoy Reproductive Health Rights*, HIMALAYAN TIMES (Dec. 22, 2018), <https://thehimalayantimes.com/kathmandu/women-still-unable-to-enjoy-reproductive-health-rights/> [https://perma.cc/SWA9-2XKS].

though the practical realization of abortion still remains a challenge. The next section will explain these after-effects of *Lakshmi Dhikta*, focusing on how separation of powers concerns were minimized for this case and continued lobbying efforts of the civil society sustained momentum for implementation.

V. EXPLAINING IMPLEMENTATION AND IMPACT

A. *Minimizing Separation of Powers Concerns Through Strategic Timing*

Separation of powers concerns were minimized in this case because the elected branches of the government had been incrementally working on abortion. The *Lakshmi Dhikta* decision was enforceable partly because it came at a strategic time in 2009 when the elected branches of government had started liberalizing access to abortion, although barriers remained. The Court's strong rights and robust remedies therefore was not received as an unjustifiable expansion of the role of Courts; rather, it was able to be used as a tool to unlock legislative and bureaucratic impasse by lawyers and activists.

At the time of the decision, various parts of the government had incrementally started liberalizing abortion and reproductive health policy since the 1990s. In 1997, the Ministry of Health launched the "Safe Motherhood Initiative" in partnership with the World Health Organization that focused on improving the health of mothers and newborns, and developed guidelines for maternal health care service providers.¹⁵⁶ Although abortion was not a focus at this time, the Ministry's work in this area enabled the recognition that maternal mortality, which was a high-priority policy issue, is linked to the issue of lack of access to abortion and it enabled a work plan dedicated to creating policy on this issue.¹⁵⁷ The government launched an "Abortion Task Force" with public and private stakeholders to study abortion policies which remained in existence until 2004.¹⁵⁸ As a response to this work and women's rights advocacy efforts, the government amended the criminal abortion ban to permit some exceptions in 2002 and introduced the Gender Equality Act in 2006 that amended other discriminatory laws in the Country Code.¹⁵⁹ The Interim Constitution of 2007, which recognized reproductive rights as fundamental rights in addition to other social and economic rights like the right to health, provided further ammunition to this momentum.

However, there was still legislative and bureaucratic impasse in this area, hindering women's actual access to legal and safe abortion. Despite gains,

156. Shyam Thapa, *Abortion Law in Nepal: The Road to Reform*, 12 REPROD. HEALTH MATTERS 85, 87 (2004).

157. *Id.* at 87.

158. Wu et. al., *supra* note 150, at 222.

159. Upreti, *supra* note 139, at 284–86.

there were limited efforts at increasing equal access to abortion services for poor and rural women.¹⁶⁰ A detailed government report in 2006 revealed that the cost of abortion in public hospitals, concentration of services in urban areas, and a lack of awareness about abortion services were some of the biggest remaining hurdles for women.¹⁶¹ At the time, an estimated 50 percent of all maternal deaths were due to unsafe abortion.¹⁶² Moreover, the country's abortion law was still written under the chapter on "Homicide" in the Country Code, attesting to the modest gain made by the 2002 amendment. The litigators of this case, who were prominent Public Interest Litigation NGOs in Nepal and an international NGO working on women's reproductive rights, viewed the Court has a strategic route because abortion rights had gained some incremental grounds, but had not yet been realized for the rural poor and not yet fully decriminalized.¹⁶³

One of the Supreme Court judges presiding over the *Lakshmi Dhikta* case expressed that when writing his judgments, the choice of remedy partly depends on whether those remedies can catalyze administrative structures already in place that might be stuck.¹⁶⁴ To bolster the implementation of the judgment, this case was handed over to the Enforcement Directorate of the Supreme Court, a body that monitors high-priority public interest litigation cases and coordinates between the Court and the elected branches of the government. The Enforcement Directorate sent and received at least six letters of correspondence to the Ministry of Health and other agencies of the government following the *Lakshmi Dhikta* decision,¹⁶⁵ thereby adding some additional pressure to implement the decision.

Because the momentum gained by the government ahead of the Court's judgment mattered, it is also not a surprise that compliance with specific forms of remedies also reflects the issue areas on which the government had already gained momentum. Among the myriad of robust remedies that the Court mandated, the Act addresses safeguards for women's privacy (section 4, 19), establishing a government fund across the country (section 22) and delivery of free services where appropriate (section 32). However, the issue of compensation for women forced to carry her pregnancy to term was not taken up in the implementation phase, neither by the Court, nor in the 2018 Act. The Act provides for compensation by perpetrators of forceful abortion and sex selective abortion (article 27), but does not include compensation for women who are forced to carry her pregnancy to term due to

160. *Id.* at 285.

161. *Id.* at 285.

162. *Id.* at 283. (ascribing this issue to, for example, oral ingestion of herbs and insertion of objects such as sticks).

163. *Id.* at 282–83.

164. Interview with Hon. Kalyan Sriman, January 17, 2019.

165. Internal records of the Enforcement Directorate of the Supreme Court of Nepal, on file with author. These letters acted as monitoring tools, requesting the Ministry of Health and other agencies for updates on the implementation of the judgment. It is worth nothing, however, that correspondence through letters was extremely slow, with the Court not receiving replies for months on end.

unavailability of abortion services, as per the Supreme Court's judgment. In letters sent to ministries to monitor compliance with this judgment, the Enforcement Directorate of the Supreme Court mentioned privacy, dissemination of information, and the creation of a new abortion law, but none of the letters mentioned compensation as one of the forms of remedies that need to be complied with.¹⁶⁶ Similarly, after the judgment, the civil society felt less prepared to lobby for the implementation of a compensation structure for women forced to carry a pregnancy to term.¹⁶⁷ It might be that implementation of compensation for women forced to carry her pregnancy to term was not taken up as a priority in the implementation phase precisely because civil society felt ill-equipped to lobby on this front.

B. Decreasing Anti-Democratic Difficulty Through Civil Society Activism

Among many factors that can explain implementation, the civil society, including public interest lawyers using the PIL system, women's rights advocates and activist, as well as the media, had an important role to play to increase awareness about abortion and lobby for the implementation of *Lakshmi Dhikta*. The civil society has an important role to play to decrease the anti-democratic and anti-majoritarian difficulty of adjudicating social and economic rights. Before the judgment, civil society and the medical profession were instrumental in collecting data and making explicit the link between maternal mortality and abortion services. For example, civil society created a "Safe Motherhood Network" in the late 1990s that involved both NGOs and the government and started organizing several efforts to educate legislators on abortion and reproductive rights issues.¹⁶⁸ Civil society organizations like the Forum for Women, Law and Development (co-petitioners in this case) and ProPublic built robust PIL practice around gender equality.¹⁶⁹

After the judgment, the Forum for Women, Law and Development and the Center for Reproductive Rights formed a working group to lobby the implementation of the decision. Other advocates and activists formed their own working groups that used mass media to disseminate information about the legal status of and access to abortion.¹⁷⁰ These working groups

166. Internal records of the Enforcement Directorate of the Supreme Court of Nepal, on file with author.

167. Interview with representative of an NGO involved in the implementation of abortion services, September 29, 2019. Interview given on condition of anonymity.

168. Thapa, *supra* note 156, at 87–89.

169. For an overview of gender equality cases litigated as public international law in Nepal, *see* Malagodi, *supra* note 67. Forum for Women, Law and Development is a non-profit human rights organization that uses legal tools and Public Interest Litigation to eradicate discriminatory laws, particularly with regards to women's rights. ProPublica is a non-profit organization that focuses on government accountability through public interest litigation, advocacy and media campaigns.

170. *Supra* note 167, interview with representative of an NGO involved in the implementation of abortion services, who partnered with the government to disseminate information about abortion through radio.

included key players within the government, like the National Women's Commission. Forming working groups that included government representatives was a strategic decision, as civil society could then nudge government representatives to act.

A former member of a working group recalls her role as that of a "bridge" between the needs of women and the posture of government agencies like the Ministry of Health.¹⁷¹ She expressed that representatives of the Ministries would often feel like the Court exposed their weaknesses in implementation and cancelled meetings, so the civil society sometimes provided positive reinforcement and gentle nudging. There was also a high degree of coordination between various advocates and activists from human rights, women's rights, and public health sectors, which helped bring progress to the implementation of this case.¹⁷² Civil society groups complemented the work of the government by, for example, submitting a draft abortion and reproductive rights bill to the Ministry of Health in 2014. The media, again, played a crucial role by foregrounding this issue in popular discourse.

C. Importance of International Stakeholders for Budget and Momentum

The international donor community has a meaningful role to play for the budgetary realization of social and economic rights in developing countries, particular poor and post-conflict countries like Nepal. A primary reason why there was an impasse in the liberalization of abortion in Nepal in the early 2000s was the Global Gag Rule, reinstated in 2001 (and again, more recently in 2017).¹⁷³ This American policy denies U.S. foreign aid to NGOs and government agencies that advocate, counsel on, or provide referrals for abortion.¹⁷⁴ After the 2002 criminal abortion law was amended to provide for exceptions, the government was relying heavily on NGOs to provide and implement abortion services. However, due to the existence of the

171. The representative stated that the government at times felt like there was 'too much pressure' to work on this issue, and at times would call off meetings, at which point the civil society needed to step in to provide positive reinforcement and additional nudging.

172. *Supra* note 167, interview with representative of an NGO involved in the implementation of abortion services.

173. Dina Bogecho and Melissa Upreti, *The Global Gag Rule: An Antithesis to the Rights-Based Approach to Health*, 1 HEALTH AND HUM. RTS. 17–32 (2006). ("USAID [the American donor agency] has been a major supporter of family planning programs in Nepal for over three decades, partnering with prominent NGOs such as the Family Planning Association of Nepal (FPAN) to provide comprehensive reproductive health services to women across the country through a network of local clinics. Following the reinstatement of the Gag Rule by the Bush administration in 2001, FPAN's programs suffered major setbacks when it refused to accept the restrictions that were imposed. 30 Clinics were closed overnight, leading to an abrupt termination of critical reproductive health services to thousands of needy women. Furthermore, in 2001, the country was in the midst of an abortion law reform movement [. . .] When President Bush reimposed the Gag Rule in 2001, advocates in Nepal were in the midst of their struggle. Within months, FPAN lost \$100,000 in funds and \$400,000 worth of contraceptive supplies in addition to being forced to close a number of rural health clinics and lay off workers.")

174. Wu et. al., *supra* note 150, at 227.

Global Gag Rule, many key NGOs had to either stop their work in the abortions sector or lose significant funding, thereby curtailing the gains made thus far.¹⁷⁵ Dina Bogecho and Melissa Upreti write that, “[w]hen President Bush reimposed the Gag Rule in 2001, advocates in Nepal were in the midst of their struggle. Within months, FPAN [a prominent NGO that provided abortion services] lost \$100,000 in funds and \$400,000 worth of contraceptive supplies in addition to being forced to close a number of rural health clinics and lay off workers.”¹⁷⁶ A former member of a working group that collaborated with the government for implementation of the *Lakshmi Dhikta* decision recalls the Global Gag Rule as one important factor that delayed the expansion and implementation of service after the Court’s judgments.¹⁷⁷

At the same time, global momentum on reproductive rights and abortion, and international support for public interest litigation had a significant role to play in bolstering abortions claims domestically.¹⁷⁸ Although abortion was initially placed in the global agenda in the 1950s and 1960s because it intersected with population control, by the 1990s reproductive rights advocates merged abortion with international human rights law.¹⁷⁹ The 1994 International Conference on Population and Development (ICPD), for example, helped cement reproductive rights as human rights.¹⁸⁰

Riding this international wave, Nepal was a co-signatory to the 1994 ICPD and the 1995 Beijing Conference on Women, both of which provided “international impetus and greater legitimacy” to movements for women’s rights and reproductive rights in Nepal.¹⁸¹ The Center for Reproductive Rights, an international non-governmental organization that works to advance reproductive rights as fundamental human rights, joined the *Lakshmi Dhikta* case as co-petitioners. The Court’s judgment itself is aware of these international gains, writing that women’s lack of access to abortion in Ne-

175. *Supra* note 134, at 227. Note that the social movements that have lent legitimacy to an ambitious constitution and an engaged and experimental Court are primarily political and popular movements, such as pro-democracy movements, the Maoist civil war, and the identity-based Madhesi movements, not necessarily the activism of the NGO sector. NGOs who receive foreign aid may intersect with such movements, but are not constitutive of them. However, international financial and non-financial support for domestic enforcement of these rights through NGOs do have a significant role to play, which this section explains.

176. *Supra* note 172, 22–24

177. *Supra* note 167, interview with representative of an NGO involved in the implementation of abortion services. The representative noted that many NGOs switched from USAID (the American donor agency) to DFID (the donor agency of the United Kingdom) to circumvent budgetary constraints.

178. See Frank W. Munger, Scott L. Cummings and Louise G. Trubek, *Mobilizing Law for Justice in Asia: A Comparative Approach*, 31 *Wis. INT’L L.J.* 353, 402–06 (2013) (providing a broad overview of U.S. foreign policy toward rule of law and human rights in the global south).

179. Rachel Rebouche, *When Rights Return: Feminist Advocacy for Women’s Reproductive Rights and against Sex-Selective Abortion*, in *GOVERNANCE FEMINISM: AN INTRODUCTION*, 205–10 (Janet Halley et. al., eds.).

180. *Id.* at 206.

181. Thapa, *supra* note 156, at 87.

pal was inappropriate and unusual,” compared to “international norms.”¹⁸² The Court’s decision has also been praised by subsequent commentary by the petitioners of the case for being consistent with General Recommendation 24 of the CEDAW Committee, which incorporates international human rights laws. Considering that the international community thus has a crucial role to play for realizing socio-economic rights in these various ways, the focus should also move toward international actors’ responsibility and obligations, to understand how to make socio-economic rights practically realizable in the grassroots. I return briefly to this point in the Conclusion section below.

CONCLUSION

This paper has illuminated that in a post-conflict context and with an ambitious new Constitution, the Supreme Court of Nepal has potential to become an important actor in realizing socio-economic rights, if there is alignment with different institutions and the civil society. Part I and II showed that Nepal’s recent experience of constitution-making and adjudication adds to emerging literature from developing countries that answer traditional criticisms leveled at social and economic rights for bring qualitatively different from civil and political rights. However, Part III showed that this is not simply due to Court-focused factors like jurisprudence or even the text of the new Constitution, but due to the chaotic institutional context of a post-conflict country that lowers separation of powers concerns and recent social movements and civil society activism around social and economic issues that lower anti-democratic and anti-majoritarian concerns.

Part IV highlighted that the implementation record of such a robust and experimental Court is far from excellent, but not insignificant. Because the Court relies on social movements and alignment with other government institutions for judicial legitimacy and impact, a downside to such a role conception is that the Court cannot guarantee that institutions of the elected branches and civil society that brought the suit have enough capacity to support the implementation of its judgments. Thus, the Court is at a risk of their judgments not being enforced to a sufficient degree. Nevertheless, as the case study of *Lakshmi Dhikta* showed in Part V, if the Court is in alignment with civil society and other elected branches of the government, important social and economic rights like poor women’s access to abortion, can achieve commendable implementation and impact.

What are the implications for future adjudication of social and economic rights? From the Court’s side, increasing alignment with elected branches and with civil society could be achieved by introducing institutional reforms like bolstering the capacity of its Enforcement Directorate. With ap-

182. *Lakshmi Dhikta Case Summary*, *supra* note 143.

appropriate levels of resources and authority, the Enforcement Directorate could consistently share information and collaborate with other elected branches of the government as well as with civil society, and play a watchdog or monitoring function for the implementation of fundamental rights cases. Another institutional innovation could be to increase communication and collaboration with human rights constitutional bodies such as the National Human Rights Commission, which investigates and monitors human rights abuses and can recommend legal action against violations. Increasing information, collaboration and monitoring with various actors in these ways would ensure that the Court remains attuned to social movements and the public sentiment such that its decisions have higher chances of being implemented to a sufficient degree. Similarly, granting certiorari for more public interest litigation (“PIL”) suits with elements of social and economic rights would utilize the Court’s potential. At the time of writing these lines, five out of the nine PIL suits resolved by the court under the new Constitution related to social and economic rights,¹⁸³ signaling a healthy interest from the Court.

From the civil society’s side, PIL lawyers should capitalize on the Court’s posture as a robust, experimental and engaged role by bringing high-quality and well-researched suits. Part of the challenge for civil society will be to make strategic decisions about what social and economic rights have most democratic legitimacy in social movements and political support in the elected branches of the government. An emerging challenge is adjudicating social and economic and other fundamental rights in economic development projects, where the alliance between the Court, civil society and other branches of government (not to mention the private sector) is dubious. Effectively framing social and economic rights as necessary to alleviate those left out by economic development might prove important for PIL lawyers.

Finally, the power of the international and foreign communities for the realization of rights is not insignificant. As shown by the case study of *Lakshmi Dhibikta*, the international donor community and the global civil society have an instrumental role to play, by creating a global momentum for certain rights claims and providing necessary budget to implement these rights. In its General Comment no. 3, the Committee on Economic, Social and Cultural Rights has stated that under the International Covenant on ESCR, the obligation for state parties to take steps “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State *and those available from the*

183. Internal Court records, on file with author. Note that the five out of nine PIL cases that have elements of social and economic rights include cases about river pollution, preventative measures for dengue disease and price for treatment, amendment to the Customs Act, environmental and cultural heritage degradation, and amendments to the Caste Based Discrimination and Untouchability Act.

international community through international cooperation and assistance”¹⁸⁴ (italics added). Scholars have elaborated on the issue of the international community’s role in realizing socio-economic rights, particularly with regards to obligations for developed states to provide development assistance for ESCRs and the role of non-state transnational actors like international finance institutions and transnational corporations extra-territorially.¹⁸⁵ Going beyond development assistance, another key way in which international actors can play meaningful roles is through the transmutation of jurisprudence, legal frameworks, and best practices from other regional jurisdictions (South Asia, for the case of Nepal). Encouraging such transnational learning by, for example, studying overlooked jurisdictions of the world, such as Nepal, would be a positive step in understanding the realizability of rights. This important question - the practical realizability of socio-economic rights - is not simply a question of one small and least developed country’s internal politics and law, but a question of studying regional and, certainly, the global community’s role conception and sense of responsibility to realize the ‘second generation’ of human rights.

184. Comm. on Econ., Soc. and Cultural Rts., General Comment 3, The nature of States Parties’ Obligations (Fifth Session, 1990), ¶ 13, U.N. Doc. E/1991/23, annex III at 86 (1991), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6, at 14 (2003), <http://hrlibrary.umn.edu/gencomm/epcomm3.htm> [https://perma.cc/VHM5-B553].

185. See e.g., Magdalena Sepúlveda, *Obligations of “International Assistance and Cooperation” in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 24 NETH. Q. OF HUM. RTS. 271–303 (2006) (tracing the interpretation of obligations of international assistance given by the Committee on Economic, Social and Cultural Rights and distinguishing the obligations for developed states versus developing ones); Wouter Vanenhole, *Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?*, 17 INT’L J. CHILD. RTS. 23–63 (2009) (arguing that while there is no international legal obligation to provide development assistance in general, obligations to respect and protect ESCRs in third countries do apply); Smita Narula, *The Right to Food: Holding Global Actors Accountable under International Law*, 44 COLUM. J. TRANSNAT’L L. 691 (2006) (explaining the impact of international finance institutions and transnational corporations on the right to food and arguing that state parties to ICESCR must respect ESCRs extraterritorially).