Social Rights and Transformative Courts in the Global South

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ABSTRACT

This thesis develops an account of how courts should contribute to fulfilling constitutionalized social and economic rights. Pursuing an internal legal perspective, the thesis takes up developments in South Africa, Colombia, and India. It charts different paths by which courts have attempted to realize social rights' ambitious promises of accessible healthcare, housing, food, water and education. More specifically, the project focusses on constitutional remedies and reforms to private law as distinctive sites of judicial contribution. Drawing on the aspirations of transformative constitutionalism and the law and political economy movement, the thesis then proposes a few general orientations for the judicial role.

The account that emerges underscores the value of two markedly different modes of judicial intervention. First, with regards to constitutional remedies, the thesis centers the courts' role in lending institutional support to underperforming state actors, and to building rights-respecting capacity. The thesis argues that structural and individual remedies can be fruitfully deployed to improve the implementation and coordination of public programs, to foster informed and evolving public policy, and to promote rights-conscious decision-making. Second, the thesis defends the gradual work of integrating social rights into the areas of law that shape a community's economic life. This process of normative integration can reshape private law's values and its modes of reasoning by surfacing questions of power, poverty, and inequality. Doing so holds out the promise of catalyzing change across a wide field, but it depends on rejecting the sharp public-private divide that remains deeply rooted in many legal cultures. These two paths mobilize different political ideologies – one more process-oriented, the other more substantive – but they may both represent judicial responses to weak state capacity.

Comparing the dynamics of judicial interventions across these two fields also underscores the strains inherent in the transformative project. "Transformation" occurs across different dimensions – including distinct sites, impacts, and political visions – and these dimensions can be in tension. The thesis thus gestures towards the need to conceive of courts as something other than as guarantors of constitutional norms.

RÉSUMÉ

Cette thèse développe une approche par laquelle les tribunaux peuvent mieux contribuer à la réalisation des droits sociaux et économiques constitutionnalisés. Adoptant une perspective juridique interne, la thèse aborde des développements en Afrique du Sud, en Colombie et en Inde. Elle trace différentes voies par lesquelles les tribunaux ont tenté de réaliser les promesses ambitieuses des droits sociaux en matière d'accès aux soins de santé, au logement, à la nourriture, à l'eau et à l'éducation. Plus précisément, le projet se concentre sur les remèdes constitutionnels et les réformes du droit privé. S'inspirant du « constitutionnalisme transformateur » et du mouvement de « droit et économie politique », la thèse propose ensuite quelques orientations générales pour le rôle des tribunaux.

La thèse souligne la valeur de deux modes d'intervention judiciaire nettement différents. Premièrement, en ce qui concerne les remèdes constitutionnels, la thèse élabore le rôle des tribunaux dans le soutien institutionnel des acteurs étatiques peu performants et dans le renforcement des capacités de l'état. La thèse maintient que les remèdes structurels et individuels peuvent être profitablement déployés pour améliorer la mise en œuvre des programmes sociaux, pour favoriser une politique publique informée et évolutive, et pour promouvoir des processus décisionnels plus conscients des droits de la personne. Deuxièmement, la thèse défend le travail graduel d'intégrer les droits sociaux dans les domaines du droit qui façonnent la vie économique. Ce processus d'intégration normative peut transformer les valeurs du droit privé et ses modes de raisonnement en mettant l'accent sur les questions de pouvoir, de pauvreté, et d'inégalité. Par conséquent, l'intégration normative peut catalyser des changements à travers un vaste domaine. Pourtant, cela dépend du rejet de la division public-privé qui reste profondément enracinée dans de nombreuses cultures juridiques.

La comparaison de ces deux styles d'interventions judiciaires souligne les tensions inhérentes au projet de transformation. La « transformation » se produit à travers différentes dimensions — y compris des endroits, des visions politiques et des impacts distincts — et ces dimensions peuvent être en tension. Ainsi, cette thèse affirme l'importance de concevoir les tribunaux autrement que comme des garants des normes constitutionnelles.

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PREFACE

The author confirms that the present thesis represents a work of original scholarship. With knowledge and consent of supervisor and committee, an adapted version of Chapter 5 was published as "Social Rights and Transformative Private Law" (2023) 60:2 OHLJ 373.

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Introduction

I. The Judicial Contribution to Realizing Social Rights

This project develops an account of how courts should contribute to fulfilling constitutionalized social and economic rights. The project's task is partly empirical. I consider the different paths by which courts have sought to realize constitutional promises of accessible healthcare, housing, food, water, and education. Each path is characterized by a different set of internal dynamics, challenges, and implications for the judicial role. The project's task is also normative. I assess the value of different kinds of interventions, and ultimately propose a few general orientations for the judicial role. The resulting account centers the courts' role in lending institutional support to underperforming state actors, in building rights-respecting capacity, and in driving a deep review of the private law rules that shape market activity.

The academic literature on social rights currently finds itself at a crossroads. From one vantage point, the field has never been more promising. While constitutionalized rights to housing, healthcare, food, water or social security were once stridently criticized,[1] a majority of the world's constitutions now expressly recognize at least a few social rights – and roughly a

[1] Frank Cross, "The Error of Positive Rights" (2003) 48:3 UCLA L Rev 857; Joel Bakan, "What's Wrong with Social Rights?" in Joel Bakan & David Schneiderman, eds, *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 85; for a summary of early criticisms on justiciability, see Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012) at 111–116; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at 93–96.

quarter recognize ten or more.[2] Over the last thirty years, their perceived novelty has worn off. The older justiciability debate has been tentatively settled in both courtrooms and in academic circles.[3] Respected courts have become familiar with different approaches for fulfilling these rights.[4] Meanwhile, social rights have earned broad (if cautious) scholarly support, and rich waves of scholarship have debated how these rights should be enforced.[5] Social rights have also been positioned as a pillar of "transformative constitutionalism",[6] and an important, distinctive contribution in the study of constitutionalism in the Global South.[7]

However, recent scholarship also registers a pervasive sense of dissatisfaction. Social rights' focus on extreme need is thought to neglect increasing levels of inequality.[8] These rights

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[2] Ran Hirschl, Courtney Jung & Evan Rosevear, "Economic and Social Rights in National Constitutions" (2015) 623:4 Am J of Comp L 1043; Mila Versteeg & Emily Zackin, "American Constitutional Exceptionalism Revisited" (2014) 81 U Chi L Rev 1641 at 1681–1682.

[3] David Vitale, "Political Trust as the Basis for a Social Rights Enforcement Framework" (2018) 44:1 Queen's LJ 177 at 179–180.

[4] See eg Daniel Bonilla Maldonado, "Introduction" in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Colombia* (Cambridge: Cambridge University Press, 2013) 1; Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, "Introduction: From Jurisprudence to Compliance" in Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, eds, *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge: Cambridge University Press, 2017) 3.

[5] See notably Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008); Rosalind Dixon, "Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited" (2007) 5:3 Int'l J Con L 391; Alana Klein, "Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights" (2008) 39 Colum Hum Rts L Rev 351; Katharine G Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012); César Rodríguez-Garavito & Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge: Cambridge University Press, 2015); Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supranational and National Law* (Cambridge: Cambridge University Press, 2021).

[6] Heinz Klug, "Transformative Constitutionalism as a Model for Africa?" in Philipp Dann, Michael Riegner & Maxim Bönnemann, eds, *The Global South and Comparative Constitutional Law* (Oxford: Oxford University Press, 2020) 141 at 146.

[7] Philipp Dann, Michael Riegner & Maxim Bönnemann, "The Southern Turn in Comparative Constitutional Law" in *The Global South and Comparative Constitutional Law* (Oxford: Oxford University Press, 2020) 1 at 14–23.

[8] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge: Harvard University Press, 2018) at 3–5 and 218; Rosalind Dixon & Julie Suk, "Liberal Constitutionalism and Economic Inequality" (2018) 85:2 U Chicago L Rev 369 at 386–388.

are said to distract from the foundational work of core economic and political reform.[9] Scholars have also argued that institutional constraints prevent courts from accomplishing much of note.[10] Judicial interventions often fail, in practice, to reach the poorest and most vulnerable.[11] Worse still, judicial orders can produce regressive outcomes. They can divert resources away from vital social programs, funneling public funds towards affluent litigants who are better positioned to access new forms of constitutional justice.[12] These rights thus risk being *anti-transformative*.[13]

The role for courts that emerges in this work stresses the importance of constitutional remedies and of private law as distinctive sites of constitutional change. "Remedies" are the orders that are issued after a court has concluded that litigants have suffered a rights deprivation. It is through these orders that judges work to fulfill their constitution's socio-economic aspirations in the "world of practical reality".[14] They represent a space of negotiation between

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[9] Roberto Gargarella, "Inequality and the Constitution: From Equality to Social Rights" in Philipp Dann, Michael Riegner & Maxim Bönnemann, eds, *The Global South and Comparative Constitutional Law* (Oxford: Oxford University Press, 2020) 235 at 246–249; Roberto Gargarella, "Equality" in Rosalind Dixon & Tom Ginsburg, eds, *Comparative Constitutional Law in Latin America* (Cheltenham: Edward Elgar, 2017) 176 at 176, 183 and 188–194.

[10] Dixon & Suk, *supra* note 8 at 395–397; Moyn, *supra* note 8 at 199–201.

[11] David Landau, "The Reality of Social Rights Enforcement" (2012) 53:1 Harv Intl LJ 189.

[12] See notably Octavio Luiz Motta Ferraz, *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (Cambridge: Cambridge University Press, 2021); Octavio Luiz Motta Ferraz, "Harming the Poor through Social Rights Litigation: Lessons from Brazil" (2011) 89:7 Tex L Rev 1643; Pedro Felipe de Oliveira Santos, "Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socio-economic Rights" (2019) 18:3 Wash U Global Stud L Rev 493 at 504–512.

[13] David Landau & Rosalind Dixon, "Constitutional Non-Transformation?: Socioeconomic Rights beyond the Poor" in Katharine G Young, ed, *The Future of Economic and Social Rights*, 1st ed (Cambridge University Press, 2019) 110; see also Sanele Sibanda, "When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism" (2020) 24:1 Law, Democracy and Development 384; Sanele Sibanda, "Not Purpose-Made - Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty" (2011) 22:3 Stellenbosch L Rev 482; Laurie Nathan, "Mind the Gap! The Constitution as a Blueprint for security" in Kristina Bentley, Laurie Nathan & Richard Calland, eds, *Falls the Shadow: Between the Promise and the Reality of the South African Constitution* (Cape Town: UCT Press, 2013) 1.

[14] Owen Fiss, "Foreword: The Forms of Justice" (1979) 93:1 Harv L Rev 1 at 51–52; put differently, remedies "translate the abstract and lofty discourse of the law into the life-world of the disputants": Helge Dedek, "The Relationship Between Rights and Remedies in Private Law: A Comparison Between the

principle and pragmatism, as judges navigate the demands of institutional comity, the need for cooperation, and a variety of other practical constraints.[15] Judges and litigators alike must set aside the abstract values that permeate rights discourse, and instead engage with the messy work that results in change.[16] The remedies considered here include both structural orders and individualized relief. Structural remedies see courts prod state actors to undertake widespread change or systemic reform. Individualized relief sees courts issue orders that attempt to resolve vital needs, but only of the litigants present before the court.

This project defends remedies – in both their structural and individualized varieties – that help build state capacity, improve implementation and coordination of public policy, and promote rights-conscious decision-making. These court orders engage in the work of building a capable, effective, rights-aware government. This general orientation – which I will term "institutional support" – can promote meaningful outcomes for vulnerable individuals and communities, reduce the risk of political backlash, and manage public expectations. It also results in a rupture between right and remedy, and reduces the need for judges to develop a substantive account of what social rights guarantee.

For its part, "private law" refers to the norms governing relationships between private persons, both natural and legal. It captures those background rules of contract and property law that set the terrain for market activity, shape economic outcomes, and determine whether vulnerable individuals can access vital goods. I understand the term broadly to include moments where constitutional duties are applied "horizontally" onto non-state actors and individuals, as

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Common and the Civil Law Tradition" in Hon Robert Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2009) 63 at 65.

[15] Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford: Oxford University Press, 2012) at 11.

[16] Roach, *supra* note 5 at 443.

well as moments where courts reform basic doctrines of contract or property law to be more responsive to constitutional rights and aspirations.

This project argues in favour of integrating social rights' values and aspirations into market-facing areas of law. This "normative integration" can reshape private law's values and its modes of reasoning by surfacing questions of power and inequality. Doing so holds out the promise of catalyzing change across a wide field, but it depends on rejecting a sharp public-private divide that remains deeply rooted in many legal cultures. This approach also challenges scholars' general preference for relying predominantly on direct "horizontal" application of constitutional norms.

Both remedies and private law represent crucial areas where courts take initiative and act as first movers. This initiative is in contrast to traditional cases of judicial review, where judges weigh whether to strike-down legislation.[17] These two areas also suffer from a degree of scholarly neglect. Remedies occupy the margins of work on constitutional theory – a neglect that has been criticized by some scholars,[18] and which may be rooted in remedies' proximity to procedural law. For its part, private law is often ignored outright by social rights scholars, whose focus remains on public law litigation and an underlying political commitment to tax-and-spend modes of redistribution. When compared to one another, these two sites offer a more complicated and textured understanding of the ways in which judges contribute to change.

[17] Robert Leckey, *Bills of Rights in the Common Law* (Cambridge: Cambridge University Press, 2015) at 2.
[18] Kent Roach, "Dialogic Remedies" (2019) 17:3 Int'l J Con L 860 at 861; on the relative neglect of remedies as a field of study, see also Aziz Huq, *The Collapse of Constitutional Remedies* (Oxford: Oxford University Press, 2021).

II. Theoretical Framework

The project is nourished by three key theoretical resources. The first is transformative constitutionalism, which has emerged over the last 20 years as an important "new concept in comparative law",[19] and as a recurring feature of constitutionalism in the "Global South".[20] The term refers to the long-term project of "constitutional enactment, interpretation, and enforcement committed […] to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction".[21] It connotes a project of "large-scale social change through nonviolent political processes grounded in law" – a process more ambitious than "reform", but falling short of a "revolution".[22]

In contrast to the liberal "preservative" constitutions, transformative constitutions are generally thought to be "social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about [their] historical setting and transformative role".[23] They therefore require a significant relaxation of the boundary between "public" and "private", since the country's foundational law "cannot be neutral with respect to the distribution of social and economic power and of opportunities for people to experience self-realization".[24] Instead, the constitution represents an "emancipatory commitment" to "steer state action and drive social change toward a more just and equal society".[25] Even before the term was

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[19] Michaela Hailbronner, "Transformative Constitutionalism: Not Only in the Global South" (2017) 65:3 Am J Comp L 527 at 528.
[20] Dann, Riegner & Bönnemann, *supra* note 7 at 20–23.
[21] Karl Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14 SAJHR 146 at 150.
[22] *Ibid*.
[23] *Ibid* at 153; for a similar list of characteristics, see Marius Pieterse, "What Do We Mean When We Talk About Transformative Constitutionalism" (2005) 20:1 S Afr Pub L 155; Hailbronner, *supra* note 19 at 540–541.
[24] Klare, *supra* note 21 at 153–154; see also Catherine Albertyn & Beth Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 SAJHR 248 at 249.
[25] Hailbronner, *supra* note 19 at 529; Klug, *supra* note 6 at 145.

popularized in academic circles, the judges of the Constitutional Court of South Africa had become comfortable describing the post-apartheid constitution in these terms. The document was read as a "commitment […] to transform our society",[26] to "transition" from the "grossly unacceptable features of the past to a conspicuously contrasting […] future",[27] and to create "a new order".[28]

Transformation challenges the extreme poverty and inequality that have been a "deeply formative experience for the Global South".[29] Equally important have been the weak state institutions that often prove ineffective, dysfunctional, unrepresentative, and corrupt.[30] The term has since migrated and is now used to describe many of the aspirational constitutions of the Global South, including India, Colombia, Brazil and Mexico.[31] It has proven difficult to define with more precision.[32] Although transformative constitutionalism has been closely associated with constitutionalized positive social rights,[33] it has also been deployed to capture different

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[26] *Soobramoney v Minister of Health (Kwazulu-Natal)*, [1997] (1) SA 765 (CC) at para 8.
[27] *S v Makwanyane*, [1995] (3) SA 391, 1995 (6) BCLR 665 at para 262.
[28] *Du Plessis v De Klerk*, [1996] 3 SA 850 (CC) at para 157.
[29] Dann, Riegner & Bönnemann, *supra* note 7 at 19; see also Upendra Baxi, "Preliminary Notes on Transformative Constitutionalism" in Oscar Vilhena, Upendra Baxi & Frans Viljoen, eds, *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria: Pretoria University Law Press, 2013) 19 at 19; David Bilchitz, "Constitutionalism, the Global South, and Economic Justice" in *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: Cambridge University Press, 2013) 41 at 41–42.
[30] Armin von Bogdandy et al, "Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism" in Armin von Bogdandy et al, eds, *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford: Oxford University Press, 2017) 3 at 6; for an account of the judicial role in Southern constitutionalism that revolves around failed institutions, see David Landau, "Institutional Failure and Intertemporal Theories of Judicial Role in the Global South" in David Bilchitz & David Landau, eds, *The Evolution of the Separation of Powers: Between the Global North and the Global South* (Cheltenham: Edward Elgar, 2018) 31.
[31] See eg Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Noida: HarperCollins India, 2019); von Bogdandy et al, *supra* note 30; Dann, Riegner & Bönnemann, *supra* note 7 at 20–21.
[32] Hailbronner, *supra* note 19 at 531–534; Pius Langa, "Transformative Constitutionalism" (2006) 17:3 Stellenbosch L Rev 351 at 351; Dikgang Moseneke, "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" (2002) 18 SAJHR 309 at 315.
[33] Klug, *supra* note 6 at 146.

forms of legal, political, economic and social change – spanning the gamut of democratic performance, rule of law reforms, economic development, executive accountability, anti-corruption initiatives, and anti-racism.[34]

Indeed, transformative constitutionalism is sometimes said to represent not a specific agenda, but rather an outlook, an experience, and a social imaginary structuring constitutional developments.[35] In South Africa, it is often captured by the metaphor of the "bridge" between a dark past and a brighter future.[36] This bridge is imagined to be an enduring space for change and contestation, since "the value of the bridge lies in remaining on it, crossing it over and over to remember, change and imagine new and better ways of being".[37] In that sense, transformation is not a temporary process but a permanent mindset, "a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created", where "change is unpredictable but the idea of change is constant".[38] Although scholars tend to focus on constitutional adjudication as the site where transformative constitutionalism is put into practice, the project is the shared responsibility of all branches of government, and indeed each individual within the political community.[39]

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[34] See eg the breadth of challenges considered under the rubric of transformative constitutionalism in von Bogdandy et al, *supra* note 30.
[35] For more on the idea of a social imaginary, see Marija Bartl, "Socio-Economic Imaginaries and European Private Law" in Poul F Kjaer, ed, *The Law of Political Economy: Transformation in the Function of Law* (Cambridge: Cambridge University Press, 2020) 228 at 231.
[36] First used by scholar Étienne Mureinik, the metaphor was adopted in the post-amble of the interim constitution of South Africa, which described the document as providing an "historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans": *Constitution of the Republic of South Africa, Act 200 of 1993*.
[37] Langa, *supra* note 32 at 354.
[38] *Ibid*.
[39] *Ibid* at 358–359.

Transformative constitutionalism supplies an overarching standard and mindset for assessing judicial efforts. Two important set of ideas further orient this work, one for my treatment of public law litigation, the other for private law developments. With regard to public law, my understanding of the judicial role is shaped by what is sometimes called the disparity thesis of the right/remedy relationship. This view holds that "rights" and "remedies" should be viewed as distinct field of activities, reflecting different relationships.[40] The question of what the state owes each individual is thus a different one from what courts ought to do "when citizens seek their assistance".[41] There are practical, relational and institutional constraints that might weigh in at the remedial stage, but those concerns are typically external to the underlying rights.[42] When confronting complex structural problems through public law, rights themselves "do not dictate the content of the remedy", and can only provide "goals and boundaries for the remedial decision".[43] Scholars in this tradition begin from the premise that there is "an important distinction between a statement which describes an ideal which is embodied in [a constitution] and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues".[44] Taken to an extreme, some suggest that "rights operate in the world of abstraction, remedies in the world of practical reality".[45] Scholars thus anticipate

[40] See eg John Jeffries, "The Right-Remedy Gap in Constitutional Law" (1999) 109:1 Yale LJ 87; Dedek, *supra* note 14.
[41] Stephen Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford: Oxford University Press, 2019) at x.
[42] Lawrence Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1978) 91:6 1212 at 1213.
[43] Susan Sturm, "A Normative Theory of Public Law Remedies" (1991) 79:5 Geo LJ 1355 at 1363–1364.
[44] Sager, *supra* note 42 at 1213.
[45] Fiss, *supra* note 14 at 52.

something lost "between declaring a right and implementing a remedy", or, more wistfully, a "jurisprudence of deficiency".[46]

The older view holds that right and remedy are instead closely connected, if not inextricable and equivalent. Partisans of this view suggest that the "[a]bsence of remedy is absence of right" since rights are "as big, precisely, as what the courts will do" to enforce them.[47] This closeness is sometimes framed as a matter of principle: courts must be guided by a standard of effective redress and act as guarantors of constitutional norms. Remedies must therefore track closely – if not altogether replicate – the underlying right.[48] Others see practical and inevitable linkages between the two, since the anticipated remedy will influence how judges shape rights doctrine.[49]

As this project will argue, underscoring the disparity between right and remedy is important because it makes clear that some constitutional rights and aspirations will be left unenforced by courts, leaving that work to other state institutions and to the wider public.[50] This tradition therefore situates courts as but one modest contributor in a dynamic and complex rights project.[51] The "disparity" thesis thus helps to situate the judicial role, and will shape certain prescriptions for how rights and remedies ought to be understood and articulated.

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[46] Paul Gewirtz, "Remedies and Resistance" (1983) 92:4 Yale LJ 585 at 587; see also Richard Fallon & Daniel Meltzer, "New Law, Non-Retroactivity, and Constitutional Remedies" (1991) 104:8 Harv L Rev 1731 at 1778 (noting that the principle of effective redress is not an "ironclad rule" and is, in practice, "not always attained".

[47] Karl Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School*, 11th ed (Oxford: Oxford University Press, 2008) at 88.

[48] Roach, *supra* note 18 at 862–865 (noting recent works of "neo-Diceyan critics" who have resurfaced the principle of effective redress).

[49] Daryl Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99 Colum L Rev 857.

[50] Richard Fallon, "Judicially Manageable Standards and Constitutional Meaning" (2006) 119:5 Harv L Rev 1275 at 1324–1328; Sager, *supra* note 42 at 1221 and 1227; see also Philip Harvey, "Aspirational Law" (2004) 52:3 Buff L Rev 701.

[51] On political constitutionalism, see Mark Tushnet, "The Relation Between Political Constitutionalism and Weak-Form Judicial Review" (2013) 14:12 German LJ 2249; on human rights experimentalism, see Gráinne de Burca, *Reframing Human Rights in a Turbulent Era* (Oxford: Oxford University Press, 2021)

In my engagement with areas often considered to be "private" law, I turn to some of the intellectual moves supplied by the law and political economy (or LPE) movement. This surging body of transnational scholarship understands law as playing a constitutive role in economic outcomes, and seeks to tilt those outcomes in a democratic and egalitarian direction.[52] LPE thus takes economic distributions – and their relationship with private law and corporate regulation – seriously. It also joins earlier realist and critical movements in challenging the assumption that there exists a naturally "private" sphere, cordoned off from "public" matters".[53] LPE instead views private law as a form of public regulation, one which would ideally promote substantive equality and reduce private domination. In this light, LPE might be contrasted with two other bodies of scholarship. One is law and economics, whose proponents tend to share the view that private law is a species of public regulation, but prefer that law be oriented towards optimizing efficiency.[54] The other is a body of progressive approaches to private law. These scholars share may share LPE's commitment to substantive equality, but they tend to prefer to retain the public-private divide, believing that private law should be anchored in theories of private relationships.[55]

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at 3–4; for an application of experimentalist approaches to judicial review specifically, see Young, *supra* note 5 at 150–151.

[52] See notably Jedediah Britton-Purdy et al, "Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis" (2020) 129:6 Yale LJ 1784.

[53] On the public/private divide in critical and realist literatures, see eg Joseph William Singer, "Legal Realism Now" (1988) 76 Calif L Rev 465 at 475–495; Duncan Kennedy, "The Stages of the Decline of the Public/Private Distinction" (1982) 130 U Penn L Rev 1349.

[54] See notably Louis Kaplow & Steven Shavell, "Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income" (2000) 29 J of Leg Stud 821; Louis Kaplow & Steven Shavell, "Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income" (1994) 23 J of Leg Stud 667.

[55] See eg Hanoch Dagan & Avihay Dorfman, "Just Relationships" (2016) 116:6 Colum L Rev 1395; Aditi Bagchi, "Distributive Injustice and Private Law" (2008) 60:1 Hastings LJ 105.

III. Methodology

As for methodology, the project focusses on judicial decisions, and locates two sites where judges make distinctive contributions. The first is in their remedial orders in litigation against the state. The second is in decisions in which judges impose constitutional duties horizontally onto private actors, or otherwise reform private law. As I suggested above, these areas represent moments where courts can take initiative and act as first-movers. Their decisions can represent a pragmatic initial step towards fulfilling social rights.

The project takes up an internal legal perspective. I thus pay close attention to the text of judgments to "track how judges extend or under-use their powers".[56] Theorizing the work that courts perform at the remedial stage also means attending to "procedural and technical matters" and even to "sources developed for legal practice" which are often marginalized by legal theorists.[57] My overarching goal will be to tease out the internal dynamics that characterize courts' remedial efforts, including trends, recurring challenges, and implications for the judicial role. An internal perspective is also valuable because it foregrounds the voice of legal actors from the Global South, curbing the temptation to reframe or reinterpret developments through the language or lenses common in the Global North.

My emphasis on comparative law is meant to expand our knowledge of the range of possibilities.[58] It also underscores how discursive developments are rooted in a local political, economic, cultural or institutional context.[59] The project thus pursues a "layered narrative" that

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[56] Leckey, *supra* note 17 at 3.
[57] *Ibid*.
[58] For more on expanding the range of possibilities to generate "rich concepts and analytical frameworks for thinking critically about constitutional norms and practices", see Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law" (2005) 53:1 Am J Comp L 125 at 130–131.
[59] Vicki Jackson, "Comparative Constitutional Law: Methodologies" in András Sajó & Michel Rosenfeld, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 54 at 66–67.

blends attention to text, interpretation, ideological assumptions, legal culture, and social and political context.[60]

I focus on the orders rendered by apex courts in South Africa, Colombia and India. These countries are widely recognized as leading jurisdictions of the Global South.[61] They have established records, extensive experience enforcing social rights, and their work has been nourished by rich scholarly communities. They also represent interesting points of contrast: these courts are different institutions, are rooted in different legal cultures and traditions, and have explored diverging paths to enforcement. Of the three, India has the longest history of enforcing socio-economic rights. While its Supreme Court has become associated with a more deferential posture in recent years, historically the Court claimed an outsized role on matters of public policy, often in response to the perceived failures of Indian political institutions.[62] Following constitutional reform in the early 1990s, the Constitutional Court of Colombia has become one of the world's most activist enforcers of social rights.[63] The South African Constitutional Court, by contrast, has championed moderation in enforcing socio-economic rights.[64]

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[60] Günter Frankenberg, "Comparing Constitutions: Ideas, Ideals and Ideology - Toward a Layered Narrative" (2006) 4:3 Int'l J Con L 429; Upendra Baxi, "Constitutionalism as a Site of State Formative Practices" (2000) 21 Cardozo L Rev 1183.

[61] See eg Maldonado, *supra* note 4; see similar selection of jurisdictions in Upendra Baxi, Oscar Vilhena & Frans Viljoen, eds, *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria: Pretoria University Law Press, 2013); and Rodríguez-Garavito & Rodríguez-Franco, *supra* note 5.

[62] See eg Madhav Khosla, "Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate" (2009) 32:1 Hastings Intl & Comp L Rev 55 at 55–57; Manoj Mate, "Public Interest Litigation and the Transformation of the Supreme Court of India" in Diana Kapiszewski, Gordon Silverstein & Robert A Kagan, eds, *Consequential Courts* (Cambridge: Cambridge University Press, 2013) 262.

[63] Alicia Ely Yamin & Oscar Parra-Vera, "Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates" (2010) 33:2 Hastings Int'l & Comp L Rev 431 at 431; Magdalena Sepúlveda, "Colombia: The Constitutional Court's Role in Addressing Social Injustice" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) 144.

[64] Dennis Davis, "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards Deference Lite?" (2006) 22:2 S Afr J Hum Rts 323; Danie Brand, "Judicial Deference and Democracy in

I refer only sparingly to lower courts. The bulk of the analysis centers on supreme and constitutional courts. Admittedly, these apex courts are not necessarily representative of their jurisdictions.[65] Some of the Indian High Courts tend to enforce rights more aggressively than the Supreme Court, for instance.[66] In South Africa, the High Courts have similarly become known for a more aggressive enforcement posture than the deferential Constitutional Court, while the Supreme Court of Appeal tends to be more formalist and conservative.[67] Nevertheless, apex courts represent an appropriate site of focus: their decisions remain the most influential and are binding – or at least frequently treated as so. These courts also have an important symbolic role in setting the tone for the judicial branch.

Lastly, the project foregrounds voices from the "Global South" as a site of a distinctive constitutional experience. The countries under study treat questions of poverty, inequality and economic transformation as matters of constitutional concern,[68] and their courts have often assumed a more activist posture in response to the failures of the "political" branches.[69]. These countries have also been the hotbeds of transformative constitutionalism.[70] Their constitutional stories are anchored in the experiences of groups that were subjected to colonization and

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Socio-Economic Rights Cases in South Africa" (2011) 22:3 Stellenbosch Law Review 614; Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge: Cambridge University Press, 2013); Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (Cambridge: Cambridge University Press, 2016).

[65] David Landau, "Choosing Between Simple and Complex Remedies in Socio-Economic Rights Cases" (2019) 69:Supp 1 UTLJ 105 at 118 (acknowledging that lower court judges may not share the "same vision and incentives" as high court judges).

[66] Gaurav Mukherjee, *The Legitimacy of Transformative Constitutional Adjudication* (2021) at 26 [Draft on file with author].

[67] *Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society Final Report* (Johannesburg: Department of Justice and Constitutional Development, Human Sciences Research Council & Nelson R Mandela School of Law, 2015) at 16.

[68] Dann, Riegner & Bönnemann, *supra* note 7 at 18–19; see also Maldonado, *supra* note 4.

[69] Landau, *supra* note 30.

[70] Although, as a constitutional experience, transformation may not be limited to certain countries in the Global South, Hailbronner, *supra* note 19.

exploitation, and who have occasionally fought to forge alternatives to a "Eurocentric civilizational paradigm".[71]

This task also requires that I recognize my positionality as a scholar trained in elite institutions of the Euro-Atlantic world. This positionality stresses the importance of joining the ranks of the "listeners, enablers, contributors and translators" of comparative constitutional law.[72] As a listener and contributor, I am receptive to the Southern constitutional experience, keen on understanding developments in their best light,[73] and intent on engaging in conversation with the work of local actors and scholars. As a translator, I hope to promote understanding between communities "hampered by linguistic, national, methodological, or ideological barriers", including between the Global North and South.[74]

IV. Thesis Overview and Outline of Chapters

This project offers a portrait of the judicial contribution to social rights fulfillment. Chapter 2 begins by introducing each jurisdiction. I provide an account of how social rights doctrine has evolved locally, and how it has been shaped by courts' institutional context. In Chapter 3, I take up structural remedies and argue that, as an empirical matter, there is a tendency for courts to shy away from mounting substantive challenges to state policy and to existing distributions. Impactful judicial interventions are, perhaps surprisingly, often light on ideology and political vision. One important trendline sees judges issue orders that help build

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[71] Boaventura de Sousa Santos, "Toward an Aesthetics of the Epistemologies of the South" in Boaventura de Sousa Santos & Maria Paula Meneses, eds, *Knowledge Born in the Struggle: Constructing the Epistemologies of the Global South* (New York: Routledge, 2019) 117 at 117–118; see also Boaventura de Sousa Santos, *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South* (Durham: Duke University Press, 2018) at 1.
[72] Dann, Riegner & Bönnemann, *supra* note 7 at 37–38.
[73] For more on generous listening as a methodology of comparative constitutional law, see Michael Dowdle, "Constitutional Listening" (2012) 88:1 Chi-Kent L Rev 115.
[74] Dann, Riegner & Bönnemann, *supra* note 7 at 39.

state capacity, improve implementation and coordination of public policy, and promote more rights-conscious decision-making. Courts are often willing to pivot away from a substantive account of what social rights guarantee, and turn instead towards building a capable, effective, rights-conscious state. I suggest that this trendline can be understood as a general remedial orientation – one which I will call "institutional support", and which I build on throughout the project.

In Chapter 4, I turn to individual remedies and contend that courts and scholars alike have not given individualized relief its due. Critics argue that individual remedies can subvert legitimate and rational processes for resource-allocation, largely to the detriment of individuals experiencing poverty. I claim that these orders, much like their structural counterparts, can be fruitfully deployed to improve state capacity – or at least to compensate for its absence – in ways that skirt these risks. I also suggest that this mode of enforcement can be tailored to be more context-sensitive, limiting its regressive impacts. Individualized relief is worth salvaging because these orders are capable of meeting the urgent needs of countless individuals, and can provoke wider, structural change. In litigation against the state, this project focusses on a prominent trendline which sees courts achieve meaningful change by issuing orders that build and buttress state capacity, and which are perhaps less strident on substantive political ideology.

In Chapter 5, I turn to private law, where the trendline diverges meaningfully. I argue that social rights can spur ideological shifts in private law, particularly by reshaping the law's stated values and its modes of reasoning. This is most prominently the case in South Africa, where a historically rigid public-private divide is being slowly displaced in favour of greater public-private alignment. Judges now spend meaningful time arguing over how to integrate constitutional economic aspirations into areas such as contract and property law. Judgments now

surface questions of power, economic distribution, efficiency, and substantive equality. This trendline suggests that private law has an important (and under-appreciated) role in nurturing social rights' critical ideology.

However, the role that social rights can play in the law of private orderings depends in part on how courts approach the public-private divide. Chapter 5 thus proposes a system for classifying ways in which social rights and private law may relate to one another. What I call "social rights denialism" is prominent in India, where a mix of procedural incentives, codified private law, constitutional text and ideology have largely insulated private law from social rights' influence. "Reliance on state resemblance" focusses on foisting positive social duties on firms that are thought to be sufficiently state-like. It is occasionally relied upon as a methodology in Colombia and South Africa. The approach I call "flexible remedialism", prominent in Colombia, favours maximum latitude and pragmatism in deciding when to impose positive social duties on private actors. It often fails to invest much effort in elaborating legal doctrine or a theory of relationships. The last approach, "normative integration", aspires to a systemic audit of private law rules to re-evaluate their potential to promote constitutionally desired economic outcomes. It is uniquely well-suited to shifting private law's values and its prevailing modes of reasoning. I note that these pathways – social rights denialism, relying on state resemblance, flexible remedialism, and normative integration – are different from the formal distinctions between direct and indirect horizontal application.

Chapter 6 takes up the project's key prescriptions. Importantly, the approach I defend in public law litigation is meaningfully different from the approach I defend in private law. In litigation against the state, I argue in favour of "institutional support" as a general remedial orientation. It can represent a path for timely, effective change, set reasonable public

expectations, and help limit resistance both within the judiciary and the "political" branches. Since institutional support can be offered either through individualized relief or through structural orders, judges also have meaningful flexibility in how they craft their response to rights deprivations. And, finally, institutional support attends adequately to judges' legitimacy and capacity constraints.

With regards to private law, I defend the ambitious effort of gradually integrating social rights' values and aspirations into the market-facing areas of law, including contract and property. I contend that "normative integration" is preferrable to its peer approaches prominent in comparative law, and favoured in academic scholarship. It is positioned to catalyze change across a greater field, and it positions constitutional aspirations as central to the private law project. The approach also promotes consistency (and indeed, normative integrity) between the rules governing private ordering and public tax-and-spend schemes.

Last, I suggest that the judicial contribution to the rights project should be reframed, and that one promising way of doing so is by uncoupling rights from remedies. Judges' remedial discretion is constrained by many different practical and strategic considerations. Being transparent about this reality can free rights from being read unduly narrowly, and it can similarly free judges to articulate rights in a wider, more aspirational manner. This move would leave fruitful spaces for other state actors, activists and civil society organizations to mobilize rights discourse in political processes.

Chapter 6 also takes stock of the judicial contribution to wider processes of transformative constitutionalism. I propose a more textured understanding of the different sites, politics, effects, and timing of transformation. These dimensions are often in tension. For instance, the structural remedies that have spurred the widest and fastest change in India often

exhibit a kind of ideological minimalism. By contrast, in South African private law, recent cases bristle with anxieties about private power, inequality, and methods to promote economic growth. Economic efficiency and redistribution now compete to be private law's new north star. However, the pace of change remains glacial, and the effects of these interventions are often limited. A sympathetic reader might interpret judges' mixed record of success as a reflection of the difficulty of getting the balance between these conflicting dimensions right. Chapter 7 then concludes and offers future lines of inquiry.

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Chapter 2:
Social Rights in their Institutional Contexts

I. Introduction

This Chapter canvasses the history of constitutionalized social rights in South Africa, India, and Colombia, and contextualizes judicial efforts to fulfill them. Institutional constraints and the indeterminacy of social rights loom large over these histories, as they continue to productively unsettle social rights' evolution. Indeed, the differences that emerge between jurisdictions are perhaps best be understood as diverging judicial responses to these well-known challenges. Capacity and legitimacy constraints may well have a greater influence on rights doctrine than differences in constitutional text or the drafters' intent.

South Africa's jurisprudence plays out as a sustained response to these difficulties. The Constitutional Court's solution has been to prefer deference, to avoid fixing general standards, and to deprive social rights of independent content. The Supreme Court of India's doctrine is chequered, revealing lingering disagreement among its judges about the Supreme Court's proper

role. The Constitutional Court of Colombia is the outlier. Buoyed by institutional confidence and a perceived need to overcompensate for the failures of the political branches, the Constitutional Court has elaborated a rights jurisprudence that is specific, categorical, and controversial.

Two key ideas emerge from this Chapter's comparative survey. The first is a basic delineation between social rights – understood as abstract, constitutional guarantees and aspirations – and the work of courts – which remain grounded in practical and institutional realities. The second relates to judicial positioning: even modest courts are willing to act aggressively when they identify modes of intervention which skirt their capacity and legitimacy constraints. These ideas provide a starting point for subsequent Chapters' discussion of courts' remedial work and their efforts to reform the rules governing private ordering.

II. Indeterminacy and Institutional Constraints

Two well-known challenges shape judges' work in articulating social rights doctrine and in formulating remedies. The first is that social rights suffer from a significant degree of indeterminacy, and lack the precision typically required of entitlements that can be demanded from the state. Guarantees to access adequate education, healthcare or housing are hardly self-explaining. Further complicating matters, these rights are consequential, in that they refer to a state of affairs that has been realized through an intermediate policy.[1] There are countless ways goods such as healthcare or housing can be made accessible, and the underlying rights are largely agnostic about the means by which the result is obtained. At most, these rights define only goals and boundaries, they do not outline how those outcomes might be achieved.[2]

[1] Frank Cross, "The Error of Positive Rights" (2003) 48:3 UCLA L Rev 857.
[2] Susan Sturm, "A Normative Theory of Public Law Remedies" (1991) 79:5 Geo LJ 1355 at 1363–1364; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (Oxford: Oxford University Press, 2008) at 198.

The indeterminacy problem is especially pronounced for the dimension of these rights that is said to be programmatic, aspirational, or subject to progressive realization. This concession reflects the fact that a government may not have the resources or the institutional capacity to fulfill costly social guarantees; states can thus only be held to act reasonably within their means to fulfill these rights over time.[3] But this concession – necessary as it is – complicates the rights analysis. It becomes difficult to fix with any precision *when* a government is obliged to provide more generously for the vulnerable. Relatedly, it is difficult to establish at what point resource constraints stop serving as a valid justification for inaction. After all, the state can always siphon funds away from other priorities, issue new currency, or tax and borrow in higher quantities.[4]

In both international and domestic law, there has been some effort to establish some "minimum legal content" to tame these rights' indeterminacy.[5] For rights advocates, this framing represents a "less is more" strategy, where "rights inflation" is traded for "rights ambition".[6] It focusses social rights towards the most vulnerable and destitute by elaborating specific claims that can be made against the state. For David Bilchitz, the indeterminacy problem is thus avoided, since judges can define minimum benchmarks without specifying the means by which this entitlement is fulfilled.[7]

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[3] For states' obligation to progressively realize social rights over time, see Ben Saul, David Kinley & Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford: Oxford University Press, 2016) at 146-155; CESCR General Comment No 3, UN Doc 5/1991/23 (14 December 1990) (distinguishing duties to the minimum core and duties to progressively realize rights) [General Comment 3].

[4] For work problematizing the concept of "available resources" and charting the social rights implications for tax law, see Philip Alston & Nikki Reisch, eds, *Tax, Inequality, and Human Rights* (Oxford: Oxford University Press, 2019).

[5] Katharine Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 Yale Intl LJ 113 at 113.

[6] *Ibid* at 114; see also Tara Melish, "Rethinking the 'Less as More' Thesis: Supranational Litigation of the Economic, Social, and Cultural Rights in the Americas" (2006) 39 NYU J of Int'l L & Pol 171.

[7] Bilchitz, *supra* note 2 at 198.

However, indeterminacy persists. The concept of the "minimum core" is typically rooted in some account of human beings' basic needs.[8] This framing might achieve some measure of precision, but it risks doing so at the cost of neglecting more imprecise objectives such as respecting human dignity or creating an environment in which human beings can flourish.[9] Furthermore, what is perceived to be "vital" has long been shown to vary across cultures, regions, level of development, and time.[10] Indeed, even when reduced to a basic question of human biology, the concept of essential needs retains this quality of arbitrariness. As Amartya Sen has noted, people "have been known to survive with incredibly little nutrition", and so any effort to establish basic benchmarks such as a "minimum nutritional requirement" is fraught with uncertainty.[11]

The second challenge is that courts face limitations on what they can do, and what they can do legitimately. Judicial intervention on matters of socio-economic policy risks foreclosing public debate and reordering legislative choices on how resources are distributed in a political community – the essence of democratic political life.[12] Courts likely lack the expertise to design social welfare programs,[13] or to manage the "polycentric or multifaceted issues that involve the

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[8] See General Comment No 3, *supra* note 3 at para 10 (referring to "minimum essential levels").
[9] Young, *supra* note 5 at 130.
[10] See eg Johan Galtung, *Goals, Processes, and Indicators of Development: A Project Description* (Tokyo: United Nations University, 1978) at 13.
[11] Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Oxford University Press, 1982) at 12; see also Jean Drèze, "Democracy and the Right to Food" in Philip Alston & Mary Robinson, eds, *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005) 45 at 55.
[12] Cross, *supra* note 1; David Beatty, "The Last Generation: When Rights Lose Their Meaning" in David Beatty, ed, *Human Rights and Judicial Review: A Comparative Perspective* (New York: Springer, 1994) 321 at 350; Katharine G Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012) at 134.
[13] Joel Bakan, "What's Wrong with Social Rights?" in Joel Bakan & David Schneiderman, eds, *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 85 at 86.

allocation of scarce resources between competing demands".[14] Sweeping court orders therefore risk impacting the interests of an "unknown but potentially vast number of interested parties", and could have "many complex and unpredictable social and economic repercussions".[15] Courts run a constant risk of inefficiently distributing resources among the needy,[16] or of siphoning funds from the vulnerable and unrepresented towards able litigants with sharper elbows.[17] Judicial intervention also risks straining judge's legitimacy and compromising their relationships with other political actors whose cooperation is necessary for judges to remain effective change-makers.[18]

Courts therefore face important limitations with regards to their capacity and legitimacy. This dynamic often results in a gap between what social rights mean as a matter of principle and the "doctrines through which judges implement constitutional guarantees".[19] This disparity has been charted in a rich vein of American public law scholarship. Richard Fallon and Lawrence Sager have fruitfully demonstrated how constitutional norms are often underenforced by judges sensitive to pragmatic and legitimacy concerns.[20] The unenforced dimension of these rights can still remain influential by guiding political discourse and by binding the "consciences of nonjudicial officials".[21]

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[14] Kent Roach, "Polycentricity and Queue-Jumping in Public Law Remedies: A Two-Track Response" (2016) 66:1 UTLJ 3; see also Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353.
[15] Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012) at 111–116.
[16] Albie Sachs, "The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case" (2003) 56:1 Curr Leg Problems 579 at 598.
[17] Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009) at 177–179.
[18] Young, *supra* note 12 at 161 and 165.
[19] This "disparity" has been charted most extensively in American public law literature, see: Richard Fallon, "Judicially Manageable Standards and Constitutional Meaning" (2006) 119:5 Harv L Rev 1275 at 1279; Mitchell Berman, "Constitutional Decision Rules" (2004) 90:1 Va L Rev 1.
[20] Fallon, *supra* note 19; Lawrence Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1978) 91:6 1212.
[21] Fallon, *supra* note 19 at 1279; Sager, *supra* note 20 at 1221 and 1227.

Scholars such as Stephen Smith and Ronald Dworkin have suggested that this kind of judicial underenforcement reflects the distinctiveness of remedial activity. For Smith, the question of what an individual is owed (the "rights" question) is different from the question of what courts should do "when citizens seek their assistance"[22] (the "remedies" question). Dworkin also cabined institutional considerations to the realm of remedies.[23] For Dworkin, courts must divine constitutional meaning and the scope of "background rights" by turning to principle and the optimal "moral interpretation" of constitutional norms.[24] Remedies, by contrast, can remain "sensitive to consequence" and to the judiciary's various institutional constraints.[25]

This Chapter's survey suggests that institutional and pragmatic considerations exert an influence over how judges elaborate substantive rights doctrine.[26] Courts in South Africa and India appear to shy away from robust rights doctrine when the demands on their capacities and legitimacy are high. Moreover, the activism of the Constitutional Court of Colombia can be understood as a response to a fractured political landscape and a perceived need to overcompensate for the failures of other state actors.

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[22] Stephen Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford: Oxford University Press, 2019) at 8; Stephen Smith, "Rights and Remedies: A Complex Relationship" in Hon Robert Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2009) 33.
[23] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at 389–392.
[24] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 82–84; see also Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1997).
[25] Dworkin, *supra* note 23 at 389–392.
[26] See eg Daryl Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99 Colum L Rev 857; Fallon, *supra* note 19; Richard Fallon, "The Linkage Between Justiciability and Remedies - and Their Connection to Substantive Rights" (2006) 92:4 Va L Rev 633.

III. South Africa

The jurisprudence of the South African Constitutional Court is explicitly framed as a response to concerns over indeterminacy and the judicial role. The Court has repeatedly declined to expound on what these rights guarantee, preferring the view that social rights acquire their content through legislative and executive action. In its early decisions, the Court champions deferential review of state policy. In its later decisions, the Court favours a turn towards process and proceduralism that guarantees a right for vulnerable persons to be heard, and that promotes rights-conscious decision-making. In South Africa, the question of what vulnerable individuals are owed has thus been eclipsed by a sustained meditation on what role the court should assume in the social rights project.

a) Constitutional framing and early jurisprudence

The South African constitution enshrines justiciable social rights. Section 26 recognizes the right every person has to "have access to adequate housing"; section 27 posits every person's right to access "health care services", "sufficient food and water" and "social security" and adds that "[n]o one may be refused emergency medical treatment".[27] Both sections impose on the state a duty to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights".[28] Section 38 adds that rights-holders may petition a competent court if any of these rights have been "infringed or threatened", and that the court may grant "appropriate relief".[29]

[27] *Constitution of the Republic of South Africa, 1996,* Bill 108 of 1996 at section 26(1), 27(1) and 27(3) [Constitution of South Africa].
[28] *Ibid* at section 26(2) and 27(2).
[29] *Ibid* at section 38.

The justiciability of these rights was a matter of significant debate when the South African constitution was drafted.[30] A 1992 issue of the South African Journal on Human Rights was published on the question.[31] Traditional anxieties about empowering judges were married to more local concerns. Future Constitutional Court justices Kate O'Regan and Albie Sachs had cautioned against judicial enforcement, preferring to see these socio-economic objectives left to a post-apartheid Parliament.[32] Leading members of the African National Congress feared that a conservative judiciary, known for its "crude positivist view of the law", might imperil progressive economic reform.[33]

The final draft of the constitution ultimately recognized rights modelled on the *International Covenant on Economic Social and Cultural Rights*, which at the time had been interpreted by the Committee on Economic, Social and Cultural Rights to distinguish between an enforceable "minimum core", that could be demanded immediately, and more ambitious rights that would be fulfilled progressively over time.[34] Concerns about justiciability remained. In the Constitutional Court's first certification judgment, the Court was tasked with certifying whether

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[30] See eg the account of these debates in Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (Cambridge: Cambridge University Press, 2016).

[31] See (1992) 8 S Afr J Hum Rts; for a sample of prominent contrasting positions, see Dennis Davis, "The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles" (1992) 8 SA J of Hum Rts 475 and Etienne Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 SA J of Hum Rts 464.

[32] See Albie Sachs, "A Bill of Rights for South Africa: Areas of Agreement and Disagreement" (1989) 21:1 Colum HRLR 13; Hugh Corder & et al, *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate* (Cape Town: University of Cape Town, 1992); Ray, *supra* note 30. Note that Sachs' position on the justiciability of social rights would evolve over time: Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009) at 165-173.

[33] Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge: Cambridge University Press, 2013) at 209; Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000) at 81-82.

[34] Roux, *supra* note 33 at 270; Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Claremont: Juta Academic, 2010) at 19; see also General Comment 3, *supra* note 3.

South Africa's proposed draft constitution complied with the principles enunciated in the country's interim constitution.[35] It was argued that social rights were inconsistent with the separation of powers and that they were non-justiciable, since they would require courts to dictate "to the government how the budget should be allocated".[36] The Court's response was brief and ambivalent: "we are of the view that these rights are, at least to some extent, justiciable. […] At the very minimum, socio-economic rights can be negatively protected from improper invasion".[37] The Court added that some civil and political rights also give rise to budgetary implications "without compromising their justiciability".[38]

This ambivalence foreshadowed what was to come. Scholars such as Danie Brand and Brian Ray have noted that institutional concerns about capacity, legitimacy, and the separation of powers have "centrally influenced" the Court's subsequent jurisprudence.[39] In the first case, *Soobramoney*, a man dying from chronic renal failure was denied access to dialysis machines at a public hospital.[40] The hospital did not have enough dialysis machines for all patients suffering from chronic renal failure, and instead prioritized patients suffering from acute renal failure, which can be treated and remedied.

The Court refused to interpret section 27(3) ("No one may be refused emergency medical treatment") as establishing an absolute right to medical assistance.[41] Instead, the right to emergency treatment would be subject to available resources; for the Court, the provision's

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[35] *Re Certification of the Constitution of the Republic of South Africa*, [1996] ZACC 26, [1996] 4 SA 744 [*Certification*].
[36] *Ibid* at paras 77-78.
[37] *Ibid* at para 78.
[38] *Ibid*.
[39] Danie Brand, "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" (2011) 22:3 Stellenbosch L Rev 614 at 616; Ray, *supra* note 30 at Chapters 3 & 5.
[40] *Soobramoney v Minister of Health (Kwazulu-Natal)*, [1997] ZACC 17, [1998] (1) SA 765 (CC).
[41] *Ibid* at paras 19-20.

purpose was only to ensure that emergency treatment "is not frustrated by reason of bureaucratic requirements or other formalities".[42] The Court also rejected the suggestion that a patient suffering from a chronic disease – even if fatal – was in need of "emergency medical treatment".[43]

The decision's analysis was instead dominated by the healthcare system's resource limitations. The majority insisted that the hospital and province's resources were already overstretched, and the policy of prioritizing patients with curable illness was reasonable. Privileging patients like Mr Soobramoney would stretch health budgets past their breaking point and compromise the state's ability to treat other patients.[44] Sachs J's concurring reasons stressed this point further, suggesting that "the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care".[45]

The majority also remained sensitive to concerns about its proper institutional role. Chaskalson P announced that the "court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters".[46] Sachs J's concurrence added that "[c]ourts are not the proper place to resolve the agonizing personal and medical problems that underlie these choices" and that these were areas "where institutional incapacity and appropriate constitutional modesty require us to be especially cautious".[47]

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[42] *Ibid* at para 20.
[43] *Ibid* at paras 21-22.
[44] *Ibid* at paras 24-28.
[45] *Ibid* at para 52.
[46] *Ibid* at para 29.
[47] *Ibid* at para 58.

In *Grootboom* and *Treatment Action Campaign,* the Court added a few substantive disciplines to reasonableness review.[48] *Grootboom* concerned a community of landless persons who had been evicted from private property and were re-settled in precarious housing at the edge of a sports field. The claimants invoked the right of access to adequate housing in section 27, and their childrens' right to shelter in section 28, which textually is not limited by the state's obligation to take reasonable measures within its available resources.[49] The community's specific needs were the subject of a settlement that was concluded before the Constitutional Court rendered judgment on the merits.[50] As a result, the question that was ultimately put to the Court was framed in general terms, namely whether the government's housing policy satisfied the demands of sections 27 and 28 of the new Bill of Rights.

Yacoob J recognized at the outset the "very difficult issue" of "how to enforce" social rights.[51] The South African Human Rights Commission and the Community Law Centre of the University of the Western Cape, intervening in the proceedings as *amici curiae*, argued that enforcement required recognizing a "minimum core" constitutional duty that must be fulfilled immediately and that is not limited by available resources. Minimum core obligations had been recognized under the *International Covenant on Economic Social and Cultural Rights* - the template for the Constitution's social rights[52] - and judges are bound consider international law when interpreting the Constitution's Bill of Rights.[53]

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[48] *South Africa and Others v Grootboom and Others*, [2000] ZACC 19, [2001] (1) SA 46 (CC) [*Grootboom*]; *Minister of Health and Others v Treatment Action Campaign and Others*, [2002] ZACC 16, [2002] (5) SA 703 (CC) [*TAC*].
[49] Constitution of South Africa, *supra* note 27.
[50] *Grootboom*, *supra* note 48 at para 5.
[51] *Ibid* at para 20.
[52] Roux, *supra* note 33 at 270; Liebenberg, *supra* note 34 at 19.
[53] Constitution of South Africa, *supra* note 27 at section 39(1).

The Court rejected the suggestion, nodding towards social rights' indeterminacy. Unlike the Committee on Economic, Social and Cultural Rights, which benefits from the experience of "many years of examining [state] reports", the Court reasoned that it lacked "comparable information" that would enable it to set reasonable benchmarks.[54] The Court expressed concern about the "complexity of the task of determining a minimum core obligation" when the "needs in the context of access to adequate housing are diverse".[55] Later in the judgment, Yacoob J was equally dismissive of the claim that section 28 recognizes children's immediate right to shelter, regardless of resource limitations.[56]

Instead, building on *Soobramoney,* the Court reasoned that in any challenge based on section 26, the Court's task will be deciding whether state measures are reasonable.[57] Deference is in order; courts are not meant to enquire "whether other or more desirable […] measures could have been adopted, or whether public money could have been better spent".[58] However, the Court made clear that governments would be held to several substantive standards:

- "The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs";[59]
- "A programme that excludes a significant segment of society cannot be said to be reasonable". Indeed "[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at

[54] Grootboom, *supra* note 48 at para 32.
[55] *Ibid* at paras 32-33.
[56] *Ibid* at paras 70-76.
[57] *Ibid* at paras 41.
[58] *Ibid*.
[59] *Ibid* at para 43.

achieving realisation of the right. It may not be sufficient […] to show that the measures are capable of achieving a statistical advance in the realisation of the right";[60]

- The state is bound to move "expeditiously and effectively" towards the realization of the right, and that any deliberately retrogressive measures would need to be "fully justified by reference to the totality of the rights" recognized in the Constitution;[61] and
- Section 26 calls for a coordinated housing program that is "comprehensive", "determined by all three spheres of government in consultation with each other", and must be reasonable in both its conception and implementation.[62]

Reviewing South Africa's policy landscape, the Court found that the government's "central thrust" was promoting housing development and access to permanent residential structures.[63] However, the policy framework failed to address the needs for temporary relief for "people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as foods and fires, or because their homes are under threat of demolition".[64] These people are "in desperate need", and their "immediate needs can be met by relief short" of the permanent housing contemplated in national legislation.[65] As will be discussed further in Chapter 2, the Court's preferred remedy was a declaration affirming that existing housing policy fell short of the demands of section 26 by failing to make reasonable provision for people "with no access to

[60] *Ibid* at paras 43-44.
[61] *Ibid*.
[62] *Ibid* at paras 40 and 42.
[63] *Ibid* at para 51.
[64] *Ibid* at paras 52 and 69.
[65] *Ibid* at para 45.

land, no roof over their heads, and who were living in intolerable conditions or crisis situations".[66]

The Court further developed the right to access healthcare services in *Treatment Action Campaign*.[67] That case considered a challenge to the government's refusal to make the antiretroviral nevirapine available in the public health sector to prevent mother-to-child transmission of HIV. The cost of the drug was not in issue, since the manufacturer had made a commitment to make nevirapine widely available for a five-year period without charge.

The decision once again declined to recognize in section 26 and 27 any independent, "minimum core" content separable from the state's obligation to take reasonable measures to realize social rights progressively, according to available resources.[68] This interpretation was supported in part by the text of the Bill of Rights, and by the Court's estimation that it would be "impossible to give everyone access even to a 'core' service immediately".[69] Sensitive to institutional context, *TAC* stressed that courts "are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining […] minimum core standards".[70] Stressing the need for "appropriate constitutional balance", the Court added that the "Constitution contemplates […] a restrained and focused role for the courts", which are "ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences".[71]

The Court's reasonableness review in *TAC* was robust, at least when compared to its other outings. It confidently rejected the government's scientific expertise on the drug's efficacy,

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[66] *Ibid* at para 99.
[67] *TAC*, *supra* note 48.
[68] *Ibid* at paras 29-39.
[69] *Ibid* at paras 33-35.
[70] *Ibid* at para 37.
[71] *Ibid* at para 38.

safety, and possibility of resistance.[72] Noting that the drug was understood even by government experts to be lifesaving and that cost was not in issue, the Court found the government's restrictions on nevirapine's use was unreasonable.[73]

The decision in *Khosa* was similarly aggressive.[74] That case concerned a challenge to the statutory exclusion of permanent residents from social assistance legislation. The Court concluded that the measure represented unjustifiable discrimination and likewise failed to reasonably fulfill permanent residents' access to social security.[75] Mokgoro J's majority reasons betray a striking confidence. The majority dismissed the government's cost concerns as speculative and stressed that extending social assistance programs to permanent residents would only result in a small increase in cost when compared to the overall costs of the program.[76] Mokgoro J added that there were other measures, short of categorical disqualification, that could prevent immigrants from becoming a financial drain on the state.[77] Scholars interpret judges' willingness to abandon their institutional modesty as reflecting the discriminatory dimension of the measure in question, which engages a more traditional and less controversial form of judicial review.[78]

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[72] *Ibid* at paras 51-66.
[73] *Ibid* at paras 71-72 and 80.
[74] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*, [2004] ZACC 11, [2004] (6) SA 505 (CC).
[75] *Ibid*.
[76] *Ibid* at para 62.
[77] *Ibid* at paras 64-65.
[78] Liebenberg, *supra* note 34 at 161 ("The stringent standard of review applied in this case should be understood in the context of the denial of a basic social benefit to a vulnerable group and the intersection breaches of a socio-economic right and the right against unfair discrimination"); Ray, *supra* note 30 at 69 ("[T]he Court treats the justiciability concerns quite differently when faced with issues that place it in a more traditional role. Here, the Court forefronted the equality arguments and, despite formally applying reasonableness review, collapsed the analyses in a way that essentially transformed it into a section 9 case").

b) Emphasis on process over substance

Reasonableness review allows judges to sidestep the question of what social rights actually guarantee. The Court has championed deference as an appropriate response to the indeterminacy of social rights and to the constraints that bear on judges' work. The Court's hesitation to elaborate substantive rights doctrine has become even more pronounced in its subsequent cases. The Court has instead begun to emphasize its role in promoting rights-conscious decision-making.

The first of these cases, *Port Elizabeth*, concerned an application to evict a group of 68 people unlawfully occupying vacant private land.[79] The case engaged the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*, 19 of 1998 (PIE), which sets out the process for eviction contemplated in section 26(3) of the South African Constitution.[80] Sachs J writes that post-apartheid eviction law "requires the court to infuse elements of grace and compassion into the formal structures of the law" and that courts, while they cannot correct "all the systemic unfairness to be found in our society", can at least "soften and minimize the degree of injustice" that eviction can entail.[81]

Noting that "[t]he managerial role of the courts may need to find expression in innovative ways", Sachs J read into the statute an obligation for the evicting party to undertake "respectful face-to-face engagement or mediation" with the individuals vulnerable to eviction.[82] The Court ultimately declined to order eviction in the case, explaining that the occupiers were "genuinely

[79] *Port Elizabeth Municipality v Various Occupiers*, [2004] ZACC 7, [2005] (1) SA 217 (CC).
[80] Section 26(3) of the South African Constitution recognizes the right of every person not to be evicted from their home "without an order made after considering all the relevant circumstances".
[81] *Port Elizabeth Municipality v Various Occupiers*, *supra* note 79 at paras 37-38.
[82] *Ibid* at paras 39 and 43.

homeless and in need", had lived there for a significant period of time, and that the municipality of Port Elizabeth had made no effort to listen, discuss or negotiate with them.[83]

In *Jaftha*, the Constitutional Court extended the need for rights-conscious engagement to a sale in execution of a debtor's home.[84] The apartheid-era *Magistrates' Courts Act* allowed for the sale in execution of property, regardless of the size of the debt. In this case, the debtor would have been rendered homeless as a result. The debtor suggested that a prohibition be read into the *Act* preventing sales in execution where the value of the debt is low or nominal. The Court rejected the suggestion, expressing concern about the legitimate interests of creditors and the possibility that poor persons might be hampered from accessing credit.[85] The Court's decision to instead "read in" a procedure for engagement and judicial oversight allowed it to avoid a controversial, substantive intervention.[86]

In *Olivia Road*, the Court further extended the reach of this procedural right to meaningful engagement.[87] The case concerned roughly 400 occupiers of two buildings in Johannesburg poised to be evicted because the buildings posed health and safety risks. The community contested the evictions and raised the more general issue of whether the City had made reasonable provision for housing for the thousands of people living in desperate conditions in the inner city. In an interim order issued after the oral hearing, the Constitutional Court ordered the parties to "engage with each other meaningfully". The successful settlement left the Court with little to add except to approve the agreement and opine on the remaining claim that

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[83] *Ibid* at para 59.
[84] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*, [2004] ZACC 25, [2005] (2) SA 140 (CC).
[85] *Ibid* at paras 50-51.
[86] For the Court's elaboration of the factors that might be considered in exercising this judicial oversight, see *ibid* at paras 56-60.
[87] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*, [2008] ZACC 1, [2008] (3) SA 208 (CC).

the City had failed to reasonably fulfill its positive obligations under section 26. To the surprise of some, the Court studiously avoided expanding on the state's general duties under section 26, denying rights advocates a much-desired sequel to *Grootboom*.[88]

Instead, Yacoob J's judgment focussed on the City's lack of meaningful engagement, an issue the parties had neglected. Yacoob J described ideal engagement, which would have seen the City listen to what the "consequences of eviction might be", whether the "city could help in alleviating those dire consequences", whether it is "possible to render the buildings concerned relatively safe and conducive to health for an interim period", and "when and how the city […] would fulfil these obligations".[89] The Court warned that evictions should only proceed if the City has succeeded in engaging "meaningfully with poor, vulnerable or illiterate people" and that preferably the City's efforts should "be managed by careful and sensitive people on its side".[90] Yacoob J added that a "complete and accurate account of the process of engagement" would need to be furnished to the reviewing Court.[91] The Court proved to be bullish on engagement and rejected the City's suggestion that with over 60,000 people living in unsafe buildings in Johannesburg, meaningful engagement cannot be expected in every case.[92] Instead, Yacoob J suggested that the City had work to do to build up its "rights-respecting capacities".[93]

The Court's activism in promoting rights-conscious decision-making contrasts sharply with its hesitation to add substantive detail to the Constitution's social rights. *Joe Slovo* tested the Court again with a municipality's plan for mass eviction.[94] In that case, however, the city's

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[88] Ray, *supra* note 30 at 116.
[89] *Ibid* at para 14.
[90] *Ibid* at para 15.
[91] *Ibid* at para 21.
[92] *Ibid* at para 19.
[93] Ray, *supra* note 30 at 117.
[94] *Residents of Joe Slovo Community, Western Cape v Thubelish Homes and Others*, [2009] ZACC 16, [2010] (3) SA 454 (CC) [*Joe Slovo*].

proposed eviction was part of a plan to develop low-income housing. Although the city had engaged in consultation with residents, several of the city's promises to the community were abandoned and the government had failed to adequately communicate with residents as the project evolved.[95] The Court was ultimately unwilling to halt a project of this magnitude. It responded instead by imposing a structured process for eviction, setting out specific issues to be negotiated, and retaining jurisdiction to oversee the parties' progress.[96] This eventually led to the city abandoning its plans and pursuing instead a cheaper on-site upgrade for residents of the settlement.[97]

This turn towards fostering rights-conscious processes culminates in two judgments where municipalities were challenged for suspending basic services. In *Joseph*, the City of Johannesburg had terminated the supply of electricity to a building because of the owner's repeated failure to pay.[98] The building's tenants challenged the City's action on several bases, including that the supply of electricity forms part of the tenant's right to access adequate housing under section 26. True to form, the Court declined to elaborate on the right to housing, preferring instead to recognize a general relationship between "public service providers and members of the local community", and a public duty incumbent on municipalities to provide residents water and electricity.[99] Far from being substantive, this duty only engages a right to be provided notice prior to service termination and, in some cases, to be invited to make representations.[100]

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[95] *Ibid* at para 246 (per Ngcobo J) at para 301 (per O'Regan J) and para 378 (per Sachs J).
[96] *Ibid* at para 7.
[97] Ray, *supra* note 30 at 126.
[98] *Joseph and Others v City of Johannesburg and Others*, [2009] ZACC 30, [2010] (4) SA 55 [*Joseph*].
[99] *Ibid* at paras 33-40.
[100] *Ibid* at paras 55-59.

Mazibuko concerned a challenge to the City of Johannesburg's new water policy and its installation of prepaid water meters for households in poorer areas of the City.[101] Part of the challengers' case rested on the right of access to water, enshrined in section 27. They pleaded for the Court to recognize each person's right to a fixed daily amount of water and then to judge, separately, whether the state had acted reasonably in seeking to achieve the progressive realization of this right.[102] Because this right to a quantified amount of water would be aspirational, this argument departed from earlier failed attempts to persuade the Court to accept a minimum core.

Nevertheless, the Court declined to do so. Gesturing towards indeterminacy concerns, the Court suggested that it would not be possible to fix a quantified standard when people's needs "vary over time and context".[103] The Court then elaborated on its "role in determining the content of social and economic rights". The fulfillment of social rights is a matter "for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable".[104] It is only through these measures that "the rights set out in the Constitution acquire content".[105]

The Court's role would be subsidiary. Reviewing its previous caselaw, the Court suggested that if the government has taken no steps to realize social rights, "the courts will require government to take steps"; if the adopted measures are unreasonable, the court will "require that they be reviewed"; if unreasonable limitations or exclusions are imposed, the "Court may order that those [be] removed"; finally, progressive realization calls on the

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[101] *Mazibuko and Others v City of Johannesburg and Others*, [2009] ZACC 28, [2010] (4) SA 1 (CC) [*Mazibuko*].
[102] *Ibid* at para 51.
[103] *Ibid* at paras 32 and 60.
[104] *Ibid* at para 61.
[105] *Ibid* at para 66.

government to continually review its policies.[106] The Court highlighted reasonableness review's potential to contribute to the "deepening of democracy". It requires government to explain the choices it has made, and the information and policy-making process it has relied on. If the process followed by the government "is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought"; in this way, citizens can hold government accountable "not only through the ballot box but also, in a different way, through litigation".[107]

It is difficult to trace South Africa's doctrinal trajectory back to constitutional text or drafting history.[108] The relevant social rights were modelled on the *ICESCR*, which had been interpreted by the Committee on Economic, Social and Cultural Rights to include minimum core obligations susceptible of being enforced with immediacy. Social rights that are drafted in categorical terms – including children's rights and the right not to be denied emergency medical treatment – have been softened through judicial interpretation.

Instead, the Constitutional Court's rights doctrine is framed as a response to the limits of the judiciary's capacities and its scope for legitimate intervention, as well as a need to promote democratic deliberation. This preferred role reflects a "lingering sense of institutional unease" with social rights.[109] At the same time, in cases "that minimize those concerns and in which the

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[106] *Ibid* at para 67.
[107] *Ibid* at para 71.
[108] For a review of critiques of the Constitutional Court's turn away from substantive standards, neglecting textual signals, see: Danie Brand, "Judicial Deference and Democracy" in Sandra Liebenberg & Geo Quinot, eds, *Law and Poverty: Perspectivesfrom South Africa and Beyond* (Cape Town: Juta and Company Ltd, 2012); Marius Pieterse, "Procedural Relief, Constitutional Citizenship and Socio-Economic Rights as Legitimate Expectations" (2012) 28 S Afr J Hum Rts 359 at 362; David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance" (2002) 117 S Afr LJ 484.
[109] Marius Pieterse, "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience" (2004) 26 Hum Rts Q 882 at 899–905; Ray, *supra* note 30 at 140.

Court can adopt a more traditional role", its judges scrutinize state measures more closely.[110] The Court was bullish on anti-retroviral therapy in *TAC* because the drug's financial cost was not at issue; the Court likewise was impatient with the statutory exclusion of social security benefits in *Khosa* because it appeared to be discriminatory.[111] In more recent cases, the Court has intervened aggressively to promote rights-conscious decision-making. The next section returns to this dynamic, and suggests that the Supreme Court of India has been comfortable innovating in bold ways even in cases where the rights claim itself has failed.

IV. India

There are two stories that can be told about social rights in India. The first is one of bold judicial initiative to entrench and enforce positive rights. The Indian Constitution distinguishes "Fundamental Rights" (including the right to life, as well as freedom of religion, expression, and association) and "Directive Principles of State Policy" (recognizing the state's duty to improve "public health", the "level of nutrition", and the general "standard of living").[112] Articles 32 and 37 provide that only the former can be enforced by the Supreme Court.[113] In spite of this textual constraint, the Indian Supreme Court of the 1980s broadened the right to life to include the right to "live with dignity" and, with this pivot, recognized judicially-enforceable rights to nutrition, livelihood, shelter, and basic healthcare.[114] The Court has since been recognized by many

[110] Ray, *supra* note 30 at 93.
[111] *Ibid* at 92.
[112] See the *Constitution of India, 1950,* Part III on Fundamental Rights, and specifically article 21 (right to life), article 19(1)(a) and (c) (freedom of expression and association), and article 25 (religion); see Part IV on Directive Principles of State Policy, and specifically Article 47.
[113] *Ibid* at article 32 (articulating a "right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by [Part III]").
[114] See generally S Muralidhar, "India: The Expectations and Challenges of Judicial Enforcement of Social Rights" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) 102; Jayna Kothari, "Social Rights Litigation in India: Developments of the Last Decade" in Daphne Barak-Erez & Aeyal Gross, eds,

scholars as a robust enforcer of social rights, willing to recognize something resembling "minimum core" guarantees that must be realized immediately.[115]

This chapter foregrounds the second, more recent story, which is one of judicial equivocation and, for some, ultimately abdication. The Court has often avoided expounding on social rights doctrine, and it frames rights and the state's correlative duties in inconsistent ways. Furthermore, its brash approach to recognizing social rights is belied by a more recent recognition of limitations, judicial temerity and deference. Pratap Bhanu Mehta thus suggests that "even as the Supreme Court has established itself as a forum for resolving public-policy problems, the principles informing its actions have become less clear".[116] Anup Surendranath is blunter in his assessment that the Court's right to dignity framework has not been elaborated with "any sense of coherence", its recognition depends on "bald assertion[s] on a case-by-case basis", leaving the Court with "absolute discretion on which rights claims it will recognise".[117]

Part of this chequered pattern of enforcement may reflect some of the Court's distinctive features: it is staffed by more than 30 judges, most decisions are made by benches of two, and its heavy caseload consists of over 60,000 cases a year.[118] Under these conditions, respecting

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Exploring Social Rights (Oxford: Hart Publishing, 2007) 171; Shylashri Shankar & Pratap Bhanu Mehta, "Courts and Socioeconomic Rights in India" in Daniel Brinks & Varun Gauri, eds, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) 146.

[115] See eg Muralidhar, *supra* note 114 at 116; Lauren Birchfield & Jessica Corsi, "Between Starvation and Globalization: Realizing the Right to Food in India" (2010) 31:4 Mich J Int'l L 691 at 750; Nick Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance Court" (2009) 8:1 Wash U Global Stud L Rev 1 at 49.

[116] Pratap Bhanu Mehta, "India's Unlikely Democracy: The Rise of Judicial Sovereignty" (2007) 18:2 J Democracy 70 at 72; see also Madhav Khosla, *The Indian Constitution* (Oxford: Oxford University Press, 2012) at 120-121 and 129; Anup Surendranath, "Life and Personal Liberty" in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2017) 756 at 775.

[117] Surendranath, *supra* note 116 at 775.

[118] Nick Robinson, "Judicial Architecture and Capacity" in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 330 at 336-337.

precedent and developing coherent doctrine has become an ideal often unachieved in practice; commentators have come to recognize a "polyvocal court" lacking a "precedent consciousness".[119] The Court may also cherish the resulting flexibility, since it frees judges from being bound to outcomes they may not like, and to modulate the intensity of their interventions according to how confident they happen to be in a particular case.[120] More likely, the Court's inconsistency reflects disagreement over judicial role and a more recent, pronounced insistence on deference and non-intervention.

a) The Directive Principles of State Policy and the right to live with dignity

Members of India's Constituent Assembly, beginning their work in December 1946, tied the country's future constitution to their desire for social revolution.[121] The constitutional project was built on an assumption that political freedom depended on freedom from starvation and precarity. Many members of the Constituent Assembly were committed socialists who perceived deep linkages between capitalism and the British empire.[122] The Directive Principles of the State were intended to provide constitutional moorings to the objectives of the social revolution, and these Directive Principles have often been perceived to be as critical as the Constitution's "Fundamental Rights".[123]

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[119] For "polyvocal court", see Nick Robinson, "Structure Matters: The Impact of Court Structure on the Indian and US Supreme Courts" (2013) 61:1 Am J of Comp L 173 at 184-185; for absence of "precedent consciousness" see Rajeev Dhavan, *The Supreme Court Under Strain: The Challenge of Arrears* (Mumbai: Tripathi, 1978) at 450; see also Upendra Baxi, "The Travails of Stare Decisis in India" in AR Blackshield, ed, *Legal Change: Essays in Honour of Julius Stone* (Sydney: Butterworths, 1983) 38 at 45.
[120] Ray suggests that this strategy might account for the pattern of enforcement in South Africa; see Ray, *supra* note 30 at Chapter 4.
[121] See general account in Glanville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966) at 26-27, 50-52, 60, and 75-83; see also Rehan Abeyratne, "Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy" (2014) 39:1 Brook J Int L 1 at 26-28.
[122] Austin, *supra* note 121 at 60, cited in Abeyratne, *supra* note 121 at 26-28.
[123] Jagat Narain, "Judicial Law Making and the Place of Directive Principles in Indian Constitution" (1985) 27:2 J Indian L Inst 198 at 203.

Members of the Constituent Assembly debated whether these principles should be judicially enforced. At the time, there were no countries willing to recognize a fulsome set judicially enforceable social guarantees.[124] Indeed, these debates were occurring twenty years before the ratification of the *ICESCR*, and even before the promulgation of the Universal Declaration of Human Rights. There was a concern among some leading members of the drafting committee that empowering judges in this way could impede the needed transformative work of the legislative branches.[125] The drafters were chastened by the United States' New Deal-era jurisprudence and the risk that judicial review posed to progressive legislation.[126] Steeped in a British tradition of separation of powers, the drafting members were inclined towards a judiciary that was "submissive", "politically-distant" and "safe".[127] They therefore opted to take inspiration from the Irish constitution's concept of "Directive Principles of State Policy" and nested the country's socio-economic commitments there.[128]

During the Constitution's early years, the Indian Supreme Court was dutifully inclined towards narrow interpretations of the Fundamental Rights.[129] However, political developments in India in the 1970s prodded the Court towards a more activist posture. In 1975, Prime Minister Indira Gandhi persuaded President Fakhruddin Ali Ahmed to declare a state of emergency under

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[124] Atul Setalvad, "The Supreme Court on Human Rights and Social Justice: Changing Perspectives" in BN Kirpal, ed, *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford: Oxford University Press, 2000) 233 at 233.
[125] Austin, *supra* note 121 at 77-83.
[126] BN Rau, among the most influential voices in the drafting process, had apparently been warned of this risk in conversations with US Supreme Court Justice Felix Frankurter: see Manoj Mate, "The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventative Detention Cases" (2010) 28:1 BJIL 216 at 221-222.
[127] Rajeev Dhavan, "Law as Struggle: Public Interest Law in India" (1994) 36:3 J Indian L Inst 302 at 312-313; Abeyratne, *supra* note 93 at 31.
[128] BN Rau, *Constitutional Precedents: Third Series* (New Delhi: Constituent Assembly, 1947) at 22.
[129] See eg *Gopalan v State of Madras*, [1950] 1 SCR 88 at 95 and 107-112 (narrow interpretation of Article 21, concluding that the state may deprive individuals of liberty so long as this deprivation is pursuant to a legally-established procedure).

the pretext of domestic political unrest. A barrage of new measures led to the mass imprisonment of political opponents, rule by Prime Ministerial decree, the suspension of elections, and other attacks on civil liberties, the press, and the courts.[130] Emergency Rule was short-lived – in 1977, the Indian National Congress Party was defeated in a general election by the Janata Party – but it left a lasting mark on the judiciary. The late 1970s and early 1980s were marked by flourishing substantive and procedural innovations, sometimes grouped together under the term "Public Interest Litigation", that repositioned the Court as an institution to promote the interests of ordinary Indians.[131]

In part, the Court was led by some of its judges' desire to "to rehabilitate and bolster the institutional legitimacy of a Court that had been tarnished by its acquiescence to Gandhi's Emergency rule".[132] The Public Interest Litigation movement also reflected the "social-egalitarian policy values and worldviews" of a few of the senior justices, including Justice PN Baghwati and Justice VR Krishna Iyer, who had previously championed law reform to expand legal aid and facilitate access to justice.[133] The movement was also propelled by the "broader outlook and sensibilities of professional and intellectual elites within the Indian media, NGOs, academia, the bar, and in some cases, national public opinion".[134] Judicial activism was seen by "national elites" as an appropriate response to the "increasing levels of corruption and graft, the

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[130] See generally, Abeyratne, *supra* note 121 at 37-38.
[131] For a more thorough account of this period of Indian constitutional politics, see Manoj Mate, "Public Interest Litigation and the Transformation of the Supreme Court of India" in Diana Kapiszewski, Gordon Silverstein & Robert A Kagan, eds, *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge: Cambridge University Press) 262; SP Sathe, "Judicial Activism: The Indian Experience" (2001) 6:1 Wash U JL & Pol'y 29; Poorvi Chitalkar & Varun Gauri, "India: Compliance with Orders on the Right to Food" in Malcolm Langford, Cesar Rodriguez-Garavito & Julieta Rossi, eds, *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge: Cambridge University Press, 2017) 288 at 292-293; Muralidhar, *supra* note 114 at 108-109.
[132] Mate, *supra* note 126 at 264-265; Upendra Baxi, *The Indian Supreme Court and Politics* (Delhi: Eastern Book Company, 1980) at 124-126; Muralidhar, *supra* note 114 at 108-109.
[133] Mate, *supra* note 126 at 264-265, 271 and 281.
[134] *Ibid* at 283.

lack of transparency and accountability, and weak or ineffective governance" in the legislative and executive branches.[135]

Many of the innovations that flourished during this time were procedural. Formalism was relaxed to facilitate access to the courts and *pro bono* litigation.[136] "Concerned citizens", civil organizations and even *amicus curiae* have been permitted to pursue litigation in the name of vulnerable communities.[137] As the next chapter discusses at greater length, it was also during this time that the Court began relying on the "continuing mandamus". This innovation sees the Court maintain jurisdiction over a matter by relying on a series of interim orders, permitting the Court to engage in continuous oversight over the political branches' response to widespread rights' deprivations.[138]

At around the same time, the Court began to reimagine a narrow, negatively-framed right to life as a more expansive positive right to live with dignity. Even before emergency rule, judges began to foreground the importance of the Directive Principles in Part IV.[139] In *Maneka Gandhi*, the Court reversed course on a narrow procedural interpretation of Article 21's right to life by adding a substantive dimension; going forward, a limit on life or liberty would have to be "reasonable, fair and just" to pass constitutional muster.[140] In *Minerva Mills*, the Court observed that "Parts III [Fundamental Rights] and IV [Directive Principles of State Policy] together

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[135] *Ibid*; Dhavan, *supra* note 127.
[136] See generally A Desai & S Muralidhar, "Public Interest Litigation: Potential and Problems" in BN Kirpal, ed, *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford: Oxford University Press, 2000) 159.
[137] Shyam Divan, "Public Interest Litigation" in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 662 at 670-672.
[138] Mate, *supra* note 126 at 273; Divan, *supra* note 137 at 673-677; Clark Cunningham, "Public Interest Litigation in the Indian Supreme Court: A Study in the Light of American Experience" (1987) 29 J of Indian L Inst 494 at 511-515.
[139] *Keshavananda Bharati v State of Kerala*, [1973] 4 SCC 225 ; *State of Kerala v NM Thomas*, [1976] 2 SCC 310 .
[140] *Maneka Gandhi v Union of India*, [1978] 2 SCR 621 at 628-629.

constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution", a "twin formula for achieving […] social revolution".[141] In *Waman Rao*, the Court continued to insist on the Constitution's commitment to "economic justice", and in *SP Gupta*, Bhagwati J argued that the civil and political rights enshrined in Part III would be "practically meaningless" unless "accompanied by social rights necessary to make them effective and really accessible to all".[142]

The Court's creative moment came in *Francis Coralie Mullin*, a case that was concerned with restrictions on a detainee's ability to speak with their lawyer and family.[143] Surprisingly, the Court rested its conclusion in favour of the detainee on the right to life. Bhagwati J opined that the right to life forms the "ark of all other rights", and therefore must be interpreted expansively to "invest it with significance and vitality […] for years to come" and to "enhance the dignity of the individual and the worth of the human person".[144] Not "restricted to mere animal existence […] [or] physical survival", Bhagwati J observed that the right to life "includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter".[145]

Bhagwati J recognized the positive dimension to this duty, and gestured towards the distinction between a "minimum core" right, on one hand, and a state duty that is aspirational and cabined by available resources, on the other. He writes that although the "magnitude and

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[141] *Minerva Mills Ltd v Union of India*, [1980] 1 SCR 206 at 208-209; see also *State of Kerala v NM Thomas*, [1976] 2 SCC 310 at 367 (per Iyer J).
[142] *Waman Rao v Union of India*, [1981] 2 SCR 1 at 3 ("The progress in the degeneracy of any nation can be rapid, especially in societies riven by economic disparities and caste barriers. We embarked upon a constitutional era holding forth the promise that we will secure to all citizens justice, social, economic and political; equality of status and of opportunity; and, last but not the least, dignity of the individual"); *SP Gupta v President of India*, [1982] 2 SCR 365 at para 19.
[143] *Francis Coralie Mullin v Administrator, Union Territory of Delhi*, [1981] 2 SCR 516.
[144] *Ibid* at 517.
[145] *Ibid* at 518.

content of the components of this right would depend upon the extent of the economic development of the country […] it must, in any view of the matter, include the right to basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self".[146]

b) Judicial expansion and equivocation

Subsequent decisions are inconsistent, revealing hesitation and disagreement among the Court's justices. The Court occasionally enforces social rights aggressively, and gestures towards the need to interpret the Constitution in line with the *ICESCR*. However, when called upon to scrutinize public policy, its judges often prefer deference and hastily accept resource limitations. Indeed, the Court is often most comfortable articulating rights in a fulsome way when it is *defending* state measures from challenge. Although its decisions resist easy systemization, the Court's jurisprudence is clearly shaped by concerns over its proper role. The Court's ambitiousness in the 1980s was a response to a particular political moment; concerns of judicial overreach flourish in its more recent caselaw, which reveals a sense of deep regret over the Court's earlier activism.

The Court's right to healthcare decisions are perhaps its most aggressive. In *Parmanand Katara*, an injured man was referred to another hospital out of concern for tort liability, and the man died in transit. Referring to article 21's right to life and to the Code of Medical Ethics, the Court reasoned that doctors at public hospitals would be "duty-bound to extend medical assistance" to preserve the life of someone in a medical emergency.[147] Silent on the issue of cost, the Court describes this obligation as "total, absolute and paramount".[148]

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[146] *Ibid*.
[147] *Parmanand Katara v Union of India*, [1989] 3 SCR 997 at 8.
[148] *Ibid*.

Paschim Banga Khet Mazdoor Samity later considered the state's obligation to provide medical treatment for individuals with serious injuries.[149] The case concerned a man who had sustained severe head injuries and was turned away from several public hospitals because of a lack of available beds. He was ultimately admitted to a private hospital, at considerable expense. The Court concluded that the state's failure to provide "timely medical treatment to a person in need" violated the right to life.[150] The Court went on to issue a number of directions, including that hospitals at the district level be upgraded and staffed with specialists, and that a centralized communication system be established to identify public hospitals where beds are available.[151] Although the Court acknowledged the financial cost of these demands, it insisted that the provision of medical services was a constitutional obligation and "[w]hatever is necessary for this purpose has to be done"; the state could not avoid its constitutional obligations "on account of financial constraints".[152]

The decision in *Sahara House* was similarly forceful. The Court objected to the National AIDS Control Organization's restriction on access to second-line anti-retroviral therapy on financial and capacity grounds.[153] At judges' direction, stakeholders negotiated a revised policy that extended second-line treatment to every person living with HIV.[154]

The Court has been less strident with other social rights, including the right to shelter.[155]

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[149] *Paschim Banga Khet Mazdoor Samity v West Bengal*, [1996] 4 SCC 37.
[150] *Ibid* at 5.
[151] *Ibid* at 9.
[152] *Ibid*.
[153] *Sahara House v Union of India*, [2010] Unreported Judgment; Writ Petition (C) 535 of 1998 (order dated 16 December 2010) cited in Surendranath, *supra* note 116 at note 97.
[154] Anand Grover, Maitreyi Misra & Lubhyathi Rangarajan, "Right to Health: Addressing Inequities through Litigation in India" in Colleen Flood & Aeyal Gross, eds, *The Right to Health at the Public/Private Divide* (Cambridge: Cambridge University Press, 2014) 423 at 439.
[155] Kothari, *supra* note 114 at 183 writing that "the development of the right to housing in India has not followed a coherent, chronological or principled pattern".

Gaurnam Kaur and *Ahmenabad* declined to recognize a city's obligation to relocate individuals prior to eviction from a public space.[156] *Sodan Singh* suggests that Article 21 is not engaged by efforts to evict squatters from roads.[157] *Gauri Shankar* upheld legislation that prevented successors from inheriting statutory residential leases reserved for low-income families. [158]

Even on healthcare, judges have shied away from a categorical framing of positive rights. *Ram Lubhaya Bagga* upheld a modification to the State of Punjab's reimbursement policy for healthcare expenses, which narrowed the scope of coverage.[159] Although social rights typically call on courts to scrutinize policy retrogression carefully, the Court hastily deferred to the government's invocation of financial constraints, adding that "[n]o right [could] be absolute in a welfare state" and that judges should avoid "entering into this realm which belongs to the executive".[160]

The Court's reputation as activist is also tempered by the fact that some of its most stirring rights proclamations come in cases where judges have defended government measures from constitutional challenge or private subversion. In *Chameli Singh*, petitioners challenged expropriations of land destined for low-income housing. Ramaswamy J suggested that the "[r]ight to social and economic justice conjointly commingle[] with right to shelter as an inseparable component for meaningful right to life".[161] He added that this right to life implies the

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[156] *Municipal Corp of Delhi v Gurnam Kaur*, [1988] 2 SCR 929 at 930; *Ahmedabad Municipal Corp v Nawab Khan Gulab Khan*, [1997] 11 SCC 123 .
[157] *Sodan Singh v NDMC*, [1989] 4 SCC 155 at para 18.
[158] *Gauri Shanker v Union of India*, [1994] 6 SCC 349 at para 12 (dismissing summarily arguments grounded on the right to life and shelter).
[159] *State of Punjab v Ram Lubhaya Bagga*, [1998] 1 SCR 1120.
[160] *Ibid*; see Anand Grover, Maitreyi Misra & Lubhyathi Rangarajan, "Right to Health: Addressing Inequities through Litigation in India" in Colleen Flood & Aeyal Gross, eds, *The Right to Health at the Public/Private Divide* (Cambridge: Cambridge University Press, 2014) 423 at 440-441.
[161] *Chameli Singh and Others v Uttar Pradesh*, [1996] 2 SCC 549 at para 3.

"right to food, water, decent environment, education, medical care and shelter".[162] For its part, the right to shelter includes "adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities".[163] Only part of this right would fall within the scope of article 21; the balance was subject to a state duty rooted in the Directive Principles and subject to economic budgeting.[164]

In the same vein, in *Shri Gupta*, Ramaswamy J explained that the State of Gujrat's low-income housing scheme strove to promote the right to a residence and a dignified life, as well as Part IV's injunction to promote the economic interests of vulnerable Indians.[165] He then summarily dismissed a challenge to the state's new priority allotment scheme for low-income housing.[166]

Shantistar Builders concerned a low-income housing project that had been subverted by the builders responsible for managing it.[167] Units were meant to be sold at a price fixed by the state government, and allotted to designated populations. However, the builders began selling units at higher prices and started ignoring deserving applications. The Court ultimately issued a series of orders – including a requirement for state supervision and for the builders to keep records of all applications – but also took the opportunity to elaborate on the positive dimensions of the right to life. Misra J suggested that the right to life takes "within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in", and adds that the Constitution's aim of "ensuring fuller development of every child"

[162] *Ibid* at para 8.
[163] *Ibid*.
[164] *Ibid*.
[165] *Shri PG Gupta v State of Gujrat*, [1995] 2 SCC 182 at paras 7-11.
[166] *Ibid* at para 12.
[167] *Shantistar Builders v Narayan Khimalal Totame*, [1990] 1 SCC 520 .

would only be possible "if the child is in a proper home". [168] He then recognized that citizens must be ensured a "reasonable home", which in India "can even be [a] mud-built thatched house or a mud-built fire-proof accommodation".[169]

These cases feature instances where the Court may feel freer to expand on social rights doctrine because the demands on its institutional capacity and legitimacy are low. The Court also tends to be bolder in cases where it can abandon robust rights interpretations while still managing to find an alternative, rights-affirming role. *Olga Tellis* is one example of this dynamic.[170] The petitioners had challenged mass eviction programs that sought to displace pavement and slum dwellers in much of Mumbai on the basis that it interfered with their ability to find work and earn a wage. The Court recognized that a right to livelihood formed part of Article 21's right to life.[171] However, it ultimately rejected the petition on the basis that the state's plans to move forward with mass eviction was reasonable, since pavements are an public space that ought to not be subverted for private use.[172]

Although the Court was prepared to defer to the state's plans to move forward with eviction, it proved more aggressive in the balance of its judgment. The decision suggests that under normal circumstances, the municipal commissioner should have provided the affected population with an opportunity to be heard.[173] The Court also directed the government to postpone the eviction process until the end of monsoon season.[174] Finally, it insisted that the government's various commitments, made during the course of litigation, must "be made

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[168] *Shantistar Builders v Narayan Khimalal Totame*, [1990] 1 SCC 520 at para 9.
[169] *Ibid*.
[170] *Olga Tellis and Others v Bombay Municipal Corporation and Others*, [1985] 2 SCR 51.
[171] *Ibid* at 55.
[172] *Ibid* at 59-60.
[173] *Ibid* at 59-60.
[174] *Ibid* at 59-61.

good".[175] These commitments included the state's promise to relocate some of the slum and pavement dwellers to alternative plots of land, and to not raze older slums in the absence of a compelling public purpose. Voicing a concern that preoccupies some of its subsequent jurisprudence, the Court warned that the state's social rights policies "must not remain a dead letter as such schemes and programmes often do".[176]

Ahmedabad also concerned municipal plans to evict pavement dwellers from a busy street.[177] The Court again signaled its comfort with evictions proceeding even in the absence of plans for resettlement.[178] Indeed, it warned that a right to resettlement might encourage encroachment on public property. However, the Court lamented how "the right to residence and settlement is an illusion to the rural and urban poor", and prodded the municipality to formulate proposals for the affected population.[179] The Court then approved the city's three proposals (without curial scrutiny) and gave the proposed evictions its blessing, so long as eligible individuals had time to apply.[180]

The Court's concerns about its proper institutional role have become more pronounced during the last twenty years. The decision in *Common Cause* is a striking example.[181] The case concerned a complaint of the rising number of road accidents and the regulation of public roads in India. Katju J began his judgment by remarking how public interest litigation has grown "totally out of control", becoming "something so strange and bizarre that those who had created it probably would be shocked to know what it has become".[182] Reviewing some of its previous

[175] *Ibid*.
[176] *Ibid*.
[177] *Ahmedabad Municipal Corp v Nawab Khan Gulab Khan*, [1997] 11 SCC 123.
[178] *Ibid* at 14-15.
[179] *Ibid* at 11-12.
[180] *Ibid*.
[181] *Common Cause v Union of India*, Civil Writ Petition 580 of 2003 .
[182] *Ibid* at para 1.

caselaw, the Court went on to focus on its role in social rights matters. It expressed concerns that the separation of powers had not always been respected in article 21 jurisprudence. If indeed the legislative and executive branches are not functioning properly, the Court warned that "it is for the people to correct the defects by exercising their franchise" and not for the judiciary to "tak[e] over the functions of the other organs".[183] Fearing judicial overreach, Katju J added that the country "can ill afford to be governed through court decrees" and that the "people must know that Courts are not the remedy for all ills".[184]

Common Cause is representative of a broader shift towards deference and non-intervention, a trend which continues up to the present day. The Supreme Court of India's social rights jurisprudence is thus chequered, positioning India between the consistent modesty practiced in South Africa and the strident rights jurisprudence of the Constitutional Court of Colombia. In spite of its early, categorical pronouncements, the Supreme Court is known now for its ready deference of government.

This conflicted rights jurisprudence reflects disagreement among the Court's judges about the judicial role. The Court's ambitious early jurisprudence was a response to a specific political moment, where the Court forged ahead with an ambitious rights agenda that is at odds with the constitution's text and drafting history. A confluence of political, institutional and even biographical factors produced judicial over-enforcement of constitutional norms. It seems that as the political and institutional landscape have shifted over time, so too has the judiciary's basic posture on social rights. The Court's reputation for activism is now belied by its judges' expressions of regret and outbursts of deference, signaling concern for past curial overreach.

[183] *Ibid* at paras 37 and 40.
[184] *Ibid* at paras 45 and 53.

Since social rights doctrine remains highly influenced by judicial role, it is not surprising that the Court's most fulsome doctrine is elaborated in cases where the demands on the Court's capacity and legitimacy are low. In the next Chapter, I consider how the Supreme Court embarked on one of its most ambitious social rights proceedings in part by turning away from the traditional model of rights enforcement and towards a variety of innovative methods of fruitfully interacting with other state actors.

V. Colombia

Unlike its peers, the Constitutional Court has enthusiastically embarked on doctrinal exposition, setting out its substantive content and articulating the circumstances in which vital goods or services can be claimed.[185] Early on, the Court recognized the state's duty to guarantee a "vital minimum" to sustain dignified life.[186] The Court has also found ways of enforcing the social rights that are expressly included in Colombia's Constitution. These "programmatic" rights have been invoked to thwart policy regression and to require state actors to adopt reasonable, targeted policies.[187] The Court has also innovated on the procedural front, expanding its reach past individual cases to address widespread deprivation.[188] In doing so, the Court has earned a reputation as a champion of the poor, while attracting heated criticism from some elected officials and policymakers.[189]

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[185] See eg infra note, discussing *Decision T-533/92*, (CC).
[186] Note that the decisions of the Constitutional Court of Colombia can be found at: <www.corteconstitucional.gov.co/relatoria/>.
[187] See eg *Decision T-595/02*, (CC); *Decision T-602/03*, (CC).
[188] See eg *Decision T-153/98*, (CC) (on prison overcrowding); *Decision T-590/98*, (CC) (on governmental failure to provide adequate protection for human rights advocates); *Decision SU-090/00*, (CC) (on failure to register public officials for socia security); *Decision T-025/04*, (CC) (on basic needs of internal migrants).
[189] Rodrigo Uprimny Yepes, "The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates" in Roberto Gargarella, Pilar Domingo & Theunis Roux, eds, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor* (Burlington: Ashgate, 2006)

The Court's rights doctrine is sustained by its confident sense of purpose and institutional role. Its judges have come to see judicial activism as a necessary response to the political branches' failure, and the Court as the only institution capable of delivering on the aspirations of the country's 1991 Constitution. This strident sense of purpose has weathered political backlash and criticism.

a) The vital minimum and the programmatic social rights

Colombia's 1991 Constitution was enacted in response to a moment of political crisis. The legitimacy of Colombia's institutions had been gravely compromised by corruption and patronage, and by an inability to curb escalating violence.[190] An inclusive drafting process saw traditional political parties collaborate with guerrilla groups, indigenous peoples, and civil society actors towards a document that reflected a "feeling of national compromise, reconstruction, and modernization".[191] The resulting document proclaims that Colombia is "a social state" (*Estado social*), respectful of "human dignity", and entrenches a substantial number of social rights, including rights to healthcare, housing, and social security.[192]

Members of the Constituent Assembly sought to achieve the country's constitutional aspirations by strengthening state institutions.[193] In particular, the 1991 Constitution established

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127 at 149; Magdalena Sepúlveda, "Colombia: The Constitutional Court's Role in Addressing Social Injustice" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) 144 at 152; David Landau, "The Promise of a Minimum Core Approach: the Colombian Model for Judicial Review of Austerity Measures" in Aoife Nolan, ed, *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014) 267 at 279.

[190] Manuel José Cepeda-Espinosa, "Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court" (2004) 3 Wash U Global Stud L Rev 529 at 545–546; Landau, *supra* note 189 at 268–269; David Landau, "Political Institutions and Judicial Role in Comparative Constitutional Law" (2010) 51:2 Harv Intl LJ 319 at 335–337.

[191] Cepeda-Espinosa, *supra* note 190 at 545.

[192] See arts 44 (social rights of children), 48 (social security), 49 (health), 51 (housing) in *Constitution of Colombia, 1991*.

[193] Cepeda-Espinosa, *supra* note 190 at 545; Landau, *supra* note 190 at 339.

the Constitutional Court and an accelerated proceeding – the *acción de tutela* – to protect individuals' "fundamental rights".[194] The *tutela*'s protection is designed to be both fast and accessible. Procedural formalities have been relaxed, proceedings can be instituted in any court, and first-instance decisions must be rendered within ten days.[195] Appeals must be filed within three days and decided within twenty. Each decision is transmitted to the Constitutional Court, which can select cases on its own initiative for review. In practice, the Court only does so for approximately 1% of cases.[196] The Constitutional Court must not take more than one month to decide which *tutelas* to hear, and three months to render final judgment.[197] These procedural innovations have earned the *tutela* "a kind of mythic status" as a pillar of constitutionally-instigated change.[198] The annual number of *tutelas* filed has continually increased, and between 1999 and 2010 there were over 2.7 million decisions rendered.[199]

There was some initial uncertainty regarding whether the Constitution's social rights could be enforced via *tutela*. Article 86 suggests that the *tutela*'s protection is limited to the Constitution's "fundamental rights", which are enumerated in their own section and include the traditional set of first-generation civil and political rights.[200] Article 85 also lists a series of rights that are "applicable immediately" and excludes the Constitution's social rights. However, unlike the Indian Constitution, social rights in Colombia are not framed as directives of state policy,

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[194] *Constitution of Colombia, 1991*, *supra* note 192 see Title VIII, Ch 4 (Constitutional Court) and article 86 (acción de tutela).
[195] Art. 86 of *ibid*; Landau, *supra* note 189 at 269.
[196] Art 241.9 of *Constitution of Colombia, 1991*, *supra* note 192; Sepúlveda, *supra* note 189 at 146.
[197] Arts 31 and 32 of *Legislative Decree 2591 of 1991*.
[198] See Landau, *supra* note 189 at 269; Rodrigo Uprimny Yepes, "Las transformaciones de la administración de justicia en Colombia" in Boaventura de Sousa Santos & Mauricio Garciá Villegas, eds, *El caleidoscopio de las justicias en Colombia* (Bogotá: Siglo de Hombres, 2001) 261 at 300–302.
[199] Katharine Young & Julieta Lemaitre, "The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa" (2013) 26 Harv Hum Rts J 179 at 186.
[200] See Art 86 and Title II, Chapter 1 of *Constitution of Colombia, 1991*, *supra* note 192.

removed from the machinery of judicial enforcement. The Constitution's textual ambiguity reflects an unresolved debate among the members of Colombia's Constituent Assembly, who were divided on the question of justiciability.[201]

The matter was left to the Constitutional Court, which ultimately recognized a right to a "vital minimum" that could be enforced through *tutela*.[202] The Court reasoned that this guarantee could be inferred from the rights to life, health, and social security, as well as the Constitution's commitment to a "social state" and human dignity.[203] In the Court's view, "fundamental rights" guarantee not just basic subsistence, but also the economic conditions necessary to live a dignified life and to freely develop one's personality.[204] The Court has described this "vital minimum" as a right to "the most elementary material conditions" and that protects the person "against any form of degradation that compromises not only his physical subsistence but also his intrinsic worth".[205] It is said to include the right to make one's own life plan ("to live as one wishes"), to the basic material conditions necessary for a decent existence ("to live well"), and to have one's physical and moral integrity respected ("to live without humiliation").[206]

The Court has since elaborated on the circumstances in which vital goods and services can be claimed.[207] The person must be "absolutely incapable" of providing for themselves; they must possess a vital need, which, if left unfulfilled, will severely impair their ability to live a dignified life; and, finally, their families must be incapable of supporting them.[208] In these

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[201] Landau, *supra* note 189 at 270.
[202] See eg *Decision T-426/92*, (CC); *Decision T-533/92*, *supra* note 185.
[203] *Decision T-426/92*, *supra* note 202 at sections 4-5.
[204] *Ibid* at section 4.
[205] *Decision T-458/97*, (CC) at section 23; *Decision C-776/03*, (CC) at section 4.5.3.3.2; translations provided by Landau, *supra* note 189 at 270.
[206] *Decision T-355/06*, Constitutional Court of Colombia at section 8.1.
[207] *Decision T-533/92*, *supra* note 185 at section 5.
[208] *Ibid* at sections 5 and 7.

circumstances, a person may petition the state for immediate relief – although the Court has hinted that this relief may be subject to a corresponding duty to reimburse the state either financially or through public labour (*trabajo social*).[209] The Court has also suggested that the State's financial capacity to satisfy this vital minimum may also limit its obligation.[210]

The *tutela* has been an valuable channel for accessing healthcare. Often, *tutelas* serve as a vehicle for individuals who were wrongly denied access to medication or treatments that are meant to be compensated by Colombia's public healthcare system. Katharine Young and Julieta Lemaître suggest that these cases number in the thousands.[211] More controversially, *tutelas* have been relied on to obtain high-cost treatments initially excluded from Colombia's compulsory health plan.[212] This relief remains available so long as the treatment in question has been prescribed by a doctor, is essential to a dignified life, is within the government's financial means, and cannot be paid for by the person in question.[213] The Court has thus ordered the provision of anti-retroviral treatment for persons living with HIV, a variety of costly orthopedic surgeries, treatment for children suffering from rare medical conditions, and even a sweeping free infant vaccination program for the poor.[214] Since *tutelas* typically represent individual claims, high-cost treatments are generally found to be within the state's financial means.

The Court's jurisprudence is generous, even by the standards of rights advocates. In the wake of Colombia's 1999 economic crisis, it began ordering the provision of medical treatment

[209] *Ibid*.
[210] *Decision SU-111/97*, (CC); Sepúlveda, *supra* note 189 at 150–151.
[211] Young & Lemaitre, *supra* note 199 at 189–190.
[212] See generally *ibid*.
[213] *Decision SU-111/97*, *supra* note 210.
[214] *Decision SU-043/95*, (CC); *Decision SU-819/99*, (CC). *Decision T-271/95*, (CC) (HIV anti-retroviral therapy); *Decision T-597/93*, (CC) (orthopedic surgery for disabled child); *Decision T-571/95*, (CC) (child's surgery for rare medical condition); *Decision SU-225/98*, (CC) (free vaccination program).

even for individuals who were capable of paying for the treatment themselves.[215] The Court's theory of what constitutes a dignified life has also proven to be expansive, reaching as far as requiring the state to provide Viagra to support men's sexual function.[216]

The labelling of the rights concerned has also shifted over time, reflecting a rights creep. Health and social security were initially recognized as "programmatic rights" that could only be enforced immediately, *via tutela*, where the interest in question formed part of the vital minimum and was connected to the right to life.[217] Over time, the Constitutional Court came to recognize that the cores of the Constitution's social rights were freestanding fundamental rights, susceptible of immediate realization (the balance of the right remaining programmatic).[218]

Its generosity appears to have encouraged litigants, provoking a staggering number of *tutelas* to be filed yearly. Between 1999 and 2010, there were over 2.7 million *tutela* decisions rendered, and estimates suggest that between 20-40% of these concerned the right to health.[219] These numbers have increased over time. Over 600,000 *tutelas* were filed in each of the years from 2015-2018, representing a striking average of 124 applications per 10,000 habitants a year.[220] In 2017 and 2018, the right to health was invoked in 32.54% and 34.21%, respectively, of all *tutelas* filed.[221] The other social rights are invoked less frequently but still represent a significant caseload. In 2018, 40,909 applications (or 6.74%) invoked the "vital minimum",

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[215] *Decision SU-480/98*, (CC) (loosening the restriction on evidence of the petitioner's financial incapacity); see also Young & Lemaitre, *supra* note 199 at 188–189; Pablo Rueda, "Legal Language and Social Change During Colombia's Economic Crisis" in Javier Couso, Alexandra Huneeus & Rachel Sieder, eds, *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2010) 25 at 44–45; note that the requirement of petitioner's financial incapacity was reaffirmed in *Decision T-227/03*, (CC); see also *Decision T-859/03*, (CC).
[216] *Decision T-926/99*, (CC).
[217] See eg Sepúlveda, *supra* note 189 at 154.
[218] Landau, *supra* note 189 at 271.
[219] Young & Lemaitre, *supra* note 199 at 186.
[220] Defensoría del Pueblo de Colombia, *La tutela y los derechos a la salud y a la seguridad social* (Bogotá, 2019) at 53.
[221] *Ibid*.

25,322 (or 4.17%) claimed humanitarian assistance, 19,886 (or 3.27%) invoked the right to social security, while only 1,041 (or 0.17%) claimed potable water.[222]

Several decisions have also given life to the "programmatic" dimensions of the Constitution's social rights, albeit on different terms. The Court conceded early on that the Constitution leaves it up to the legislative and executive branches to give these rights their content, and to achieve more generally a "just and equitable redistribution of economic and social resources to favour the groups that have been traditionally marginalized from the benefits of wealth".[223] Subsequent decisions have since introduced a few disciplines. First, policy regressions are subjected to special scrutiny and must be motivated by compelling reasons.[224] For instance, the Court struck out legislation introducing a new tax on basic necessities including food, housing and transportation.[225] The Court reasoned that the measure imposed an undue burden on the poor, compromised Colombia's aspiration of a social state, and ignored the constitution's directive to tax equitably and progressively.[226] The Court was especially concerned that the reform was introduced hastily – the product of an eleventh-hour compromise – without opportunity for legislative deliberation or public scrutiny.[227]

Regressive policy is often vigilantly scrutinized. In 1999, in the midst of economic crisis, the government's budget proposed to only index to inflation the incomes of government workers who were earning less than twice the minimum wage. The government had proposed freezing the

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[222] *Ibid*.
[223] *Decision T-533/92*, *supra* note 185 at section 5; see also *Decision T-595/02*, *supra* note 187 at section 4.2.
[224] See eg *Decision T-602/03*, *supra* note 187; *Decision T-025/04*, *supra* note 188; for David Bilchitz and David Landau, this kind of "special attention" and its attending substantial burden of justification is a better representation of the minimum core enforcement model: Bilchitz, *supra* note 2 at 208–213; Landau, *supra* note 189 at 295–296.
[225] *Decision C-776/03*, *supra* note 205.
[226] *Ibid* at sections 4.5.3.3.1, 4.5.5.1-4.5.5.5, 4.5.6.1.
[227] *Ibid* at section 4.5.6.1.

salaries of public employees earning more, even though inflation was running near 9% at the time. Invoking the Constitution's social rights, the Court recognized public employees' right to income indexed to inflation and struck the budget down.[228]

The political branches have also been warned not to remain idle in exercising their duty to realize social rights. The "programmatic" character of the constitution's social rights are still thought to empower courts to ensure (1) that a public policy exists, (2) that the policy prioritizes the effective enjoyment of the right in question, and (3) that the process for formulating, implementing, and evaluating the policy permits sufficient democratic participation.[229] In prioritizing the right's fulfillment, the policy must remain above all "sensitive to the real problems and needs of rights-holders" with special attention afforded to the most vulnerable.[230] If the state falls short of this duty, courts are meant to remain sensitive to their institutional limits and to the importance of preserving democratic deliberation. Decision T-760/08 instructs judges to avoid specifying what policies are required to fulfill social rights, and on the remedial front, courts ought to remit policy matters back to the legislative and executive branches.[231] On this front, Colombian jurisprudence resembles the approach endorsed by the Constitutional Court of South Africa in *Mazibuko*.

b) Judicial role and controversy

For the judges of the Court, social rights are an integral part of the story of modern Colombian constitutionalism. The Constitution's social rights are oriented towards "overcoming existing social inequalities and to offering to everyone the necessary opportunities to develop

[228] *Decision C-1433/00*, (CC).
[229] *Decision T-760/08*, (CC) at sections 3.3.11-3.3.14; see also *Decision T-595/02*, *supra* note 187 at section 4.2; *Decision T-792/05*, (CC); *Decision T-133/06*, (CC); *Decision T-884/06*, (CC).
[230] *Decision T-595/02*, *supra* note 187; *Decision T-760/08*, *supra* note 229 at sections 3.3.12 and 6.1.2.1.1.
[231] *Decision T-760/08*, *supra* note 229 at section 3.3.15.

their aptitudes and to overcome material constraints".[232] The "social state" envisioned in the Constitution is said to fall somewhere between a feared welfare state (which "in many cases end in fiscal crisis and […] [ultimately] transfer more power to influential groups") and liberal market economies (which are prey to "individual excesses" and fail to adequately redistribute the wealth of a country's resources).[233] Social rights thus intervene to "correct […] the grave inequality and inequity existing in society" without abandoning the market economy.[234]

This social rights jurisprudence is also sustained by a robust institutional self-perception. In spite of the 1991 constitutional reforms, a fractured party system, an overweening executive and rampant corruption have remained a part of the country's political life.[235] Faced with this landscape, the Court sees itself as a voice for the socially and economically marginalized, and is animated by its goal of ensuring that Colombia's constitutional aspirations are realized.[236] Judges and court watchers alike have noted a redrawing of the separation of powers in response to these shortcomings of the political branches.[237]

The Court has benefitted historically from "striking institutional popularity" and has been seen by many "as the best embodiment of the transformative project of the 1991 constitution".[238] Speaking extra-judicially, judges concede that "the Court is more relevant to [the lives of

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[232] *Decision C-288/12*, (CC) at section VI.24; citing *Decision C-776/03*, *supra* note 205; see also *Decision C-044/04*, (CC) at section VI.4.
[233] *Decision T-533/92*, *supra* note 185 at section 4.
[234] *Decision C-1064/01*, (CC) at section 3.2.3.
[235] Landau, *supra* note 190 at 341–344.
[236] *Decision T-153/98*, *supra* note 188 at section 50 (suggesting that a voice for marginalized populations is necessary in an underdeveloped country like Colombia, where the needs of the vulnerable are at risk of being crowded out by competing demands); see also Libardo José Ariza, "The Economic and Social Rights of Prisoners and Constitutional Court Intervention in the Penitentiary System in Colombia" in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013) 129 at 131–132.
[237] Landau, *supra* note 190 at 345–347; Manuel José Cepeda-Espinosa, *Polémicas constitucionales* (Bogotá: Legis, 2008) at 241–242.
[238] Landau, *supra* note 190 at 344; see also Uprimny Yepes, *supra* note 189 at 130; Ariza, *supra* note 236 at 136.

Colombians]", that the "legislature is irrational", that political life appears to be "beneficial for politicians and not for ordinary people", and that the country's laws do not represent the will of the majority.[239] Even the Court's opinions have lamented how the combination of executive power and weak legislative leadership must be compensated for "with the fortification of judicial power".[240] The Court's perceived institutional purpose becomes indissociable from its robust rights jurisprudence.

There is a steady consistency to Colombia's social rights doctrine, which has been maintained even in the face of vigorous criticism from elected officials and policymakers alike.[241] Some have taken issue with the fiscal impact of the Court's decisions. The cost of the Court's judgments on public employee salaries, prison reform, and the government's proposed new taxes were significant.[242] For instance, in just one year, the Court's rejection of a new tax on basic goods was estimated to have costed 320 million USD.[243]

One of the Court's most controversial interventions came in response to the mortgage debtor's crisis in 1998 and 1999. In the midst of economic recession, the interest rate on mortgage payments spiked to 33%, resulting in widespread threats of foreclosure.[244] Colombians

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[239] Landau, *supra* note 190 at 345 (citing interviews with Humberto Sierra Porto and Manuel José Cepeda Espinosa, Justices of the Constitutional Court of Colombia); Cepeda-Espinosa, *supra* note 237 at 241–241 (noting that the Court's legitimacy is based on a perception that politics is beneficial only for politicians and that the country's laws do not represent the will of the majority).
[240] *Decision T-406/92*, (CC) at section 9.
[241] For a summary of economists' early critique of the Court's fiscal impact, see Sepúlveda, *supra* note 189 at 152; citing Salomón Kalmanovitz, "Los efectos económicos de la corte constitucional" (1999) Banco de la República, online: <https://www.banrep.gov.co/es/efectos-economicos-corte-constitucional>; Sergio Clavijo, "Fallos y fallas economicas de las altas cortes" (2001) Banco de la República, online: <www.banrep.gov.co/.../fallos-y-fallas-economicas-las-altas-cortes-el- caso-colombia-1991-2000>; María Cuéllar, "La prueba de razonabilidad y la estabilidad de las reglas de juego" (2005) 7:12 Revista de Economía Institucional 13.
[242] See generally Landau, *supra* note 189 at 279.
[243] Uprimny Yepes, *supra* note 189 at 149 (citing an unpublished general budgetary direction of the Ministry of Finance and Public Credit).
[244] I rely here on the general account provided in *ibid* at 135–137.

protested in considerable numbers, and petitioned the courts for assistance. The Constitutional Court eventually responded by banning prepayment penalties and the capitalization of interest, ordered that mortgages be recalculated accordingly, directed that the interest rate used to calculate mortgage payments be capped at the rate of inflation, and struck down as unconstitutional the entire system of mortgage financing.[245] The Court suspended its order for seven months, providing time to the legislature to pass fresh housing finance legislation. The resulting law was also subject to constitutional challenge, and was upheld only after pro-debtor amendments capped interest rates at a deliberately low level.[246]

It was also in the midst of this crisis that the Court struck down as unconstitutional a budget that failed to index public employees' salary to inflation.[247] During this time, the Court also began wavering on its requirement that *tutela* petitioners demonstrate financial destitution before obtaining healthcare or social security relief.[248]

These decisions – representing mostly assistance for the middle class – made the Court popular but provoked political rebuke. Critics took issue with these decisions' economic and budgetary implications, and to the Court's meddling in policy more generally.[249] The shadow of this controversy loomed over the Senate's election of new justices in 2000.[250] In the years following, the Court retreated, but only slightly. The Court reversed its earlier decision requiring government employee salaries to be indexed to inflation; going forward, indexation would only

[245] *Decision C-747/99*, (CC); *Decision C-700/99*, (CC).
[246] *Decision C-955/00*, (CC) at section V.B.4.
[247] *Decision C-1433/00*, *supra* note 228.
[248] *Decision SU-480/98*, *supra* note 215; see also Rueda, *supra* note 215.
[249] Landau, *supra* note 189 at 279–280.
[250] The year 2000 was an important year of renewal since the Constitutional Court began sitting in 1992 and its judges hold non-renewal terms of eight years. They are all appointed by the Senate, which chooses from names supplied by the Supreme Court of Justice, the Council of the State and the President; see Article 239 of *Constitution of Colombia, 1991*, *supra* note 192.

be required for employees making less than twice the minimum wage.[251] The Court also reintroduced the requirement that *tutela* petitioners prove financial incapacity before being entitled to judicial assistance.[252]

However, the Court has remained confident in its role as a voice and source of support for vulnerable Colombians. As described above, the Court struck down tax reforms that would have added new taxes on basic goods.[253] The Court's bullishness on access to healthcare has not wavered even though the number of *tutelas* filed has surged significantly over the last 15 years. Indeed, in spite of political backlash, the Court has embarked on some of its most ambitious judgments and structural proceedings. For instance, in 2004, the Court concluded that the unmet vital needs of Colombia's internal migrants, displaced by armed conflict, represented an unconstitutional state of affairs.[254] In the Court's estimation, the state had failed to ensure that this vulnerable group had access to emergency relief, housing, healthcare and work.[255] This decision launched a marathon structural proceeding involving the Court and various other state agencies in continuous dialogue, which continues to have significant policy and fiscal implications.[256]

In 2008, the Court began to prod the government to address systemic failures in the healthcare system.[257] These included lengthy delays in making reimbursements, continued failure to reimburse individuals for procedures either included on Colombia's scheduled list or ordered

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[251] *Decision C-1064/01*, *supra* note 234 at section 4.2.2.2.
[252] See *Decision T-227/03*, *supra* note 215; *Decision T-859/03*, *supra* note 215.
[253] *Decision C-776/03*, *supra* note 205.
[254] *Decision T-025/04*, *supra* note 188.
[255] *Ibid* at section III.6.3.4.1.
[256] This proceeding is considered in greater detail in Chapter 2; for the proceedings' varied implications on policy, governance, and discourse see Cesar Rodriguez-Garavito & Diana Rodriguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge: Cambridge University Press, 2015).
[257] *Decision T-760/08*, *supra* note 229.

by a court, and a generalized state of mismanagement that resulted in "increasing government expenditures […] not always reflected in improved healthcare provision".[258] Consistent with its practice in structural litigation matters, the Court retained jurisdiction over the matter and issued a substantial number of follow-up awards and constituted a special chamber devoted to oversee the implementation of its orders.[259] The government later rebuked the Court's decision by issuing decrees that continued to exclude court-ordered medications and treatments from the country's public health plan, on the pretext of the state's limited financial resources. Unimpressed, the Court struck the decrees down as unconstitutional,[260] and public protests succeeded in persuading the government to reverse course and faithfully implement the Court's previous decision.[261]

Concerns about the fiscal impacts of the Court's decisions culminated in a constitutional amendment that affirmed the importance of fiscal sustainability and proposed a special appeal mechanism for reconsidering judicial decisions in light of their costs on the public purse.[262] The Court was aware of criticisms from elected officials; nevertheless, it took the opportunity presented by a constitutional challenge to entrench its previous caselaw. The Court concluded that the proposed amendment did nothing more than reiterate that good fiscal health was a pillar of Colombia's "social state", a mere means to the constitution's desired end of economic justice and provision for the vulnerable.[263] Social rights doctrine, after all, had always recognized that programmatic rights had to be realized progressively, according to the state's available resources.

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[258] Young & Lemaitre, *supra* note 199 at 191–192.
[259] *Ibid* at 192.
[260] *Decision C-252/10*, (CC).
[261] Young & Lemaitre, *supra* note 199 at 195–196.
[262] See *Decision C-288/12*, *supra* note 232 at section II (reproducing text of amendment) and section VI.54 (summary of congressional debates expressing concern over the fiscal implications of the Constitutional Court's jurisprudence).
[263] *Ibid* at section VI.64.4.

However, the Court added that policy regressions would be difficult to justify on the basis of limited resources, and omitted from discussion the concept of the vital minimum.[264]

The Constitutional Court of Colombia emerges as the author of a robust social rights jurisprudence. In spite of textual indications to the contrary, the Court was eager to recognize a vital minimum that could be enforced *via tutela*. It has also intervened repeatedly in sweeping questions of socio-economic policy. Lofty constitutional aspirations and dysfunction in the political branches may have again provoked judicial over-enforcement. The judicial modesty practiced in South Africa seems to have little purchase among Colombia's leading judges. The Constitutional Court is also less prone to the sudden doctrinal reversals and expressions of regret witnessed in India. Instead, the Court's rights doctrine has been buoyed by a perceived mandate to serve as an institutional voice for the poor, to compensate for the failings of political actors, and to hold the Colombian government accountable to the Constitution's socio-economic aspirations.

VI. Conclusion

This chapter has canvassed social rights doctrine in South Africa, India and Colombia. Their doctrinal trajectories have diverged considerably, and these outcomes cannot be easily explained by reference to constitutional text or to drafting history. Instead, differences in rights doctrine are best understood as contrasting institutional responses to two well-known problems, the first being social rights' stubborn indeterminacy and the second being the capacity and legitimacy constraints of courts as enforcers of constitutional guarantees. The justiciability debate continues to shape the work of courts.

[264] *Ibid* at section VI.66.

South African jurisprudence has responded to these two challenges by turning away from substantive standards and towards reasonableness review and an effort to promote rights-conscious decision-making. Indian jurisprudence reflects a mixed response that betrays deep disagreement concerning the Supreme Court's proper role. Colombian jurisprudence reveals a Constitutional Court confident in its role as a voice for the vulnerable in an ineffective political system. Political climate and institutional self-awareness thus powerfully shape judicial enforcement and the way rights have been articulated.

One upshot is that even moderate courts are comfortable acting aggressively when they have settled on a mode of intervention which skirts these traditional capacity, legitimacy, and indeterminacy concerns. South Africa's deferential Constitutional Court has found its second wind encouraging meaningful engagement and bolstering the government's rights-respecting capacities. The Indian Supreme Court has promoted the cause of social rights even in cases where rights claims fail, by encouraging negotiation and by holding government to its policy commitments. The next two Chapters elaborate on this insight in the context of complex structural remedies and individualized relief.

Chapter 3:
Structural Remedies and Institutional Support

I. Introduction

Structural remedies prod state actors to address widespread rights deprivations. Bound together by an aspiration of systemic change, structural remedies include declarations, various forms of injunctive relief, orders to report progress, directions to negotiate and formulate proposals, appointment of monitors to supervise compliance, and orders to produce evidence. They have been deployed to address the housing needs of South Africa's landless, provide care for Colombia's displaced internal migrants, and help curb malnutrition in India.

Structural remedies tend to affect a large number of people and implicate different state actors.[1] As a result, these remedies have long been the focus of the literature on social rights enforcement. They represent the "most visible and ambitious court interventions", which can result in the creation of laws, social programs, and even institutions.[2] For some, these remedies raise the concern that judges will arrogate important powers to themselves and impose solutions to core distributional debates, exceeding their competence and democratic credentials. For others, these remedies can foster cooperation and dialogue around socio-economic problems in areas where other institutions have repeatedly failed, bringing "radical deprivation to trial".[3]

This Chapter develops a basic empirical claim that is central to this work. Lawyers commonly assume that courts issuing structural remedies are engaged in some form of rights enforcement. On this view, the role of the court order is to align reality with the rights envisaged by the constitution. This Chapter suggests that ambitious structural remedies commonly have a different orientation. These complex remedies often pivot away from articulating implicit constitutional standards, or compelling state actors to adhere to constitutional guarantees. Instead, structural orders are instead often positioned to bolster the capacity of other state actors, and to improve these actors' institutional performance. Judicial orders might do so by addressing coordination and implementation failures, mandating data collection, promoting the dissemination of best practices, or confronting corruption. I call this basic remedial orientation "institutional support". I suggest that institutional support presents a path to meaningful change

[1] Cesar Rodríguez-Garavito & Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge: Cambridge University Press, 2015) 6.
[2] *Ibid*.
[3] *Ibid*.

that skirts some of the well-known problems with more traditional forms of judicial enforcement. Indeed, this is perhaps why courts find it attractive.

This Chapter is structured as follows. First, I canvass the uses of structural remedies in India, Colombia and South Africa. Second, I outline reasons for shifting away from traditional forms of rights enforcement. Third, I take up a close reading of the orders of the Indian Supreme Court in its "right to food" litigation in *People's Union for Civil Liberties v Union of India* (or *PUCL*).[4] While there is considerable variety in the basic orientations and goals reflected in the Court's orders, a significant portion of these orders appear to be angled to improve other institutions' performance. Instead of reflecting constitutional guarantees, these orders reflect an image of what a well-functioning, dynamic and rights-conscious state looks like. I then build on this insight in subsequent Chapters.

II. Survey of structural remedies

In India and Colombia, structural remedies emerged as a judicial innovation designed to address rights-deprivations that were systemic in nature. In South Africa, structural remedies – and in particular the declaration – have been preferred for the deference they can afford to the political branches and for their ability to treat all potential rights-bearers equally. This section canvasses the ambition and complexity of these orders, setting the stage for a discussion of these orders' theoretical dimensions in the later parts of this Chapter.

a) India

Structural remedies emerged in India and in Colombia as jurisprudential developments tethered loosely to the text of their constitutions. In India, these remedies emerged as a part of a

[4] *People's Union for Civil Liberties v Union of India & Others*, Petition (Civil) No. 196/2001.

broader set of judicial initiatives known collectively as Public Interest Litigation, which I canvassed in the previous Chapter. The movement was driven by the politics of post-Emergency India, the social-egalitarian worldview of a few judicial leaders, and the sentiment among India's elite that judicial power was a necessary curb on corruption, lack of accountability, and ineffective governance in both the legislative and executive branches of government.[5]

The Public Interest Litigation movement notably saw the Supreme Court adopt an expansive interpretation of the Constitution's "Fundamental Rights". The Court broadened the right to life to include the right to "live with dignity" [6] and later included within its scope rights to "the bare necessities of life, such as adequate nutrition, clothing and shelter",[7] basic health,[8] an adequate livelihood,[9] a clean environment,[10] and freedom from bonded labour.[11] The Court also

[5] For a more thorough account of this period of Indian constitutional politics, see Manoj Mate, "Public Interest Litigation and the Supreme Court of India" in Diana Kapiszewski, Gordon Silverstein & Robert Kagan, eds, *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013) 262 at 264-265; Poorvi Chitalkar and Varun Gauri, "India: Compliance with Orders on the Right to Food" in Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi, eds, *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge University Press, 2017) 288 at 292-293 [Chitalkar and Gauri, "Right to Food"]; S Muralidhar, "India: The Expectations and Challenges of Judicial Enforcement of Social Rights" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009) 102 at 108-109 [Muralidhar, "Enforcement of Social Rights"]; J Sathe, "Judicial Activism: The Indian Experience" (2001) 6 J of L and Pol 30; Upendra Baxi, *The Indian Supreme Court and Politics* (Delhi: Eastern Book Company, 1980) at 124-126; Rajeev Dhavan, "Law as Struggle: Public Interest Law in India" (1994) 36 J of the Indian L Inst 302; Robert Moog, "Activism on the Indian Supreme Court" (1998) 82 Judicature 124 at 124-126; Robert Moog, "0Judicial Activism in the Cause of Judicial Independence" (2002) 85 Judicature 268 at 270; Oliver Mendelsohn, "The Supreme Court of India as the Most Trusted Public Institution in India" (2000) 23 J S Asian Stud 103 at 103-104 at 114.
[6] *Maneka Gandhi v Union of India*, (1978) AIR 597, (1978) SCR 621.
[7] *Francis Coralie Mullin v Administrator*, (1981) 2 SCR 516 at 518.
[8] *Paramanand Katara v Union of India*, (1989) 4 SCC 286; see later *Paschim Banga Khet Majoor Samity v State of West Bengall* (1996) 4 SCC 37.
[9] *Olga Tellis v Bombay Municipal Corporation*, (1986) AIR SC 180.
[10] *MC Mehta v Union of India*, Supreme Court Writ Petition (Civil) No 13029/198.
[11] *Bandhua Mukti Morcha v Union of India*, (1984) AIR SC 802.

relaxed its procedural rules.[12] Even postcards could "be treated as a writ petition",[13] and the rules of standing were relaxed to such an extent that "concerned citizens" and non-governmental organizations could sue on behalf of vulnerable populations.[14] The Court permitted cases to proceed in the absence of a petitioner by appointing *amicus curiae*.[15]

At around the same time, the Court also began relying on the "continuing mandamus", which couples interim orders with judicial supervision.[16] The Court also occasionally appointed commissioners to monitor implementation and expert commissions to provide opinions on technical questions.[17] Since the "function of the writ of mandamus is to compel the performance of public duties", the applicant must satisfy that "he has a legal right to the performance of a legal duty by the party against whom the writ is sought".[18] This has meant that the writ of mandamus cannot be issued to the legislature to enact particular laws, or against other executive actors to enact subordinate legislation.[19] Nevertheless, this process of direction and oversight has allowed the Court to oversee structural reform in areas as varied as prison conditions and the

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[12] See generally A Desai & S Muralidhar, "Public Interest Litigation: Potential and Problems" in BN Kirpal et al, eds, *Supreme But No Infallible: Essays in Honour of the Supreme Court of India* (Oxford: Oxford University Press, 2000) 159.
[13] Muralidhar, *supra* note 5 at 108-109; Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" in Jagga Kapur, ed, *Supreme Court on Public Interest Litigation* Vol. 1 (LIPS Publications, 1998) A-91.
[14] *Mumbai Kamgar Sabha v Abdulbhai Faizullabhai* (1976) 3 SCC 832, at para 7.
[15] See eg *TN Godavarman Tirmulapad v Union of India* (1997) 2 SCC 267; *Sheela Barse v Union of India* (1988) 4 SCC 226; and *SP Anand v HD Deve Gowda* (1996) 6 SCC 734.; see also Mate, *supra* note 5 at 274 and Shyam Divan, "Public Interest Litigation" in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 662 at 672.
[16] The orders are "interim" so that the court may retain jurisdiction pending a final ruling: see Gopal Subramanium, "Writs and Remedies" in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 614; Mate, *supra* note 5 at 273.
[17] Muralidhar, *supra* note 5 at 110.
[18] Subramanium, *supra* note 16 at 620.
[19] *Ibid*.

length of pre-trial sentences,[20] the state's failure to investigate cases of political corruption,[21] the protection of forest cover,[22] and even pollution threatening the Taj Mahal.[23]

For social rights specifically, the Court has overseen structural reforms addressing widespread malnutrition in *PUCL*.[24] The proceedings began in 2001 after starvation-related deaths were recorded in drought-affected states.[25] The original writ petition sought to correct deficiencies in the running of the Food Corporation of India and the Public Distribution System, with an order to immediately release food stocks for drought relief and to increase the food quota for grains.[26] Astonishingly, when so many Indians were in dire need of food relief, the Food Corporation of India possessed close to 50 million tonnes of surplus grain in stock, but had failed to make these provisions available.[27] The proceedings, however, gradually expanded and transformed. They would eventually include every state as a defendant and target the implementation of programs related to child development, girls' access to primary and secondary education, stagnant wages, unemployment, homelessness, urban destitution, and governmental transparency.[28]

Consistent with its practice in structural cases, the Supreme Court also appointed two commissioners in May 2002 to monitor the implementation of the Court's orders.[29] The

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[20] *Hussainara Khatoon v State of Bihar* [1980] 1 SCC 81.
[21] *Vineet Narain v Union of India* (1998) 1 SCC 226.
[22] *In Re: Bhavani River-Shakti Sugars Ltd* (1998) 6 SCC 335, *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212.
[23] *MC Mehta v Union of India* (2002) 5 SCALE 8.
[24] *PUCL*, *supra* note 4.
[25] Lauren Birchfield & Jessica Corsi, "Between Starvation and Globalization: Realizing the Right to Food in India" (2010) 31:4 Michigan J of Int'l L 691 at 692; Chitalkar & Gauri, *supra* note 5 at 294; Muralidhar, *supra* note 5 at 116.
[26] Chitalkar and Gauri, *supra* note 5 at 296.
[27] Muralidhar, *supra* note 5 at 298.
[28] *Ibid* at 299.
[29] *PUCL* Interim Order 8 May 2002.

commissioners' reports are relied on heavily by the Court, as are their recommendations for state actions.[30] These two commissioners are supported by a staff of state advisors who generally "serve as bridge between commissioners, state governments, and civil society".[31] The commissioners have "focused on building relationships with state officials and using those successfully forged partnerships to resolve grievances and foster political will for the implementation of court orders".[32] The commissioners' work has also become a site for negotiation and cooperation. For instance, commissioners have negotiated new arrangements for court orders that proved difficult to implement, and states have cooperated with the hope of gaining the commissioners' trust as well as eventual positive reporting before the Court.[33] Indeed, the commissioners have leveraged that influence to negotiate solutions and to resolve individual grievances that are beyond the scope of the actual proceedings.[34]

With over 40 interim orders, the proceedings have resulted in meaningful change. While the level of compliance with court orders has varied considerably, programs like the Mid-Day Meal saw their coverage increase by nearly 61 million children from 2001 to 2006, increasing affected children's intake of calories, proteins and carbohydrates by an average of 49-100 percent.[35] Serving over 100 million children, India's resulting Mid-Day Meal program is the

[30] Birchfield and Corsi, *supra* note 25 at 728.
[31] *Ibid* at 721.
[32] *Ibid* at 729-730.
[33] *Ibid* at 728.
[34] *Ibid* at 721-730.
[35] Daniel Brinks & Varun Gauri, "The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights" (2014) 12:2 Persp on Pol 375 at 379.

largest such program in the world, and has also been found to have sharply increased the school enrolment of girls.[36] The proceedings thus remain a point of focus in the social rights canon.[37]

b) Colombia

As I described in the previous Chapter, Colombia's 1991 constitutional reforms democratized access to the courts through the *acción de tutela* (or writ of protection).[38] The result was a surge in individual litigants with claims implicating fundamental rights. From these cases emerged patterns of widespread rights violations, which invited a structural or systemic response.[39] The Constitutional Court eventually assumed the authority to declare an "unconstitutional state of affairs".[40] This is distinct from a normal finding of unconstitutionality, which is typically remedied by striking down the relevant statute and remanding the matter to the legislature.[41] An unconstitutional state of affairs implies systemic deprivations of rights across "a broad class of people, who are impacted by a range of institutions".[42] The doctrine's effects are principally procedural. Rather than being limited by the remedies that the Court would normally have access to once a claimant demonstrates that his rights have not been fulfilled, the Court can

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[36] Jayna Kothari, "Social Rights Litigation in India: Developments of the Last Decade" in Daphne Barak-Erez & Aeyal Gross, eds, *Exploring Social Rights* (Oxford: Hart Publishing, 2007) 171 at 181.
[37] See eg Rosalind Dixon & Rishad Chowdhury, "A Case for Qualified Hope? The Supreme Court of India and the Midday Meal Decision" in Gerald Rosenberg, Sudhir Krishnaswamy & Shishir Bail, eds, *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (Cambridge: Cambridge University Press, 2019) 243.
[38] Article 241.9 of the *Constitution of Colombia, 1991*; Articles 31 and 32 of Legislative Decree 2591 of 1991; see Magdalena Sepúlveda, "Colombia: The Constitutional Court's Role in Addressing Social Injustice" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) 144 at 146.
[39] Libardo José Ariza, "The Economic and Social Rights of Prisoners and Constitutional Court Intervention in the Penitentiary System in Colombia" in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013) 129 at 142–143.
[40] This notion was first deployed in the context of proceedings addressing prison overcrowding: *Decision T-153/98* (CC).
[41] For instance, *Decision C-700/99* (CC), the Court declared Colombia's system of housing finance to be unconstitutional and directed Congress to respect certain parameters in legislating a substitute.
[42] David Landau, "Political Institutions and the Judicial Role in Comparative Constitutional Law" (2010) 51:2 Harv Intl LJ 319 at 358-359.

instead join thousands of *tutelas* into a single proceeding and can issue injunctions and supervisory orders with nationwide reach.[43]

The doctrine emerged as a judicial choice responsive to chronically underperforming political institutions.[44] The Court has recognized unconstitutional states of affair to address concerns as varied as prison overcrowding,[45] the urgent needs of migrants displaced by armed conflict,[46] the failure to register public officials for social security and pension entitlements,[47] restrictions on access to the notarial profession,[48] as well as the lack of state protection for human rights advocates.[49] In a matter targeting deficiencies in Colombia's healthcare system, the Court even joined *tutelas* and issued structural remedies without relying on the doctrine of an unconstitutional state of affairs.[50]

Throughout these cases and others, the Constitutional Court has assumed an important role in governance and matters of policy. As in India, judicial activism was a response to perceived weakness and ineffectiveness in the political branches.[51] At the legislative level, for instance, national policymaking and democratic accountability had been impeded by a fragmented party structure, the prevalence of unstable "rural, patronage-based parties", an overweening executive as well as the corrupting presence of criminal organizations and

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[43] See eg *Decision T-153/98* (CC), and *Decision T-025/04* (CC); Sepúlveda, *supra* note 38 at 148.
[44] Rodrigo Uprimny Yepes, "The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates" in Roberto Gargarella, Pilar Domingo & Theunis Roux, eds, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Farnham: Ashgate Publishing, 2006) 127 at 129-130, 145.
[45] *Decision T-153/98*, (CC).
[46] *Decision T-025/04*, (CC).
[47] *Decision SU 090/00*, (CC).
[48] *Decision SU-165/00*, (CC).
[49] *Decision T-590/98*, (CC).
[50] *Decision T-760/08*, (CC); see Everaldo Lamprea, *Derechos en la práctica: Políticas desalud, litigio y cortes en Colombia 1991-2014* (Bogotá: Uniandes, 2015).
[51] See generally Uprimny Yepes, *supra* note 44 at 129-130, 145.

paramilitary groups.[52] At the administrative level, the implementation of government programs had been impeded by poorly coordinated state agencies, a weak bureaucratic culture, and corruption.[53] In this environment, the Constitutional Court emerged – at least in the eyes of the public – as "the best embodiment of the transformative project of the 1991 constitution".[54] Former Justice Manuel José Cepeda Espinosa has even recognized that much of the Court's work is grounded in the view that the "legislature is irrational, that it is such a bad legislature that we have been forced into a very tight form of political control".[55] Indeed, in one of its early decisions regarding the judicial enforcement of social rights, the Court reasoned as follows:

> The difficulties deriving from the overflowing power of the executive in our interventionist state and the loss of political leadership of the legislature should be compensated, in a constitutional democracy, with the strengthening of the judicial power, which is perfectly placed to control and defend the constitutional order. This is the only way to construct a true equilibrium and collaboration between the powers; otherwise, the executive will dominate.[56]

As others have stressed, the experience of India and Colombia demonstrates the extent to which the "neoconstitutionalism of the Global South" represents a redrawing of the separation of powers to account for the judiciary's relative effectiveness at instigating systemic change in dysfunctional political cultures.[57]

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[52] Landau, "Political Institutions", *supra* note 42 at 341-342, citing the statistic that of the 170 legislators elected to the 2006-2010 term in the House and Senate, roughly one third had either bene removed from office or were under investigation as of early 2009.
[53] Uprimny Yepes, *supra* note 44 at 129-130, 145.
[54] Landau, *supra* note 42 at 344.
[55] *Ibid* at 345.
[56] *Decision T-406/92*, (CC).
[57] David Bilchitz, "Constitutionalism, the Global South, and Economic Justice" in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: Cambridge University Press, 2013) 40 at 79-81 (suggesting a distinctive "constitutionalism of the Global South" that responds to "particular conditions present") and at 84-87 (writing on India and Colombia, specifically).

With regards to the enforcement of social rights, the most ambitious set of proceedings began in 2004 with Decision T-25. The Constitutional Court concluded that the unmet vital needs of thousands of Colombia's internal migrants, displaced by political violence, amounted to an unconstitutional state of affairs. The Court has since prodded various state actors to identify, monitor, and address this community's vital needs. In some cases, the Court has enshrined unenforced government policy in a structural injunction.[58] Where existing policy is insufficient, the Constitutional Court has ordered state actors to formulate proposals to be considered and approved by the Court. For instance, the Court noted in its earliest judgment that existing government programs lacked budgetary resources. The Court directed the Ministry of Finance and other state entities to calculate the budget necessary to fund government programs and to set the relative contributions of various state actors.[59] The Court also regularly requests information or recommendations from state and civil society actors before issuing orders.[60] Depending on the context, the Court has sometimes preferred broad and general guidelines while at other times it has preferred precise measures to address the needs of the "hardest-hit group within the [internally displaced persons] population".[61] The Court thus pivots from its role as a "guide" and as a "restrained policymaker".[62] The Court has also constituted a monitoring commission for tracking implementation and formulating proposals.[63] During the proceeding's first decade alone the Court issued 289 follow-up orders and held 20 hearings to evaluate the government's progress.[64]

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[58] Rodríguez Garavito & Rodriguez-Franco, *supra* note 1 at 65.
[59] See *Decision T-25/04*, (CC) at section 6.3; see also *ibid* at 67.
[60] *Ibid* at 113.
[61] *Ibid* at 76-79, 87-89.
[62] *Ibid* at 77-78.
[63] *Ibid* at 118.
[64] *Ibid* at 11, 114-115.

c) South Africa

The Constitution of the Republic of South Africa provides the Constitutional Court with considerable discretion to fashion appropriate remedies.[65] Sections 38 and 172(1)(b) state respectively that "[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief" and that "[w]hen deciding a constitutional matter within its power, a court […] may make any order that is just and equitable".

In exercising this discretion, in contrast to the apex courts of India and Colombia, the Constitutional Court has championed a light-touch deference. Early on, judges expressed concerns about injunctive relief which might have significant budgetary implications, since these might divert resources from other important public programs.[66] The Court had also declined to recognize a "minimum core" to social and economic rights, preferring instead to subject state policy to reasonableness review.[67]

In line with this deferential posture, sensitive of its institutional limits, the Court preferred declaratory over injunctive relief in *Grootboom*.[68] In that case, a community of landless persons had been evicted from private property and had re-settled on the edge of a sports field. Irene Grootboom applied for relief on behalf of herself and a community counting some 2,800

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[65] *Constitution of the Republic of South Africa, 1996,* No 108 of 1996.
[66] *Soobramoney v Minister of Health (Kwazulu-Natal*), [1997] ZACC 17, [1998] (1) SA 765 (CC) at para 19-30, where Chaskalson J argued that if the Court accepted Mr. Soobramoney's claim for emergency health care services, a significant portion of the provincial health budget would be diverted towards providing emergency services, to the detriment of all those individuals who currently benefit from preventative healthcare or treatment for conditions that are not life threatening.
[67] *Ibid*; see also *Minister of Health and Others v Treatment Action Campaign and Others*, [2002] ZACC 16, [2002] (5) SA 703 (CC) at 740 and *Mazibuko and Others v City of Johannesburg and Others*, [2010] ZACC 28, [2002] (4) SA 1 (CC) at paras 55-67.
[68] *South Africa and Others v Grootboom and Others,* [2000] ZACC 19, [2001] (1) SA 46 (CC) ; *Grootboom* has been at the center of much of the social rights scholarship, a phenomenon David Landau has referred to as the "South African obsession": David Landau, "The Reality of Social Rights Enforcement" (2012) 53:1 Harvard Intl LJ 189 at 196.

residents.[69] The Court concluded that the state's housing policy was unreasonable since it did not contemplate any assistance for destitute South Africans facing moments of crisis.[70] Turning to the question of appropriate relief, the Court noted that the right to housing does not entitle petitioners to "claim shelter or housing immediately upon demand", and so the injunctive relief favoured by the lower court was inappropriate.[71] Instead, the Court declared as follows:

> (a) Section 26 (2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated program progressively to realize the right of access to adequate housing.
>
> (b)The program must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Program, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.
>
> (c) As at the date of the launch of this application, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.[72]

The order does more than just declare state policy to be unreasonable – it provides some measure of direction. The Court suggests that measures such as the Accelerated Managed Land Settlement Program would qualify as reasonable, and that the target population of responsive reforms must be those who have "no access to land, no roof over their heads, and who are living in intolerable conditions".[73] Otherwise, the Court leaves the reasonableness of the response to the government.

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[69] Kameshni Pillay, "Implementation of *Grootboom*: Implications for the Enforcement of Socio-economic Rights" (2002) 6:1 Law, Democracy & Development 1.
[70] *Grootboom*, *supra* note 68 at para 52.
[71] *Ibid* at para 95.
[72] *Ibid* at para 99.
[73] *Ibid*.

Even when the Court eventually issued injunctive relief in a claim involving social rights, it declined to retain jurisdiction to supervise the government's response.[74] In *TAC* – the challenge to the government's refusal to make the antiretroviral nevirapine available in most public hospitals, in spite of free supply – the Court declared that the government had a duty to take reasonable measures for reducing the risk of mother-to-child transmission of HIV.[75] The government was then expressly ordered to remove restrictions associated with the prescription of nevirapine for the purpose of reducing mother-to-child transmission, to permit and facilitate its use for this purpose, as well as to provide for adequate training.[76] However, the Constitutional Court declined to issue a structural interdict requiring the Minister of Health to submit a revised policy for the Court's review.[77] The Court preferred a simpler, one-time order, reflecting its belief that "[t]he government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case".[78]

Little explanation is offered for why injunctive relief was awarded in *TAC* but not *Grootboom*. In passing, the decision suggests that by "spelling out the steps necessary to comply with the Constitution", it will be easier for "all sectors of the community, in particular civil society, [to] [ ] co-operate in the steps taken to achieve this goal".[79] Scholars have wondered whether the judges may have been concerned that declaratory relief might be met with a laggard

[74] *TAC*, *supra* note 67 at para 129.
[75] *TAC, supra* note 67 at para 135.
[76] *Ibid*.
[77] The availability of the structural interdict had been previous confirmed in *City Council of Pretoria v Walker*, [1998] ZACC 1, 1998 (2) SA 363 at para 96.
[78] *TAC*, *supra* note 67 at para 129.
[79] *Ibid* at para 126.

response since the government was already hesitant to confront the AIDS crisis,[80] and its response to *Grootboom* had been lackluster.[81]

The Court has avoided the kind of extensive engagement with the political branches seen in India or Colombia. Supervisory orders are rare outside of the High Court.[82] However, scholars have suggested that the Constitutional Court's recognition of a duty of consultation in individual social rights cases might eventually pave the way for judicially-supervised process of engagement over structural reforms in the future.[83] This light-touch approach has been interpreted as a response to local political conditions. While the activism of the apex courts of India and Colombia may be interpreted as a response to weak political institutions, Theunis Roux has suggested that the Constitutional Court of South Africa's deference is a response to a political environment dominated by the African National Congress.[84] The ANC's leaders would have had close professional connections with many of the Court's judges, and the Court would have depended on maintaining a close relationship to the party in order to ensure its institutional survival and effectiveness.[85]

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[80] See Steven Robins, *From Revolution to Rights in South Africa: Social Movements, NGOs & Popular Politics After Apartheid* (Scottsville: University of Kwazulu-Natal Press, 2008) at 100-102.
[81] Pillay, *supra* note 69.
[82] See eg *N v Government of Republic of South Africa & Others* (2006) (6) SA 543 (D), (6) SA 568 (D), and (6) 575 (D) (supervisory order against Westville Prison to remove restrictions preventing prisoners from accessing antiretroviral treatment, with government being provided with a timeline within which to report back on compliance).
[83] The Court has occasionally relied on mandatory and supervisory orders in order to promote consultation in eviction cases. These kinds of orders are also commonly awarded by the High Court: see Danielle Elyce Hirsch, "A Defense of Structural Injunctive Remedies in South African Law" (2007) 9:1 Or Rev Intl L 1 at 7-8; Katharine Young & Julieta Lemaitre, "The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa" (2013) 26 Harv Hum Rts J 179 at 213; Brian Ray, "Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation" (2011) 27:1 SAJHR 107 at 111-113; Brian Ray, "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy" (2010) 9:3 Washington U Global Studies L Rev 399.
[84] See generally Theunis Roux, "Principle and Pragmatism on the Constitutional Court of South Africa" (2008) 7:1 Intl J Const L 106.
[85] *Ibid*.

On the whole, social and economic rights claims framed in general, positive terms have remained relatively rare in South Africa. Counsel before the Constitutional Court have even warned that the Court's deferential approach heavily discourages litigation.[86] Outside a few test cases brought by well-funded organizations, the cost of bringing ambitious challenges is often prohibitive, cases can take years to arrive before the Constitutional Court, and enthusiasm among litigants may have been dampened by the Court's jurisprudence, which has consistently declined to provide litigants with immediate relief.[87]

More generally, it is worth noting that South African jurisprudence demonstrates how structural remedies can reflect and reiterate the state's underlying constitutional duty. The Constitutional Court in *Grootboom* found that the state had a duty to take "reasonable measures" to provide relief for landless South Africans living in intolerable conditions or crisis situations. The Court then declared that the government had a duty to do just that.[88] Meanwhile, in *TAC*, the Court concluded that the government had failed to fulfill its constitutional duty by preventing doctors from prescribing nevirapine "even when it was medically indicated and adequate facilities existed".[89] The Court's declaration and order directed the government to remove that same restriction. In both cases, the Court either restated the government's duty in a declaration or replicated the duty in a curial command.[90] As we will see in subsequent sections, it is more difficult to chart the relationship between right and remedy in the ambitious structural proceedings in India and Colombia.

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[86] See *Mazibuko*, *supra* at note 67 at para 159.
[87] Young & Lemaître, *supra* note 83 at 213.
[88] *Grootboom*, *supra* note 68 at para 99.
[89] *TAC, supra* note 67 at para 135.
[90] For a deep structural analysis of the relationship between rights and remedies in the private law, see Stephen Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford: Oxford University Press, 2019) and Rafal Zakrzewski, *Remedies Reclassified* (Oxford: Oxford University Press, 2005).

III. Rights enforcement and institutional support

As courts navigate this complex remedial landscape, what can we say about their orders' basic orientation? The traditional view maintains that the principal objective of any remedy must be the enforcement of rights. This assumption is maintained in contemporary scholarship on weak or "dialogic" remedies. Indeed, this view is reflected in the South African Constitutional Court's practice, as I have already suggested. The Court's declaratory orders mirror closely the way that rights have been articulated. In practice, this assumption may also hold true for a significant portion of the structural remedies ordered by the Indian Supreme Court and the Colombian Constitutional Court. However, I argue in this Chapter that the remedial objectives pursued in their structural cases are actually more varied.

On the reading advanced here, the structural remedies ordered in India and Colombia are often not animated by a desire to realize a particular right, but rather to offer up different forms of institutional support, or capacity building. Sometimes, courts prod public actors to be more coordinated, to diligently implement government programs, and to stifle corruption in the delivery of public services. Other times, courts craft orders which galvanize state actors to be more innovative and responsive to changing conditions. Seen in this light, judicial activity at the remedial stage may be driven less by a substantive account of what social rights guarantee, and more by a vision of what a well-functioning state looks like.

This section sets up the argument in the following way. I begin by canvassing the traditional position that remedies are about enforcing rights. I will then consider how this assumption has been maintained for remedies at either extreme end of the strong—weak continuum. I then consider some of the objections to both strong and weak remedies, a discussion which involves a closer examination of the responses to the South African

Constitutional Court's judgment in *Grootboom* and *TAC*. Finally, I suggest that the shortcomings of strong and weak remedies may explain the varied approaches adopted in India and Colombia. In these ambitious proceedings, the right–remedy relationship becomes harder to sketch as courts occasionally turn away from rights enforcement and towards various forms of institutional support. The following section builds on these ideas by considering in greater depth the Indian Supreme Court's orders in *PUCL*.

a) Remedies as vehicles for rights fulfillment

It is conventionally assumed that the principal objective of any court order must be to enforce an underlying right.[91] After all, rights depend on remedies "for their application to the real world".[92] Only remedies can "translate the abstract and lofty discourse of the law into the life-world of the disputants".[93] The rule of law itself depends on rights being at least generally enforceable by a remedy.[94] Realists even doubt the existence of a right in the absence of a remedy, since a "right is as big, precisely, as what the courts will do" to enforce it.[95]

For their part, remedies depend on rights for their legitimacy. The legitimacy of judicial

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[91] On the "inseparable connection between the means of enforcing a right and the right to be enforced", see Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution,* 10th ed (London: Macmillan, 1965) at 199.

[92] Daryl J Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99 Colum L Rev 857 at 858.

[93] Helge Dedek, "The Relationship Between Rights and Remedies in Private Law: A Comparison Between the Common and Civil Law Tradition" in the Hon Robert Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010) 63 at 65.

[94] See eg *Marbury v Madison* (1803) 5 US S Ct 137 at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right") and Blackstone's Commentaries ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded"); Gopal Subramanium, "Writs and Remedies" in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 614 at 614, citing *Ashby v White* (1703) 2 LD Raym 938 at 953. Note that the enforceability of rights through remedies represents an ideal, even if it is not always attained: see Richard H Fallon Jr & Daniel J Meltzer, "New Law, Non-Retroactivity and Constitutional Remedies" (1991) 104 Harv L Rev 1731 at 1778

[95] Karl Llewellyn, *The Bramble Bush* (1960) at 83-84.

interventions on matters of political controversy hinges on courts exercising their important responsibility to make constitutional guarantees a reality.[96] This rule of law logic can no longer shield courts whose orders might be doing something *other* than confirming substantive rights.[97]

This required closeness of right and remedy is the common ground between Mark Tushnet's strong- and weak-form review.[98] Strong courts pair "rule-like interpretations of rights" with "muscular" remedies that can replicate the state's constitutional duty in a specific judicial command (such as an order requiring the state to erect a certain number of shelters for the homeless) or in an award for a close substitute (such as an order for the payment of money so that claimants can erect a shelter themselves).[99] Weak-form remedies, for their part, leave the responsibility of construing rights in the hands of the political branches. They include declarations, orders for state officials to develop proposals, or judicial encouragement of negotiation between affected parties.[100] For Tushnet, weak remedies can still serve as an appropriate vehicle for vindicating rights. Drawing on modern dialogue theory, Tushnet argues that the legislature and executive's interpretation of the constitution "are not intrinsically inferior to judicial interpretations", and that they may engage in dialogue "with the courts, responding to [judicial] interpretations with their own".[101] The declaratory orders in *Grootboom* and *TAC* are

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[96] For discussion of the gap between the "ideal" and the "real" see John C Jeffries, Jr, "The Right-Remedy Gap in Constitutional Law" (1999) 109:1 Yale LJ 87 at 87.
[97] For a discussion of this point in the private law context, see Smith, *supra* note 90 at xv.
[98] See generally Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (New Jersey: Princeton University Press, 2009).
[99] Katharine Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012) at 138.
[100] Tushnet, *supra* note 98 at 247-248.
[101] *Ibid* at 36; on this Tushnet relies on the theory advanced in Peter Hogg & Allison Bushell Thornton, "The *Charter* Dialogue Between Courts and the Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75 [Hogg & Bushell, "*Charter* Dialogue"]; Peter Hogg, Allison Bushell Thornton & Wade Wright, "*Charter* Dialogue Revisited – or Much Ado About Metaphors" 45:1 Osgoode Hall LJ 1; Kent Roach, "Dialogic Review and Its Critics" (2004) 23:1 SCLR 49.

compelling examples. Their innovation, from this perspective, is to "appreciate the role of other institutions in […] implementing constitutional norms" and eschewing the view "that remedies are the sole preserve of the judiciary".[102] Crucially, though, whether the remedy is "strong" or "weak", the baseline assumption about its endpoint remains the same. Both approaches share an assumption that remedies are about fulfilling rights.

Approaches falling at either extreme of the strong-weak spectrum have attracted considerable criticism, and this may have prodded courts to experiment with moderate or blended approaches. Strong courts risk overstepping their institutional capacity and democratic credentials. Courts lack the necessary expertise to design social welfare programs,[103] or to manage the "polycentric or multifaceted issues that involve the allocation of scarce resources between competing demands".[104] Sweeping court orders risk impacting the interests of an "unknown but potentially vast number of interested parties"[105] and could have "many complex and unpredictable social and economic repercussions".[106] Strong remedies also run a healthy risk of inefficiently distributing resources among the needy,[107] or of siphoning funds from the vulnerable and unrepresented towards able litigants with sharper elbows.[108] Equally concerning,

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[102] Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford: Oxford University Press, 2012) at 14-15, 105. Sathanapally also stresses how weak or "open" remedies can stimulate democratic deliberation and cooperative constitutionalism.
[103] Joel Bakan, "What's Wrong with Social Rights?" in Joel Bakan & David Schneiderman, eds, *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 85 at 86.
[104] Kent Roach, "Polycentricity and Queue-Jumping in Public Law Remedies: A Two-Track Response" (2016) 66:1 Univ of Toronto LJ 3 at 5, citing Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353.
[105] See Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012) at 111-116.
[106] *Ibid.*
[107] Albie Sachs, "The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case" (2003) 56:1 Curr Legal Probs 579 at 598
[108] Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009) at 177-179.

strong remedies can foreclose public debate and reorder important legislative choices.[109] Courts might also strain their legitimacy and compromise their support among key political actors and stakeholders, whose cooperation is necessary for change to occur.[110]

Moreover, as I discussed in the previous Chapter, social rights cannot confidently guide judicial activity, especially at the remedial stage. Rights to shelter, healthcare, education, food, and water are ultimately meant to guarantee a socio-legal environment in which these vital goods are accessible to all.[111] But these guarantees are "consequential"; they refer to a state of affairs that has been realized through an intermediate policy.[112] There are countless ways goods such as healthcare or housing can be made accessible through changes to laws, institutions or social programs. The underlying rights are agnostic about the means by which the ultimate result is obtained.

Remedies at the extreme end of the "weak" spectrum succeed at avoiding a number of these objections but run the risk of being ineffective and failing to produce constitutionally-required change. For remedies like declarations to be effective, political actors have to be willing to cooperate. They must also possess a sufficient level of institutional capacity to formulate complex policy and coordinate implementation, something which cannot be assumed.

Feeble follow-up to *Grootboom* exposes the costs and risks of assuming state capacity and cooperation. In that case, the Constitutional Court of South Africa's declarations did not specify

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[109] See eg Frank R Cross, "The Error of Positive Rights" (2003) 48:3 UCLA L Rev 857; David Beatty, "The Last Generation: When Rights Lose Their Meaning" in David Beatty, ed, *Human Rights and Judicial Review: A Comparative Perspective* (New York: Springer, 1994) 321 at 350; Young, *Constituting SERs*, *supra* note at 134.
[110] Young, *supra* note 99 at 161, 165.
[111] András Sajo, "Socioeconomic Rights and the International Economic Order" (2002) 35:2 NYU J of Intl L & Pol 221 at 232 (referring to the right to food as a "guarantee of a sociolegal environment conducive to having access to food"); see also Aditi Bagchi, "Distributive Injustice and Private Law" (2008) 60:1 Hastings LJ 105 at 147.
[112] Cross, *supra* note 109.

which level of government was responsible for the adoption of emergency housing policy, and progress was stalled as different state actors argued over which one of them was responsible for implementation.[113] Eventually, the national government amended the *Division of Revenue Act*, obliging provinces to commit between 0.5-0.65% of their budget to address "Grootboom-like" crises.[114] Later, the National Housing Code was amended to include a "Housing Assistance in Emergency Circumstances" program[115], which sought to provide relief to those who would lose dwellings in natural disasters or who faced imminent eviction.[116] That program invited municipalities to assess and define their emergency housing needs, and then to file a request for funding from the provincial department of housing.

These reforms were late-coming and insufficient. They provided no emergency relief for communities that had already lost access to their homes. Moreover, many municipalities never submitted requests for emergency housing funding, and the intended relief was therefore unavailable when it was needed.[117] Provincial funding was also poorly distributed. The new law stipulated that a fixed percentage be committed to housing emergencies, despite the fact that not every province faced housing crises in equal proportion.[118] Some provinces dramatically

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[113] This responsibility-dodging behaviour was noted by the South African Human Rights Commission in its letter to the Constitutional Court, filed on 14 November 2001: see Pillay, *supra* note 69 at 8.
[114] *Ibid* at 10.
[115] Sandra Liebenberg, "South Africa: Adjudicating Social Rights Under a Transformative Constitution" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 74 at 99.
[116] This is documented in "South Africa: Justice Sector and the Rule of Law", *Open Society Foundation for South Africa* (2005) online: Open Society Foundation <http://www.opensocietyfoundations.org/sites/default/files/afrimapreport_20060223.pdf> at 31-32 [accessed April 16, 2019].
[117] This became a matter for subsequent litigation. For instance, in *City of Cape Town v Rudolph and Others*, [2003] (11) BCLR 1236, [2004] (5) SA 39, the Cape Provincial Division of the High Court ordered the City of Cape Town to comply with its obligations under both the National Housing Code and the Bill of Rights by being proactive in assessing and defining its emergency housing needs.
[118] The Western Cape Province, for instance, was already suffering a severe housing shortage and the crisis was compounded by the Western Cape floods in 2002.

underspent their housing budgets, while others were strained by excess demand.[119] As a result of these shortcomings, there was little structural change in the short and medium term after *Grootboom* was rendered.[120]

The members of Irene Grootboom's community continued to live in precarious housing for over a decade.[121] Sadly, the community's settlement with the local municipality was neglected, leading to continued deplorable living conditions. The 3,000 residents were forced to share twelve toilets and their field did not drain rainwater or the human refuse dumped nearby, both incubating disease.[122] Fires repeatedly swept through the encampment, caused by the proximity of dwellings and the use of candlelight.[123] Irene Grootboom herself died in 2008 in the same dwelling she lived in at the time proceedings were instituted.[124]

Grootboom remains a cautionary tale for litigants, judges and scholars. *TAC* was more faithfully implemented. The Court had issued specific orders in addition to declaratory relief and failure to comply could have been met with an action in contempt of court. The Treatment Action Campaign had also included in its proceedings the national Minister of Health and the Ministers of Health of each province so that it could compel compliance through actions in contempt nationwide.[125] When some governments stalled in expanding access to nevirapine,

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[119] Pillay, *supra* note 69 at 10.
[120] Liebenberg, "South Africa" *supra* note 115 at 101; Pillay, *ibid*. For the view that *Grootboom*'s most significant effects were felt over the long-term, see Malcolm Langford & Steve Kahanovitz, "South Africa: Rethinking Enforcement Narratives" in Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, eds, *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge University Press, 2017) 315.
[121] Liebenberg, "South Africa"*, ibid* at 90.
[122] *Ibid.*
[123] Bonny Schoonakker, "Treated with contempt: Squatters' precedent-setting victory has gained them only stinking latrines", *Sunday Times* (21 March 2004).
[124] Francis Hweshe, "Irene Grootboom dies without a house" *Carpe Argus* (4 August 2008) online: Abahlali base Mjondolo < http://www.abahlali.org/node/3860> [accessed April 16, 2019].
[125] Pillay, "Implementation" *supra* note 113 at 12.

Treatment Action Campaign responded with renewed threats of legal action. Implementation thus depended on the sustained efforts of one of South Africa's largest and well-financed non-governmental organizations.[126] The Court's orders may well have been unfulfilled if state actors had been left to their devices.

b) The turn to institutional support

The concerns associated with strong and weak remedies have led some scholars – and perhaps some judges – to prefer moderate paths that strike a better balance between judicial effectiveness, legitimacy and competence.[127] There appears to be scholarly support for some of these approaches, fueled by the examples of T-25 in Colombia and *PUCL* in India. These cases involved a blend of judicial supervision and dialogue, a variety of judicial decrees – some specific, others encouraging proposals or negotiation – as well as the involvement of other stakeholders and monitoring bodies. This variety of judicial strategies is similar to the controversial "institutional decrees" or "administrative injunctions"[128] in the United States which "enrich[ed] the institutional repertory" of the state.[129]

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[126] For a more fulsome account of Treatment Action Campaign's litigation strategy and success, see Mia Swart, "Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor" (2005) 21 SA J on Hum Rts 215 at 223-224; Mark Heywood, "Shaping, Making and Breaking the Law in the Campaign for a National/HIV Treatment plan" in Peris Jones & Kristian Stokke, eds, *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (Leiden: Martinus Nijhof Publishers, 2005) 181; and Mark Heywood, "Contempt or Compliance? The TAC Case After the Constitutional Court Judgment" (2003) 4:1 ESR Rev 1.

[127] See eg the co-authored "Introduction: From Jurisprudence to Compliance" by Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, "Introduction: From Jurisprudence to Compliance" in Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, eds, *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge: Cambridge University Press, 2017) 3.

[128] William Fletcher, "The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy" (1982) 91:4 Yale LJ 635 at 638-640; Owen Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978).

[129] Charles F Sabel & William Simon, "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 Harv L Rev 1016 at 1017.

However, courts embarking on these mixed paths receive little guidance from the underlying rights themselves, since these provide only "goals and boundaries" for the remedial process.[130] As Susan Sturm persuasively argues, the "choice of remedy is likely to be driven by goals that do not directly relate" to the content of the right itself.[131] Stephen Smith suggests that this insight reflects a basic truth about remedies: rights and remedies reflect fundamentally different relationships and constitute distinct spheres of activity. The question of what the state owes each individual is different from the question of "what courts [should] do when citizens seek their assistance".[132]

This second question raises distinct questions about the capacity of courts, their relationship to other political actors, the local legal culture, the perceived legitimacy and anticipated efficacy of their interventions, the ambit of judicial powers, the resources judges have at their disposal, as well as rules governing procedure and the administration of litigation.[133] These limitations can shape the eventual remedy, and yet they are external to the underlying rights. For this reason, Paul Gewirtz positions remedies as a "jurisprudence of deficiency", keenly aware that there will be something "lost between declaring a right and implementing a remedy".[134] Taken to an extreme, this view holds that rights can "occupy an exalted sphere of

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[130] Susan Sturm, "A Normative Theory of Public Law Remedies" (1991) 79:5 Geo LJ 1355 at 1363–1364.
[131] *Ibid*.
[132] Smith, *supra* note 90 at 8; see also Stephen Smith, "Rights and Remedies: A Complex Relationship" in the hon Robert Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010) 33.
[133] For this idea expressed in the American constitutional context, see generally Lawrence Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1978) 91:6 Harv L Rev 1212; Owen Fiss has similarly argued that rights represent the "true meaning of … constitutional values […] [while] remedies "actualize" the constitutional value and are influenced by concerns which are "subsidiary", "strategic" and "instrumental": Owen Fiss, "Foreword: The Forms of Justice" (1979) 93:1 Harv L Rev 1 at 51-52.
[134] Paul Gewirtz, "Remedies and Resistance" (1983) 92 Yale LJ 585 at 587; Jeffries, *supra* note 96 at 87-88 (describing the "distance between the ideal and the real" as the "shortfall between the aspirations we call rights and the mechanisms we call remedies"); on the idea of underenforced constitutional norms more generally, and not confined to the remedial context, see Sager *supra* note 133.

principle, while remedies are consigned to the banausic sphere of policy, pragmatism, and politics", the two being made simply "of different stuff". [135]

Some remedies can distance courts from straightforward exercises in rights-enforcement and redirect judges towards other objectives. On the approach Katharine Young labels "conversational", courts engage in dialogue with other state actors over possible responses to rights deprivations.[136] This dialogue can aim to overcome obstacles in the political process by targeting the "blindspots" which occur when the political branches fail to recognize the full impact of government policy and the "inertia" which prevents state actors from achieving commonly-desired objectives.[137] With courts forcing social rights onto the legislative agenda, judicial remedies can go beyond both the need to "redress the wrong done to the plaintiff" and "ensuring that future public action complies with the requirements of the law". Remedies can instead "facilitate[ ] democratic deliberation beyond the courts as to how best to protect rights".[138] For dialogic theories, the endpoint of the remedial process is to involve other state actors in the project of interpreting the scope of social rights. Departing from this view, this Chapter stresses that judicial dialogue can be pressed into the service of building state capacity and increasing rights awareness in public decision-making.

Courts can also "destabilize" public institutions through experimentalist remedies.[139] This form of judicial regulation "combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability".[140] These fruitful "new

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[135] Levinson, *supra* note 92 at 857-858.
[136] Young, *supra* note 99 at 147.
[137] Rosalind Dixon, "Creating Dialogue About Socio-Economic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited" (2007) 5:3 I-CON 391 at 394, 402-407.
[138] Sathanapally, *supra* note 102 at 11.
[139] See esp Sabel & Simon, *supra* note 129.
[140] *Ibid* at 1019.

governance" approaches imagine courts initiating a process which engages stakeholders in consultation, information-generation, and the dissemination of best practices.[141] This process relieves courts of having to fix precise content to inherently indeterminate rights like healthcare or education, all without "abandoning enforcement to political discretion".[142] On this model, a court might limit itself to specifying an ultimate goal that is to be achieved and to ensuring that "actors have engaged in an inclusive, bona fide effort" to agree on how that goal should be realized.[143] This process can also be paired with improved standards for measuring an institution's performance.[144] For experimentalists, the state's performance should always be "treated as provisional and subject to continuous revision with stakeholder participation".[145] In this way, structural remedies can "institutionalize[ ] a process of ongoing learning and reconstruction",[146] which incorporates the input "of a new set of actors"[147] and can succeed in destabilizing public institutions which have "chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability".[148]

New governance theories thus position the remedial process as a forum for improving rights outcomes through policy innovation. However, by outsourcing much of the important work to a process of stakeholder engagement, they risk abandoning the pursuit of how these substantive decisions can remain in the hands of judges, which remains the case in jurisdictions like India, Colombia and South Africa.

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[141] Alana Klein, "Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights" (2008) 39 Colum Hum Rts L Rev 351 at 397.
[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid*.
[145] *Ibid*.
[146] *Ibid*.
[147] Young, *supra* note 99 at 151.
[148] Sabel & Simon, *supra* note 129 at 1020.

Finally, courts can manage state actors through "mandatory form[s] of relief that require a continuing, ground level, day-to-day control".[149] While judicial managerialism usually implies detailed orders and ongoing judicial supervision, it need not necessarily devolve into the pure strong-form enforcement described earlier in this Chapter. Courts can enshrine existing government policies in court orders or require state actors to formulate a proposal for judicial approval.[150] In this way, managerialism can overcome the "structural impasses" and "institutional blockage" of modern political systems and bureaucracies.[151] Indeed, for this reason, issuing specific judicial commands does not necessarily run counter to deference, since judges keep intact the legislative and executive's branches authority on matters on policy.

These remedial approaches can overlap and blend into one another. They each present the possibility of turning away from simple rights enforcement. Instead, each of these postures can reflect a basic desire to offer institutional support for lagging state actors. Thus, a "conversational" court may aspire to provoke greater democratic deliberation or raise rights consciousness in public decision-making. An "experimentalist" court may wish to create a structured process for stakeholder input, ongoing learning and policy recalibration. A "managerial" court may aspire to help state actors overcome administrative disfunction, coordination breakdowns, and implementation failures.[152]

The choice courts ultimately make may be influenced by a number of cultural, institutional and strategic factors. Judges may have some internalized sense of their role and what kinds of curial contributions are legitimate. Judges may also be mindful of the norms of the

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[149] Young, *supra* note 99 at 155.
[150] *Ibid*.
[151] Rodríguez-Garavito & Rodriguez-Franco, *supra* note 1 at 16-17, 28.
[152] For a different account of how judicial intervention can help buttress state capacity, see Madhav Khosla & Mark Tushnet, "Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry" (2022) 70:1 Am J of Comp L 95.

local constitutional culture, and of the court's relationship to other state actors and to the public more generally.[153] In weighing the possible payoff, judges may consider the severity of need as well as the likelihood that a particular order will be complied with. There are also constraints imposed by the court's internal resources – including budget and number of judges – as well as by law, precedent and litigation procedure. The role courts opt for may also reflect the judges' perception of where and how other state actors are failing. Katharine Young suggests that, in the end, the role of courts is to be "catalytic".[154] A closer examination of *PUCL* and T-25 sharpens that insight by demonstrating how judges can spur meaningful change by directing their efforts towards bolstering institutional performance.

IV. Institutional Support and Remedial Pluralism in *PUCL*

This section parses the Indian Supreme Court's orders in *PUCL* in pursuit of an internal perspective of the Court's remedial objectives in this decades-long proceeding. As mentioned above, *PUCL* serves as an important case-study because it represents one of India's most ambitious and consequential social rights litigation and may serve as a touchstone for comparative scholarship and jurisprudence elsewhere.

The Indian Supreme Court has issued over 40 interim orders. While the text of these orders are brief, they occasionally reveal the Court's varied objectives and shifting approaches. I thus depart from the assumption, maintained by some scholars, that *PUCL* can be understood as a straightforward process by which courts "gradually define" social rights.[155] I also challenge the

[153] *Ibid* at 172-174.
[154] Young, *supra* note 99 at 172.
[155] See Birchfield & Corsi, *supra* note 25 at 700 (writing that "[b]y engaging in something strikingly close to lawmaking, the Supreme Court has, through its series of interim orders, gradually defined the right to food in terms of what policies are required of the state and central governments in order for them to adequately fulfill their constitutional obligation under Article 21").

tendency to subsume this diversity of judicial approaches under umbrella concepts like "dialogic judicial activism"[156].

Instead, *PUCL* demonstrates that a diversity of remedial approaches can flourish within a single proceeding. Occasionally, the Court engages in strong-form rights-enforcement, identifying one of the state's constitutional commitments, and enshrining it in a mandatory order. However, at other times, the Court's remedial work has sought to strengthen other state actor's institutional performance. These orders do not reflect the content of the government's constitutional duties in any clear or straightforward manner. Instead, they appear to reflect the Court's image of a well-functioning state – one where public programs are effectively coordinated and implemented, where corruption is weeded out from the delivery of public services, where public policy remains dynamic and ever-changing, and where vital human needs remain top-of-mind concerns for public officials.

a) Facilitating implementation of government programs

One of the Supreme Court's principal objectives was articulated in an early interim order. The original proceeding was concerned with the running of the Food Corporation of India and the Public Distribution System, and with the amount of undistributed grain wasting in public facilities.[157] Voicing the concern that policy is "best left to the Government", the presiding judges went on to state that "[a]ll that the Court has to be satisfied and which it may have to ensure is that the food grains which are overflowing in storage receptacles […] and which are in abundance, should not be wasted by dumping into the sea or eaten by rats. Mere schemes without any implementation are of no use".[158] Implicit in this statement is the "role conception" that has

[156] Rodríguez-Garavito & Rodriguez-Franco, *supra* note 1 at 5, 16-17, 26-28.
[157] Chitalkar and Gauri, *supra* note 5 at 296.
[158] *PUCL* Interim Order 20 August 2001.

often guided the Court through its decades-long proceeding: the role of the Court is to ensure that available programs for food relief are effective and succeed in reaching their intended recipients.[159] Indeed, the Court repeatedly returns to its regret that "[m]ere schemes without any implementation are of no use",[160] and that "amongst plenty there is scarcity".[161]

By appearance, these concerns have shaped the Court's conception of its role and, consequently, on the kinds of interim orders it has issued. Many orders convert (non-legal) food distribution programs into legal entitlements by directing state officials to implement them according to official guidelines.[162] The Court thus encourages implementation of official policy by converting certain programs into legal guarantees. This dynamic is present in some of the Court's orders regarding the Public Distribution System,[163] the Integrated Child Development Scheme,[164] the Mid-Day Meal Scheme,[165] employment support schemes,[166] as well as shelters for homeless persons.[167] The Court has also had to order government actors to release funding earmarked for certain programs and to distribute grain in storage.[168] The Court's institutional support, in these cases, takes the form of coercing public officials to follow-through on their institution's commitments. These orders represent an important portion of the Court's remedial work in *PUCL*. The Court's orders rarely consider whether these schemes are reasonable and defensible, or whether they fulfill the constitution's guarantees.

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[159] Young, *supra* note 99 at 172.
[160] *PUCL* Interim Order 20 August 2001 as well as its repetition in *PUCL* Interim Orders 2 May 2003 and 29 October 2010.
[161] See *PUCL* Interim Orders 23 July 2001 and 2 May 2003.
[162] Chitalkar & Gauri, *supra* note 5 at 298.
[163] *PUCL* Interim Orders 23 July 2001, 28 November 2001, 8 May 2002, and 29 April 2004.
[164] *PUCL* Interim Orders 8 May 2002, 29 April 2004, 7 October 2004, and 13 December 2006.
[165] *PUCL* Interim Orders 28 November 2001, 20 April 2004, and 17 October 2004.
[166] *PUCL* Interim Order 20 April 2004
[167] *PUCL* Interim Orders 15 November 2010 and 7 January 2011.
[168] *PUCL* Interim Orders 28 November 2001 and 13 December 2006.

The Court also regularly enshrines policies into orders with the goal of coordinating a variety of government actors and civil society organizations at the central, state and local levels. In some cases, the central government had made earnest efforts, but implementation was impeded by laggard responses at the state level.[169] For instance, states have been ordered to fulfill their responsibility to identify families below the poverty line,[170] distribute ration cards,[171] dispense grain allocated by the central government,[172] and to match funds to universalize the Integrated Child Development Scheme.[173] Here, support means relieving the kind of administrative disfunction that impedes the delivery of vital goods.

An interim order from December 2006 exemplifies both of these trends. At the time, states were not matching the central government's contribution towards the Integrated Child Development Scheme, and much of the allocated funding was not being disbursed. There was thus a significant shortfall that denied children access to various programs including supplementary nutrition, growth monitoring, nutrition and health education, immunization and pre-school education. The Court responded by reiterating its previous orders which directed that these programs be implemented, and this time requiring the Chief Secretaries of a number of underperforming states to appear personally before the Court to explain their state's poor implementation.[174]

These orders reimagine the workings of rights adjudication. Instead of holding the government to a rights-inspired standard, the Court instead shepherds public actors to be better coordinated and to follow-through on their commitments to social assistance. This shift in role

[169] *PUCL* Interim Order 28 November 2001.
[170] *PUCL* Interim Order 3 September 2001.
[171] *PUCL* Interim Order 28 November 2001.
[172] See eg *ibid* and *PUCL* Interim Orders 17 September 2001 and 12 August 2010.
[173] *PUCL* Interim Orders 13 December 2006.
[174] *Ibid*.

also contextualizes how courts may participate in transformative constitutionalism. Instead of challenging the distribution of resources within a political community, some of the Court's most important contributions consist in prodding political actors to be simply more effective and coordinated. In doing so, the Court demonstrates how judicial managerialism can be relied upon to improve other state actors' institutional performance while deferring to their view of optimal policy. Judicial strong-arming does not necessarily run contrary to respect for the work of the legislative and executive branches.

Orders to implement existing policy are typically paired with an obligation to report back to the Court on progress. This too can be interpreted as a prong of what I have called "institutional support". The promise of holding state actors to account creates an ongoing pressure on public officials to remain attentive to the problems identified in the Court's orders and to take action to show progress. However, the Court goes further than this exercise in accountability; it also showers praise on states that have cooperated. The Court takes note of "meaningful beginning[s]" and "serious endeavor[s]".[175] An ambitious response to the plight of India's homeless population prompted the Court to express a "deep sense of appreciation" for those who acted "promptly to save human rights (*sic*) of a large number of the homeless".[176] Not only can this positive encouragement be galvanizing, but this language also has the function, intentional or not, of re-legitimizing government action in an environment where public trust in the Court is high but trust in other public actors is low. The Court's approach rehabilitates and re-legitimates state activity.

[175] Chitalkar & Gauri, *supra* note 5 at 301, citing *PUCL* Interim Orders 17 September 2001, 7 January 2010, and 12 August 2010.
[176] *PUCL* Interim Order 27 January 2010.

Beyond requiring state actors to implement state policy in a coordinated fashion, the Court has also attempted to improve the performance of other institutions by addressing the role that corruption plays in hamstringing food assistance programs.[177] The Court established a "Central Vigilance Committee" tasked with finding solutions to reduce corruption in the Public Distribution System. By September 2012, that Committee had submitted 22 reports and had made a number of important policy recommendations, including a complete digitization food distribution system.[178]

In some cases, the Court assumed important law-making powers to address corruption and administrative inefficiencies. Early on in the proceeding, for instance, the Court took issue with several abusive practices of licensees in the Public Distribution System and created a series of regulatory offenses to facilitate the supply of grain.[179] The Court's order reads as follows:

> Licensees, who
>
> > (a) do not keep their shops open throughout the month during the stipulated period,
> >
> > (b) fail to provide grain to BPL families strictly at BPL rates and no higher,
> >
> > (c) keep the cards of BPL households with them,
> >
> > (d) make false entries in the BPL cards,
> >
> > (e) engage in black-marketing or siphoning away of grains to the open market and hand over such ration shops to such other person/organizations,

[177] *PUCL* Interim Orders 12 July 2006 (noting widespread corruption in Public Distribution System and establishing the Central Vigilance Committee).
[178] *PUCL* Interim Orders 12 July 2006 (noting widespread corruption in Public Distribution System and establishing the Central Vigilance Committee), 12 August 2012 (recommending computerization of the Public Distribution System) and 17 September 2012 (cataloguing the 22 reports of the Central Vigilance Committee).
[179] *PUCL* Interim Order 2 May 2003.

> shall make themselves liable for cancellation of their licenses. The concerned authorities/functionaries would not show any laxity on the subject.[180]

Finally, many of the Court's ordered helped generate information for state actors to better implement social programs and to craft measures more responsive to real-world conditions. The Court's two commissioners, assisted by aides at the state level, regularly reported on problems in the administration of food assistance programs.[181] Another example is the Court's establishment of the Central Vigilance Committee to report on incidences of corruption. The Court would order other state actors or public officials to gather data as well – including an order to obtain up-to-date figures on the number of families below the poverty line.[182] These anti-corruption initiatives can also be understood as species of institutional support, concerned as they are with uprooting obstacles to the full implementation of public policy.

These orders demonstrate the Court's desire to improve the performance of other institutions by encouraging better coordination, full implementation, and targeting corruption. Unsurprisingly, many of these orders are broader than the rights that were the initial source of concern.[183] While the Court began anxious about widespread malnourishment and wasted grain stock, over time, the proceedings expanded to capture a number of concerns that were only indirectly relevant to the problem of malnutrition. The Court's involvement in addressing corruption in the Public Distribution System is but one example, with many of its orders generating useful information for public and civil society actors.[184]

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[180] *PUCL* Interim Order 2 May 2003
[181] *PUCL* Interim Order 31 August 2010 (noting spoilage in food grain storage as a result of the storage facilities used).
[182] *PUCL* Interim Orders 3 September 2001, 5 May 2010 and 6 September 2010.
[183] See Sturm, *supra* note 130 at 1364-1365, for a similar observation made in the context of the United States' experience with structural injunctions.
[184] On the interactions between civil society, the Court and Indian political institutions, see Birchfield & Corsi, *supra* note 25.

b) Encouraging innovation

I have so far considered how the Court's orders prodded state actors towards more effective coordination and implementation of existing social programs. The Court has also encouraged state actors to innovate. In its interim orders, the Court occasionally makes non-binding policy suggestions and requests state officials to respond.[185] From time to time, the Court's judges also praise innovative measures taken by certain states and encourages the dissemination of best practices. In May 2011, for instance, the Court encouraged the central government to distribute grain per individual rather than per family, a practice which began in the state of Tamil Nadu.[186] The Court also encouraged states to consider the innovative approaches to homelessness adopted by the state of Andhra Pradesh.[187] That state had created the Mission for Elimination of Poverty in Municipal Areas, which organized self-help groups.[188] It had also launched an ambitious housing program which provided technical and financial help for families wishing to construct a new home, and had boasted of the creation of 60 new night shelters within 2010 alone. The state also arranged to provide skills development training for individuals experiencing homelessness and elementary school education for their children.[189]

The Court has also directed government actors to consider and respond to policy ideas raised by non-state actors[190], or to propose solutions to identified problems.[191] For instance, in 2012 the Court shepherded a process which saw the parties collaborate on the creation of a draft

[185] See eg *PUCL* Interim Orders 12 August 2010, 31 August 2010, and 6 September 2010.
[186] *PUCL* Interim Order 14 May 2011.
[187] *PUCL* Interim Orders 5 May 2010 and 26 November 2010.
[188] *PUCL* Interim Order 26 November 2010.
[189] *Ibid*.
[190] See eg *PUCL* Interim Orders 2 May 2003, 9 May 2005, 10 February 2010.
[191] *PUCL* Interim Order 8 May 2002 ("The gram panchayats shall frame employment generation proposals").

manual on the regulation for homeless shelters.[192] The Court had also mandated a Central Vigilance Committee to identify solutions for reducing corruption in the Public Distribution System.[193] In this way, the proceedings have become a space for exchanging policy innovations, prodding state actors to be more dynamic and adaptive, all while insisting that vital human needs deserve to remain a top-of-mind concern for public officials. The Court's orders thus prod state actors towards a performance ideal, as opposed to holding those actors accountable to some constitutional benchmark. Indeed, the resulting orders and policy outcomes extend well beyond the rights in question.

There are benefits, beyond theoretical clarity, to understanding this remedial activity as being distinct from the underlying rights. Some governments have been inclined to defend their social rights performance on the basis that they are complying with what has been demanded by the courts.[194] This thinking is consistent with the view of some scholars, who have assumed that the *PUCL* interim orders must be "gradually defin[ing]" what the general "right to food" entails.[195] The view that right and remedy must be coextensive may thus lead scholars and public officials to construe social rights unduly narrowly. Framing the Court's proposals and directions as part of a remedial process which is principally directed towards institutional support, as opposed to rights enforcement, might provide activists with some space to mobilize rights claims which go beyond what is directed in court orders.

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[192] *PUCL* Interim Order 27 February 2012.
[193] See *PUCL* Interim Orders 12 July 2006 (noting widespread corruption in Public Distribution System and establishing the Central Vigilance Committee), 12 August 2012 (recommending computerization of the Public Distribution System) and 17 September 2012 (cataloguing the 22 reports of the Central Vigilance Committee).
[194] This is a risk that has been identified in the Colombian context, for instance: see Natalia Angel-Cabo & Domingo Lovera Parmo, "Latin America Social Constitutionalism: Courts and Popular Participation" in Helena Alviar Garcia, Karl Klare & Lucy Williams, eds, *Social & Economic Rights in Theory and Practice: Critical Inquiries* (New York: Routledge, 2014).
[195] See Birchfield & Corsi, *supra* note 25 at 700.

c) Judicial dictation and rights-enforcement

The orders reviewed so far have gravitated towards inching other state institutions towards certain performance ideals. The Court has prodded public actors to be more coordinated, held them accountable to full implementation of government programs, identified corruption impeding the delivery of vital goods, and has encouraged innovation as well as the dissemination of best practices. The Court's continued supervision has also compelled public leaders to treat the vital needs of India's vulnerable as a top-of-mind concern. These remedies seem to reflect the Court's view of what a well-functioning, concerned government looks like.

The Court has also engaged in strong-arm managerialism. For instance, early on, the Court directed the Government of India to expand the list of eligible beneficiaries for the Antyodaya Anna Yojana program, a scheme that entitles the "poorest of the poor" to obtain fixed amounts of grain and rice at a subsidized rate.[196] Later, the Court issued specific orders with regards to the government's mid-day meal scheme for schoolchildren and employment support scheme for adults.[197] The Court not only ordered states to implement parts of the mid-day meal scheme which were otherwise voluntary, it added specific instructions on matters like which cooks to hire, how the program should be financed, when meals would be supplied, and a direction to improve food-distributing facilities.[198] With regards to the employment-support scheme, the Court ordered states to "pay minimum wages", to stop relying on "labour displacement machines", and added that, "as a result of financial constraints", states may apply to the central government for permission to pay "100% of wages in the shape of good-grains".[199]

[196] *PUCL* Interim Order 2 May 2003.
[197] *PUCL* Interim Order 20 April 2004.
[198] *Ibid*.
[199] *Ibid*.

It is difficult to tie the substance of these orders back to any account of underlying rights. The Court never suggests that details such as which cooks ought to be hired, or to what extent states can rely on automation, can be tied back to some kind of constitutional guarantee. Many of these orders are better understood as modest efforts to improve policy, and they reveal judges who are confident enough in their ability to improve policy outcomes. In other instances, the Court's heavy-handedness is framed as a response to the state's repeated failure to take action.[200] In these cases, the Court acknowledges that it is not operating in a strictly judicial role, and is instead usurping a policy prerogative that would normally fall to other public actors. For this reason, the Court employs language which recognizes that these interventions are exceptional – an "unusual direction"[201] or a "one-time measure"[202], justified by the government's failure to act.

Throughout dozens of interim judgments the Court says little about the content of the right to food. This near-total absence of rights analysis leaves the impression that the Court's remedial activity is driven by considerations other than rights-enforcement. The Court occasionally expresses its "anxiety" that "amongst plenty there is scarcity".[203] It also states in an early order that Article 21 of the Constitution of India "protects for every citizen a right to life with human dignity".[204] It has added that the "prevention of [hunger and starvation] is one of the prime responsibilities of the Government – whether Central or State".[205] But these passages represent the limits of the Court's doctrinal exposition. This dearth of doctrine might be

[200] *PUCL* Interim Order 20 April 2004 (series of directions on how to implement Mid-Day Meal scheme, ostensibly justified by the "anguish that despite lapse of nearly three and half years (*sic*), the order dated 28th November, 2001 has not been fully implemented by all the States and Union Territories. As stated earlier, many of the States have given only half-baked information and figures").
[201] *PUCL* Interim Order 12 July 2006.
[202] *PUCL* Interim Order 14 May 2011.
[203] *PUCL* Interim Order 23 July 2001; see also *PUCL* Interim Order 2 May 2003, repeating this same phrase.
[204] *PUCL* Interim Order 2 May 2003.
[205] *PUCL* Interim Order 20 August 2001.

contrasted with the South African Constitutional Court's jurisprudence, which goes to greater lengths to outline the government's constitutional duties. Indeed, this kind of doctrinal exposition might have limited the court's ability to award the kind of creative and untethered orders we find in *PUCL*.

Occasionally, the Court's intervention resembles strong-form rights-enforcement, even if it does not explain its intervention in these terms. For instance, upon being presented with updated information on the cost of food, the Court reasoned that those living below the poverty line and even those "marginally above the poverty line" were in a state of crisis. The Court went on to direct the central government to procure and distribute an additional 5 million tonnes of grain than it was initially committed to.[206] The Court also outlined a process for how this grain should be allocated among possible recipients and ordered state governments to exhaust all of their existing quantity of food-grain.[207]

Intriguingly, the Court does expound on the right to shelter and issues orders destined to safeguard that right. In January 2010, the Court was seized with a series of interim petitions within the *PUCL* proceedings after a few individuals experiencing homelessness perished due to extreme cold in Delhi.[208] Initially, the Court attempted to link homelessness to food scarcity.[209] In reality, its judges began addressing homelessness first in Delhi, then elsewhere, as an independent cause of concern.[210] On one occasion, the Court outlined in unqualified terms the "bounden duty of the Union of India and the State Governments to ensure at all costs that no

[206] *PUCL* Interim Order 14 May 2011.
[207] *Ibid*.
[208] *PUCL* Interim Order 20 January 2010.
[209] *Ibid*.
[210] *PUCL* Interim Orders 10 February 2010, 5 May 2010, 21 July 2010, 15 November 2010, 24 November 2010, 26 November 2010, 16 December 2010, 3 January 2011, 7 January 2011, 27 February 2012.

death takes place because of lack of night shelters or basic facilities".[211] On another occasion, the Court outlined in unqualified terms the state's duty to prevent deaths due to lack of shelter:

> It is the bounden duty of the Union of India and the State Governments to ensure at all costs that no death takes place because of lack of night shelters or basic facilities. To reserve and save the lives of the people of this country has to be given top priority by the State. No laxity or lapse on this count can be countenanced.[212]

The Court's interim orders go on to enforce this right in direct terms. In January 2010, the Court ordered government actors in Delhi to set up "at least 100 temporary shelters for people living on the streets within the next one week".[213] It further ordered those parties to construct "at least 140 permanent shelters for people living on the streets by December, 2010".[214] Many of the Court's subsequent orders from 2010 track Delhi's progress.

Other orders of the Court go much further and suggest, if only implicitly, that homeless individuals have a right to accessible shelter which provides for all their vital needs including food, water, sanitation, toilets, beds, sheets, heating, first aid, and security. These fulsome rights were never explicitly recognized by the Court, but rather emerged from the workings of the *PUCL* proceeding. The Court's commissioners had suggested that government actors should provide 24-hour homeless shelters which have all the "basic amenities to enable a life with dignity".[215] Following this report, a number of states submitted affidavits confirming their intention to build shelters which included these basic amenities. The Court then simply directed

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[211] *PUCL* Interim Order 16 December 2010; see also *PUCL* Interim Order 27 February 2012, where the Court indicates that the "life of homeless people must be properly protected and preserved".
[212] *PUCL* Interim Order 16 December 2010.
[213] *PUCL* Interim Order 20 January 2010.
[214] *Ibid*.
[215] *PUCL* Interim Order 5 May 2010.

states to submit further affidavits detailing their progress or ordered them to begin construction as indicated in their submissions.[216]

d) Colombia and T-25

The flurry of orders in *PUCL* are marked by divergences in remedial objectives and by a sustained commitment to improve the performance of public institutions. While the Constitutional Court of Colombia's marathon proceedings in T-25 are beyond the scope of this chapter, it is worth noting that similar tendencies are present there.

In T-25, the Constitutional Court concluded that the plight of internally displaced persons in Colombia constituted an unconstitutional state of affairs. These widespread human rights violations were associated with a number of persistent state failures: the Colombian government lacked a "serious and coordinated policy" for offering emergency aid, public officials had little data regarding how many internally displaced persons there were, where they were located, or what kinds of circumstances they were facing.[217] Budgetary resources committed to government programs was also insufficient.[218]

The Court responded with a process of supervised structural reform. As of 2014, the Court had issued 289 follow-up decisions and held 20 public hearings to evaluate the government's progress.[219] On occasion, the Court ordered "the creation of specific policies for especially vulnerable groups […] and for communities in extremely violent zones of the country",[220] while at other times the Court identified shortcomings in state action but preferred to issue guidelines, principles, and suggestions paired with orders to report back.[221]

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[216] *Ibid.*
[217] See Rodríguez-Garavito & Rodriguez Franco, *supra* note 1 at 3-4.
[218] Ibid.
[219] *Ibid* at 10-11.
[220] *Ibid* at 86-88.
[221] *Ibid* at 85-86, 112.

As was the case in *PUCL*, many of the Court's orders have attempted to strengthen the performance of state institutions. In its initial judgment, the Court expressed particular concern for how the "implementation, follow-up and evaluation of policy" had "contributed in a constitutionally significant manner to the disregard of fundamental rights".[222] The Court went on to order officials to implement existing policy, as in *PUCL*. Of particular importance, the Court directed the *Sistema Nacional de Atención Integral a la Población Desplazada* to fulfill its mandate to create special programs directed towards the vital needs of displaced populations. Occasionally, the Court has also taken issue with a lack of budgetary resources to implement existing public programs. Identifying a "principle of coherence in policy", it has directed officials to calculate the amount of financial resources required for full implementation and, after, has ordered those funds to be made available.[223] The Court has also directed information-gathering on internally-displaced persons in Colombia and launched a participatory process to construct "rights-based indicators" to measure the effects of government action.[224] Finally, the Court's follow-up hearings and directions to report back on progress has helped galvanize state officials, prodded them to treat the situation of displaced persons as a priority, and has provided a measure of accountability that was absent from normal democratic channels.[225] Among other outcomes, these proceedings improved the visibility of the displaced in Colombian public life, improved coordination and data-gathering among state actors, and resulted in budget increases for vital social programs.[226]

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[222] See *Decision T-25/04*, (CC) at section 6, translated in Rodríguez-Garavito & Rodriguez Franco, *supra* note 1 at 77-78.
[223] See *Decision T-25/04*, (CC) at sections 8.1 and 6.3.1.1.
[224] Rodríguez-Garavito & Rodriguez Franco, *supra* note 1 at 22.
[225] Landau, "Political Institutions", *supra* 42.
[226] David Landau, "The Promise of a Minimum Core Approach: the Colombian Model for Judicial Review of Austerity Measures" in Aoife Nolan, ed, *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014) 267 at 287.

V. Conclusion

In overseeing structural reform, apex courts in India and Colombia have pursued a variety of remedial objectives. Some orders are clearly positioned to offer institutional support, and to strengthen the performance of other public institutions. They inch state actors to be more effective and coordinated, to address the corruption that can impede the delivery of social assistance, and to remain innovative and responsive on questions of vital need. These orders appear to reflect a performance ideal, rather than holding state actors accountable to some rights-inspired standard.

This Chapter introduced these forms of "institutional support" and capacity building as a general remedial orientation. Courts may be attracted to this family of approaches because they avoid some of the shortcomings of classically strong or weak judicial enforcement. They likewise allow courts to sidestep the difficult task of fixing precise content on inherently indeterminate rights. These varieties of institutional support offer a path for courts to participate in transformative constitutionalism without mounting a vigorous challenge on how resources are distributed within a political community. The theme of fashioning remedies to help build state capacity will be reprised in the next Chapter, on individualized relief. In the final Chapter, I offer a defense of institutional support as a sensible focus and baseline for remedies in social rights litigation against state actors.

Throughout this Chapter, I have stressed the need to imagine rights and remedies as distinct spheres of activity, a theme that will be revisited. Some scholars interpret the flurry of orders in *PUCL* as clarifying the content of the right to food. I have suggested that this view is mistaken. The better position maintains that rights reflect general state duties while structural remedies tend to reflect judges' view of the appropriate role for the court and its relationship to

other institutions. The Indian Supreme Court's reliance on brief interim orders has meant that the Court has had little opportunity to provide doctrinal exposition on social rights. However, the Court's remedial orders do provide glimpses of the Court's changing view of its role. I have therefore argued that equating all judicial activity with rights-enforcement risks both misinterpreting what is happening and construing social rights too narrowly.

Chapter 4:
Giving the Individual Remedy Its Due

I. Introduction

The previous Chapter discussed structural remedies, where I underscored the importance of remedial approaches which build state capacity and offer "institutional support". I build on this theme in this Chapter, which focusses on individual remedies. These orders commonly take the form of injunctions to provide a good or a service, directions to state actors to engage and negotiate with litigants, or awards for damages.[1] They can be "strong-form" and dictate the precise good or service that must be supplied to litigants (such as an order to provide specific medical treatment). They can also be "weak", and leave state actors with substantial discretion

[1] For a more detailed list of the remedies available for social rights deprivations, see Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supranational and National Law* (Cambridge: Cambridge University Press, 2021) at 412–426.

over how to respond (such as an order to respectfully engage with an occupier before evicting them).[2] Whatever their form, these remedies share a limited aspiration: they only aim to respond to the needs of the litigants before the court. Unlike structural remedies, these orders do not set out to "fix the potential broader failings in a given social system".[3] By appearance, at least, they fall more comfortably within the traditional boundaries of the judicial role.[4]

In this Chapter, I make three contributions. First, I critically evaluate the objections to individualized relief in social rights litigation. Although they enjoy some scholarly support,[5] these kinds of orders remain deeply controversial. Due to their modest ambitions, individual remedies are usually judged to be a poor vehicle for transformative constitutionalism.[6] More pressingly, empirical research has shown that this mode of relief allows wealthier litigants to jump the proverbial "queue", at the expense of the poor.[7] The result can be both a regressive and inefficient distribution of public goods. Individualized relief is indeed rare in South Africa and

[2] David Landau, "Choosing Between Simple and Complex Remedies in Socio-Economic Rights Cases" (2019) 69:Supp 1 UTLJ 105 at 106–107.
[3] *Ibid*.
[4] David Landau, "The Reality of Social Rights Enforcement" (2012) 53:1 Harv Intl LJ 189 at 199–201.
[5] For a defence of such strong-form remedies, see David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance" (2002) 117 S Afr LJ 484; and David Bilchitz, "Constitutionalism, the Global South, and Economic Justice" in *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: Cambridge University Press, 2013) 41 at 87–88; see also the more tepid defenses of individual remedies in Kent Roach, "Polycentricity and Queue-Jumping in Public Law Remedies: A Two-Track Response" (2016) 66:1 UTLJ 3; Roach, *supra* note 1 at 428–450; and Landau, *supra* note 2.
[6] César Rodríguez-Garavito & Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge: Cambridge University Press, 2015) at 6.
[7] Albie Sachs, "The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case" (2003) 56:1 Curr Leg Problems 579 at 598; Octavio Luiz Motta Ferraz, *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (Cambridge: Cambridge University Press, 2021); Octavio Luiz Motta Ferraz, "Social Rights, Judicial Remedies and the Poor" (2019) 18:3 Wash U Global Stud L Rev 569 at 573; Octavio Luiz Motta Ferraz, "Harming the Poor through Social Rights Litigation: Lessons from Brazil" (2011) 89:7 Tex L Rev 1643.

India, although it is common in Colombia.[8] From this critical evaluation of the current scholarly debate, I identify several conditions under which individualized relief can be justifiable.

Second, I defend several forms of individualized relief against scholarly criticism. Building on a theme from the previous Chapter, I argue that certain kinds of individual remedies are valuable because they offer institutional support. For instance, individual remedies can provide a mechanism for challenging administrative disfunction, and can do so by enforcing the benefits promised by state policy. Individualized relief can also command state actors to engage respectfully with rights claimants. As forms of institutional support, these kinds of orders can improve policy implementation, build rights-awareness in public decision-making, and identify novel solutions for fulfilling rights. Last, I gesture towards ways that individualized relief could responsibly provide urgent, last-resort assistance to individuals who are at the mercy of unreasonable priority-setting schemes.

Third, I argue that individualized relief has an under-appreciated role to play in transformative constitutionalism. The sheer number of successful *tutela* proceedings in Colombia represents a massive rights intervention, particularly in the field of healthcare. Moreover, these orders can catalyze policy and administrative reforms. Likewise, these orders can both spur and facilitate ambitious structural remedies. They can also foster judicial legitimacy and shield courts from political attack.

Giving individual remedies their due is important for the broader social rights project. Ambitious structural remedies represent resource-intensive endeavors that depend on judicial

[8] Ottar Mæstad, Lisa Rakner & Octavio Luiz Motta Ferraz, "Assessing the Impact of Health Rights Litigation: A Comparative Analysis of Argentina, Brazil, Colombia, Costa Rica, India, and South Africa" in Alicia Ely Yamin & Siri Gloppen, eds, *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Cambridge: Cambridge University Press, 2011) 273 at 282–283.

initiative. Courts can only rarely make that kind of investment.[9] Empirical evidence also suggests that structural orders are more difficult to enforce, and are more likely to encounter resistance and non-compliance from the political branches.[10] They can also leave individual litigants without immediate relief – and often without any relief at all.[11] Lives may well be imperiled, as the death of Irene Grootboom demonstrated. And by frustrating litigants' expectations, courts can discourage future claims.[12] The success of the social rights project may therefore depend on the viability of at least some forms of individual relief.

II. The Case Against Individual Remedies

In this section, I evaluate the criticisms levelled against individualized relief. I argue that many of these objections are over-stated. However, one pressing concern persists: if left unchecked, individual remedies can foster a regressive and inefficient distribution of resources. This objection is serious, and it may provide reason to dispense with this form of relief altogether. Crucially, though, I will suggest that there are forms of individualized relief which largely avoid this risk regressive mis-enforcement. This suggestion forms the foundation of the subsequent sections, where I defend three different kinds of individual remedies in social rights litigation.

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[9] Landau, *supra* note 2 at 111, 114 and 116–117.
[10] Mæstad, Rakner & Ferraz, *supra* note 8 at 285–286; Landau, *supra* note 4 at 218; Octavio Luiz Motta Ferraz, "Brazil: Are Collective Suits Harder to Enforce?" in Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, eds, *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge: Cambridge University Press, 2017) 177; Florian Hoffmann & Fernando Bentes, "Accountability for Social and Economic Rights in Brazil" in Varun Gauri & Daniel Brinks, eds, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) 100 at 133.
[11] Robert Leckey, "The Harms of Remedial Discretion" (2016) 14:3 Int'l J Con L 584 at 591; Rodríguez-Garavito & Rodríguez-Franco, *supra* note 6 at 123–126.
[12] Kent Roach, "Dialogic Remedies" (2019) 17:3 Int'l J Con L 860 at 865, 879–880.

a) Traditional by appearance, controversial in practice

The charges made against individualized relief are as follows. In their strong-form, these orders can require judges to identify precisely what social rights guarantee, resurfacing concerns about these rights' "raging indeterminacy".[13] They also give rise to traditional capacity and legitimacy concerns. As I described in Chapter 3, courts can skirt some of these issues when they craft complex, "structural" remedies. For instance, judges might engage in dialogue with the political branches over the meaning of rights, or pivot towards providing institutional support and capacity building. The same cannot be easily accomplished at the level of the individual remedy. The degree of judicial investment required cannot be scaled up to address the thousands upon thousands of individual rights deprivations.

More troublingly, in practice, individual enforcement can be regressive and harm the poor. In the first instance, they extend privileged treatment to litigants over the countless others who suffer from the same systemic deprivation, compromising rights-holders' "horizontal equality".[14] By jumping the proverbial "queue",[15] litigants can compromise the integrity of whatever system of priority-setting has been established to distribute scarce resources – whether a queue, a lottery, or a program based on need or merit.[16]

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[13] Frank Michelman, "The Constitution, Social Rights, and Liberal Political Justification" (2003) 1:1 Int'l J Con L 13 at 30.
[14] On the judicial preference for horizontal equality in public law, see Leckey, *supra* note 11 at 590.
[15] See eg Sachs, *supra* note 7 at 598.
[16] Queue-jumping has indeed become the shorthand to describe any situation where litigants rely on court orders to subvert rational and publicly-established methods of resource allocation: Katharine Young, "Rights and Queues: On Distributive Contests in the Modern State" (2016) 55:1 Colum J Transnat'l L 65 at 68 and 121; see also Guido Calabresi & Philip Bobbitt, *Tragic Choices: The Conflicts Society Confronts in the Allocation of Tragically Scarce Resources* (New York: WW Norton & Company, 1978); Ronen Perry & Tal Zarsky, "May the Odds Be Ever in Your Favor: Lotteries in Law" (2015) 66 Ala L Rev 1035.

In the process, individualized relief risks diverting resources away from both the most needy, and from where they might make the greatest difference. As judges in South Africa have noted, the cost of providing one water tap for a single litigious mountain-dweller may exceed the cost of a thousand taps in low-lying lands.[17] This kind of concern famously prompted the Constitutional Court to reject a man's claim to renal dialysis machines in *Soobramoney*.[18]

Empirical research suggests that individual healthcare remedies in Latin American countries have indeed had a distorting effect. Mass litigation has funnelled public funds towards expensive, experimental and low-priority medications for affluent individuals.[19] The result is a regressive, "mis-enforcement" of social rights.[20] The trend was first noted in the context of health rights litigation in Brazil,[21] and subsequent studies in Costa Rica and Colombia suggested that similar patterns prevailed there.[22]

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[17] Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009) at 177–179.

[18] *Soobramoney v Minister of Health (Kwazulu-Natal)*, [1997] (1) SA 765 (CC) .

[19] For Costa Rica, see notably Ole Frithjof Norheim & Bruce Wilson, "Health Rights Litigation and Access to Medicines: Priority Classification of Successful Cases from Costa Rica's Constitutional Chamber of the Supreme Court" (2014) 16:2 Health & Hum Rts J 47; Olman Rodríguez Loaiza et al, "Revisiting Health Rights Litigation and Access to Medications in Costa Rica: Preliminary Evidence from the Cochrane Collaboration Reform" (2018) 20:1 Health & Hum Rts J 79; for Colombia, see eg Alicia Ely Yamin & Oscar Parra-Vera, "Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates" (2010) 33:2 Hastings Int'l & Comp L Rev 431 at 444; Landau, *supra* note 4 at 201–202; for Brazil, see Ferraz, *supra* note 7; Ferraz, "Harming the Poor", *supra* note 7.

[20] See eg Ferraz, "Judicial Remedies and the Poor", *supra* note 7 at 573; Landau, *supra* note 4 at 191 (calling this species of enforcement "subversive"); Pedro Felipe de Oliveira Santos, "Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socio-economic Rights" (2019) 18:3 Wash U Global Stud L Rev 493 at 499 (calling this form of intervention rights "mis-enforcement").

[21] For "regressive judicialization", see Ferraz, "Judicial Remedies and the Poor", *supra* note 7 at 573; for "mis-enforcement of rights", see Santos, *supra* note 20 at 499; for empirical work on health rights litigation in Brazil, see Ferraz, "Harming the Poor", *supra* note 7; but see also Daniel Brinks & Varun Gauri, "The Law's Majestic Equality: The Distributive Impact of Judicializing Social and Economic Rights" (2014) 12:2 Perspectives on Politics 375 (noting that regressive impacts of litigation in Brazil might be offset somewhat by indirect effects of litigation).

[22] For empirical work on Colombia, see Landau, *supra* note 4 at 213–214; for Colombia, see also Yamin & Parra-Vera, *supra* note 19 at 444–445; Alicia Ely Yamin & Ole Frithjof Norheim, "Taking Equality Seriously: Applying Human Rights Frameworks to Priority Setting in Health" (2014) 36:2 Hum Rts Q

In healthcare litigation, regressive mis-enforcement is the result of a common dynamic. First, the affluent and the educated will generally find it easier to pursue litigation than the poor and marginalized.[23] Second, litigation will tend to focus on the most expensive goods and services – such as costly, experimental medications – since only something of considerable value could justify the costs of litigation.[24] Indeed, in Brazil, satisfying the average healthcare judgment has required nearly six times the expense of the average healthcare patient.[25] Third, the costs of complying with the resulting judicial orders is typically drawn from existing social programs and their limited budgets.[26] Without an increase in available funds, litigation is therefore "likely to produce reallocation from comprehensive programs aimed at the general population to these privileged litigating minorities".[27] The result is both regressive *and* inefficient – a rebuke to the reasonable and gradual realization of social rights.[28] Public methods of prioritizing needs are undermined by the "morally irrelevant criterion of who has access to justice".[29]

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296 at 332; for Costa Rica, see Norheim & Wilson, *supra* note 19; Loaiza et al, *supra* note 19; see generally David Landau & Rosalind Dixon, "Constitutional Non-Transformation: Socioeconomic Rights Beyond the Poor" in Katharine Young, ed, *The Future of Economic and Social Rights* (Cambridge: Cambridge University Press, 2019) 110 at 113.

[23] Ferraz, "Harming the Poor", *supra* note 7 at 1646; Brinks & Gauri, *supra* note 21 at 382–383; Santos, *supra* note 20 at 508–512; Yamin & Parra-Vera, *supra* note 19 at 444.

[24] Brinks & Gauri, *supra* note 21 at 382–383; Ferraz, "Harming the Poor", *supra* note 7 at 1661; Norheim & Wilson, *supra* note 19.

[25] Santos, *supra* note 20 at 510–512.

[26] Mæstad, Rakner & Ferraz, *supra* note 8 at 290.

[27] Ferraz, "Harming the Poor", *supra* note 7 at 1646; Mæstad, Rakner & Ferraz, *supra* note 8 at 290.

[28] Santos, *supra* note 20 at 512.

[29] Yamin & Parra-Vera, *supra* note 19 at 444–445; see also Diana Pinto Masis & María Isabel Castellanos, "Caracterización de los recobros por tutelas y medicamentos no incluidos en los planes obligatorios de salud" (2004) 3:7 Revista Gerencia y Políticas de Salud 40 at 56 (writing that hundreds of thousands of individuals in Colombia's subsidized healthcare regime could have been insured from the amounts paid into the contributory regime as a result of healthcare litigation).

These dangerous trends can be exacerbated by the volume of litigation. In Colombia, some 2.7 million healthcare claims were litigated between 1999 and 2010,[30] with a recent study suggesting that claimants have an over 90% success rate.[31] Statistics from Brazil and Costa Rica are similarly striking. In Brazil, as of June 2014, there were 392,921 health-related lawsuits in progress and in 2009, compliance with healthcare litigation cost the state a total of $1 billion USD.[32] Costa Rica saw 20,000 cases related to health rights filed before the Constitutional Chamber of the Costa Rican Supreme Court in 2014.[33]

Admittedly, the volume of litigation can cut both ways. If the number of cases indicate that vulnerable individuals are accessing courts in significant numbers, then the concern of regressive enforcement may be mitigated. Indeed, some empirical evidence suggests that the impact of healthcare litigation in Colombia may not be as regressive as it is in Brazil. One study found that 49% of individuals filing *tutelas* had incomes that fell below the minimum wage.[34] Another study suggests that affluent individuals litigate more frequently not because courtrooms are more accessible to them than they are to the poor, but because delays for specialists are higher among high-income groups.[35]

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[30] Katharine Young & Julieta Lemaitre, "The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa" (2013) 26 Harv Hum Rts J 179 at 186; Defensoría del Pueblo de Colombia, *La tutela y los derechos a la salud y a la seguridad social* (Bogotá, 2019) at 53.
[31] Diego Gómez-Ceballos, Isabel Craveiro & Luzia Gonçalves, "Judicialization of the Right to Health: (un)compliance of the Judicial Decisions in Medellín, Colombia" (2019) 34 Int'l J Health Plann Mgmt 1277.
[32] Octavio Luiz Motta Ferraz, "Brazil, Health Inequalities, Rights and Courts: The Social Impact of the Judicialization of Health" in Alicia Ely Yamin & Siri Gloppen, eds, *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Cambridge, Mass: Harvard University Press, 2011) 76 at 83; Santos, *supra* note 20 at 504–505.
[33] Loaiza et al, *supra* note 19 at 81–82.
[34] Oscar Bernal et al, "The Judicialization of Health in Colombia" (2013) 1:1 Glob Virtual Conf 310 at 311.
[35] *OECD Reviews of Health Systems: Colombia 2016* (Paris: OECD Publishing, 2015) at 76.

Troublingly, individualized enforcement can also lure judges into a false sense of comfort, since these cases can resemble traditional forms of rights enforcement. On one approach, judges simply outline what the right guarantees and then issue an order that compels its delivery. Judges in Brazil, Costa Rica and Colombia have occasionally embraced this rigid and mechanical approach, foregoing any analysis of these orders' aggregate costs and their opportunity costs.[36] These judges may take comfort in the belief that they are engaging in a straightforward rights-enforcing exercise. Since this activity is ostensibly demanded by law, judges can act without overtly wading into political debates on just distributions. But this abstention from politics is only superficial. In practice, this approach to enforcement has grave and regressive distributive consequences.

Perhaps motivated by some of these concerns, South African and Indian courts have relied less frequently on strong-form, individualized relief. As I described in Chapter 2, the South African Constitutional Court refused to award an individual remedy in both *Soobramoney* and *Grootboom*.[37] The Court in *Soobramoney* was concerned that individual relief would compromise the government's choice to prioritize curable patients.[38] The Constitutional Court has generally preferred structural remedies.[39] Indian courts rely more heavily on structural remedies. As I described in Chapter 3, the reforms ushered in under the umbrella of "Public Interest Litigation" have allowed courts to direct structural change in many different fields,

[36] Hoffmann & Bentes, *supra* note 10 at 127–128, 139 and 143; see also critique developed by Justice Uprimny Yepes in *Decision T-654/04*, (CC).
[37] *Soobramoney v Minister of Health (Kwazulu-Natal)*, *supra* note 18; *South Africa and Others v Grootboom and Others*, [2000] ZACC 19, [2001] (1) SA 46 (CC) at para 95 [*Grootboom*].
[38] *Soobramoney v Minister of Health (Kwazulu-Natal)*, *supra* note 18 at paras 24-28.
[39] Landau, *supra* note 2 at 119.

including environmental damage, prison conditions, corruption, and malnutrition.[40] In one study of Indian healthcare litigation, only 1/3 of cases were for individual relief, and the majority of those claims sought compensation for medical negligence; they were not positive claims for treatment.[41] Indeed, because of their reliance on structural remedies – with their cascading, indirect effects for non-litigants – Varun Gauri and Daniel Brinks classified India and South Africa as having the most significantly "pro-poor" jurisprudence in their multi-jurisdictional review.[42] In spite of these charges, I will argue that there are three forms of individualized relief that are desirable. Before discussing them, I assess the merits of the indeterminacy and queue-jumping objections.

b) Roughly determinate

The claim regarding social rights' indeterminacy is overstated. Many jurisdictions have moved ahead with delineating a minimum core obligation that is defined and that can be the object of immediate enforcement through judicial order. In Chapter 2, I considered how the Colombian Constitutional Court came to recognize a right to a "vital minimum".[43] This right extends to the elementary material conditions needed to respect the individual's "intrinsic worth"

[40] See generally Shyam Divan, "Public Interest Litigation" in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 662.
[41] Mæstad, Rakner & Ferraz, *supra* note 8 at 288.
[42] Daniel Brinks & Varun Gauri, "A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World" in *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) 303 at 328; Brinks & Gauri, *supra* note 21 at 382–383, 390–391.
[43] See also eg David Landau, "The Promise of a Minimum Core Approach: the Colombian Model for Judicial Review of Austerity Measures" in Aoife Nolan, ed, *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014) 267 at 269–270; Magdalena Sepúlveda, "Colombia: The Constitutional Court's Role in Addressing Social Injustice" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) 144 at 150–151.

and to live a dignified life.[44] The Court has gone on to describe what this right requires, in more concrete terms, in cases concerning healthcare, social security, and access to potable water.[45] The Indian Supreme Court has likewise gestured towards a minimum core, framed as the "bare necessaries of life" to sustain a life of "human dignity", and to permit "the bare minimum expression of the human self".[46] This has included, for instance, a right to emergency medical treatment.[47] Scholars have likewise contributed helpful concepts and framings to give these rights more precise meaning.[48] With an even greater passion for detail, the influential General Comments of the United Nations Committee on Economic, Social and Cultural Rights have attempted to provide specific rights benchmarks across a variety of fields.[49] Admittedly, there remains room to disagree on what is needed to respect an individual's intrinsic worth and to promote dignified living.[50] The task, while difficult, remains at least manageable. Judges remain roughly capable of deciding when a vital minimum has gone unfulfilled.

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[44] *Decision T-426/92*, (CC) at sections 4-5; *Decision T-458/97*, (CC) at section 23; *Decision C-776/03*, (CC) at section 4.5.3.3.2.
[45] For healthcare, see eg *Decision T-227/03*, (CC); *Decision T-859/03*, (CC); *Decision T-448/03*, (CC); for minimum water requirements, see eg *Decision T-928/11*, (CC); *Decision T-077/13*, (CC).
[46] *Francis Coralie Mullin v Administrator, Union Territory of Delhi*, [1981] 2 SCR 516 at 517–518.
[47] *Parmanand Katara v Union of India*, [1989] 3 SCR 997 ; *Paschim Banga Khet Mazdoor Samity v West Bengal*, [1996] 4 SCC 37 .
[48] See eg Katharine Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 Yale Intl LJ 113; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (Oxford: Oxford University Press, 2008) at 187-191 (on incorporation of urgency and protection of survival); Tara Melish, "Rethinking the 'Less as More' Thesis: Supranational Litigation of the Economic, Social, and Cultural Rights in the Americas" (2006) 39:171 NYU J of Int'l L & Pol; Rodolfo Arango, "Basic Social Rights, Constitutional Justice, and Democracy" (2003) 16 Ratio Juris 141; Audrey Chapman & Sage Russell, eds, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (New York: Intersentia, 2002).
[49] See eg Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water* (E/C.12/2002/11, 2003) at para 12; Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (E/C.12/2000/4, 2000) at paras 12 and 43; Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food* (E/C.12/1999/5, 1999) at para 8.
[50] For difficulties defining the precise objective that the minimum core is meant to realize, see Young, *supra* note 48 at 128.

Second, courts can issue orders and contribute to realizing social rights without specifying the right's content precisely. As I suggested in Chapter 3, when it comes to realizing social rights, it is often helpful – and indeed common – for courts to uncouple right from remedy. This means recognizing that the meaning of the right – what the State owes each individual – may not overlap neatly with what assistance the court can offer each deserving individual. This uncoupling allows remedies to be adaptable, imperfect, and settled according to institutional considerations. Courts can thus pivot to weak-form "meaningful engagement" remedies that have become a staple of South Africa's social rights jurisprudence. Courts can also avoid defining rights precisely, and recognize instead that the "vital minimum" or "core" may often "elude attempts at definition along essentialist lines".[51] As an added advantage, once right and remedy are no longer thought to reflect one another, courts can circumscribe relief without unduly limiting the meaning of the underlying right. This can be a boon for rights activists, because it leaves room for rights claims to be deployed in political arenas, beyond the orders issued in the course of litigation.

c) Putting "queues" in their place

The queue-jumping problem, with its potential to foster regressive and inefficient distributions of public resources, is more serious. As described above, "queue-jumping" has become the shorthand to describe any instance where individual litigation subverts the priorities of public programs. The label is misleading, since establishing a "queue" represents only one method of resource allocation.[52]

[51] *Ibid* at 116–117; citing Daryl Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99 Colum L Rev 857 at 925.
[52] Young, *supra* note 16 at 121; Calabresi & Bobbitt, *supra* note 16.

This objection is serious, and some scholars have too quickly dismissed it. For instance, Kent Roach has argued that subverting the queue can be justified on the basis of successful litigants' legitimate expectation of a remedy.[53] In his view, the objection "smack[s] of […] second thoughts about the justiciability of [social] rights".[54] For Roach, the courts' principal duty is to right the injustice before them, and not to the masses who choose not to litigate, since judges simply "cannot know how many similarly situated individuals have suffered similar injustices".[55]

This response is ultimately unpersuasive. Litigants' expectations can be fickle. Indeed, they can be molded by previous decisions that circumscribe the scope of individual relief. Furthermore, there is no principled basis for privileging the expectations of litigants over the expectations of those waiting in the "queue", who likely expect that public goods will be distributed according to the government's established process. Indeed, those waiting in line tend to "react strongly against those who apparently evade it".[56] Moreover, justiciability arguments should not be simply sidelined once social rights have been recognized. As I canvassed in Chapters 2 and 3, the capacity and legitimacy concerns that made up the core of the case against justiciability continue to haunt social rights litigation, fruitfully shaping the way courts tailor their enforcement efforts. Finally, courts should consider the interests of the masses who do not pursue litigation. As empirical research has laid bare, these vulnerable individuals can be gravely impacted by decisions in individual cases. These orders can have important distributive consequences, whether judges attend to them or not. Ignoring this risk can undermine efforts to

[53] Roach, *supra* note 1 at 429.
[54] *Ibid*.
[55] *Ibid*.
[56] Young, *supra* note 16 at 88; Kevin Gray, "Property in a Queue" in Gregory Alexander & Eduardo Peñalver, eds, *Property and Community* (Oxford: Oxford University Press, 2010) 165 at 179–180.

fulfill social rights by distributing public resources in ways that are both regressive and inefficient.

Instead of wholesale rejection, what is needed is a more sensitive appreciation of the limits of the queue-jumping objection. There are several dimensions to the charge, and not all of them are convincing. For instance, calls against "queue-jumping" often voice a law-and-order concern. This frame centers patience and obedience as key civic virtues.[57] As Justice Johann van der Westhuizen put it in the context of housing allocations, "[o]pportunists should not be enabled to gain preference over those who have been waiting for housing, patiently, according to the legally prescribed procedures […] they have to wait in the queue or join it".[58] From this vantage point, the wrong of queue-jumping lies in the way individuals attempt to subvert orderly processes, and potentially encourage others to do the same.[59] This dimension of the critique is much less potent. Order and obedience cannot be categorically preferred over actions that satisfy vital needs. Decisions that appear subversive – that cast vulnerable families as "opportunists" – are often taken out of sheer necessity. The landless communities in *Grootboom* and *Modderklip* relocated to fields that did not belong to them because they simply had nowhere to go.[60]

There is also a class dimension to the queue-jumping objection, since more affluent individuals will have greater access to litigation. But remedies that benefit members of the middle class are not objectionable for that reason alone, so long as this access does not impede the interests of the poor. Relief might be needed, since affluent individuals can also

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[57] Young, *supra* note 16 at 80.
[58] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*, [2011] ZACC 33, [2012] (2) SA 104 (CC) at para 93 [*Blue Moonlight*].
[59] This variation on the queue jumping argument was voiced by government lawyers in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*, [2005] ZACC 5; [2005] (5) SA 3 (CC) at paras 33-35.
[60] *Ibid*; *Grootboom*, *supra* note 37.

(occasionally) experience acute vulnerability. Furthermore, the resulting litigation can sometimes benefit the less fortunate. As I describe later on, individual remedies can catalyze policy and administrative reforms that assist others. Moreover, the jurisprudence that is developed as a result of these lawsuits can helpfully clarify the substantive scope of social rights. Disadvantaged groups have been known to "piggyback" on litigation undertaken by the more affluent in subsequent lawsuits.[61] Middle class litigation can also normalize social rights enforcement in cases that touch on interests that will appear familiar to judges. Broadly accessible relief can also strengthen popular support for social rights and judicial enforcement: it can boost the courts' standing in the eyes of the public,[62] and foster a sense of solidarity. As studies of universal economic programs have shown, extending benefits widely may be inefficient, but it can make social programs more popular and durable, resistant to austerity and cutbacks.[63]

There remains a core, compelling concern: namely, that individualized relief can subvert reasonable, priority-setting schemes to the detriment of the poor. On its own, this objection is sufficiently important to warrant abandoning individualized relief altogether. Crucially, though, some forms of judicial intervention do not raise this "mis-enforcement" problem. Some individual remedies do not harm the interests of non-litigants. Other orders may come at some social cost, but may nevertheless improve on an even more imperfect *status quo*. In the balance of this section, I highlight three kinds of cases which succeed, to varying degrees, in avoiding the

[61] Malcolm Langford, "Judicial Politics and Social Rights" in Katharine Young, ed, *The Future of Economic and Social Rights* (Cambridge: Cambridge University Press, 2019) 66 at 75.
[62] Landau, *supra* note 2 at 119–120.
[63] See eg Clem Brooks & Jeff Manza, *Why Welfare States Persist: The Importance of Public Opinion in Democracies* (Chicago: The University of Chicago Press, 2007); note recent challenges to this received wisdom in Tijs Laenen & Dimitri Gugushvili, "Are Universal Welfare Policies Really More Popular Than Selective Ones?" (2020) SPSW Working Paper.

core of the queue-jumping problem. This analysis then forms the foundation for the next section, where I sketch justifiable forms of individualized relief.

First, priority-setting schemes may have been compromised by administrative disfunction or corruption, in which case the allocation of public resources never reflected a policy of rationing access. In Colombia, for instance, individuals have experienced lags in obtaining payments from health insurers to fund procedures and treatments.[64] Insurers have exploited weak regulatory oversight to avoid (or delay) paying what they owe. The result is form of unintentional priority-setting that is unjust and untransparent.[65] In such circumstances, individual relief may award litigants with expedited access, compromising an ideal of horizontal equality. However, in another sense, the remedy improves the working of the healthcare system by aligning what was promised by state policy with what individuals receive.

Priority-setting schemes can similarly be compromised by corruption, where preferential access is negotiated by the affluent by bribing or coercing public officials.[66] Queues can also be subverted by informal markets: individuals queuing might be paid (or be "planted") for their place in line, undermining the scheme's commitment of equal treatment.[67] Once a priority-setting scheme has been compromised in this way, it is no longer obviously preferable to a system of judicially-created priority.

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[64] See generally Everaldo Lamprea & Johnattan García, "Closing the Gap Between Formal and Material Health Care Coverage in Colombia" (2016) 18:2 Health & Hum Rts J 49; Alicia Ely Yamin, Andrés Pichon-Riviere & Paola Bergallo, "Unique Challenges for Health Equity in Latin America: Situating the Roles of Priority-Setting and Judicial Enforcement" (2019) 18 Int'l J for Equity in Health 106 at 106–108.
[65] Yamin, Pichon-Riviere & Bergallo, *supra* note 64 at 107–108.
[66] Kate Tissington, Ebenezer Durojaye & Gladys Mirugi-Mukundi, *"Jumping the Queue", Waiting Lists and Other Myths: Perceptions and Practice Around Housing Demand and Allocation in South Africa* (Cape Town: Community Law Centre, 2013) at 72.
[67] See eg Chapter 1 of Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (New York: Farrar, Straus and Giroux, 2012).

Second, there are cases where remedies can promote greater rights-awareness in decision-making, and identify new paths to fulfill vital needs for litigants, without harming others' interests. Below, I argue that this has been the case for South Africa's evictions jurisprudence. Courts have prodded state actors to identify new solutions for resolving the needs of vulnerable individuals and communities. Such interventions expand what state actors do to fulfill social rights. In the process, litigants might obtain expedited access, but in a way that can actually relieve pressure on social programs.

Third, there are circumstances where the existing priority-setting scheme may be unreasonable. One example is where queues are designed in a way that overshoots on simplicity. Queues are often favoured because they are easy to administer and treat every person as equal. In their simplest form, the scheme only differentiates between those who have been waiting longer than others.[68] However, if the queue is entirely insensitive to the intensity of a person's needs, it can fail to reasonably fulfill rights. In such circumstances, expedited access, won through litigation, can actually be pro-poor and privilege access for the most vulnerable. The remedy would subvert the public priority-setting scheme, but only by creating need-based differentiations among individuals.[69] There are queues that are already designed to do this.[70] The "subversion", in this case, might undermine administrative simplicity, but it does not pose the same risk of rights mis-enforcement or of regressive outcomes. Expanding on each of these cases, the next section outlines a context-sensitive approach to individualized relief.

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[68] See eg Ronen Perry & Tal Zarsky, "Queues in Law" (2014) 99 Iowa L Rev 1595; Neil MacCormick, "Norms, Institutions and Institutional Facts" (1998) 17:2 L & Phil 301 at 307; Young, *supra* note 16 at 79–80.

[69] Need-based distribution schemes are of course common methods of distribution, see eg Calabresi & Bobbitt, *supra* note 16.

[70] For a description of how certain classes of persons can be exempted from wait, see Gray, *supra* note 56 at 187–188.

III. Three Desirable Kinds of Individual Relief

In this section, I consider promising developments in Colombian healthcare litigation and South African evictions law, and identify valuable spaces for individualized relief. Crucially, these will be interventions that avoid – or at least curb the risks of – regressive mis-enforcement. They can also be read as case studies of institutional support. These orders can facilitate the implementation of state policy, confront administrative disfunction, create opportunities for rights fulfillment, and offer exceptional relief for unreasonable priority-setting schemes. They retire a rigid and mechanical rights-enforcement model, and prefer contextual approaches that are more sensitive to distributive consequences, and which are often concerned with buttressing state capacity.

a) Confronting administrative disfunction

Individual orders can compel the provision of vital goods that have been promised by public policy, but which government actors (or their private proxies) have failed to deliver. Such failures can be the result of inadequate budgets, administrative disfunction or a lack of oversight. Whatever their cause, these shortcomings point to an incoherence in policy that may justify curial intervention.[71] In this context, individualized relief can bridge the gap between a state's aspirations, on the one hand, and its weak institutions, on the other. In that sense, these interventions resemble forms of institutional support considered in Chapter 3.

Confronting administrative disfunction has been a major feature of Colombian healthcare litigation. Reforms in 1993 introduced a *Plan Obligatorio en Salud*, which included a list of benefits that had to be funded by private health insurance companies (known as *Entidades Promotoras de Salud,* or "EPS") to individuals included within the "contributory regime" or the

[71] *Decision T-025/04*, (CC) at sections 8.1 and 6.3.1.1.

"subsidized regime".[72] However, these insurance companies regularly refused to pay for treatments included in the national plan, denying thousands of Colombians needed care.[73] Frequent delays and refusals even contributed to the bankruptcy of hospitals and healthcare facilities.[74] Insurance firms could do so with impunity because of poor regulatory oversight, a legacy of the abruptness of Colombia's healthcare reforms and its weak institutional capacity.[75]

As the Colombian Constitutional Court began to work out which kinds of healthcare claims could be justiciable, these "included benefits" cases stood out as being relatively uncontroversial.[76] Ever since, a significant portion of healthcare litigation has centered around medicines and treatments that were already promised in the scheduled list.[77] To give a sense of numbers, in 2008, over 140,000 healthcare *tutelas* were filed in Colombia, and most concerned claims for included benefits.[78] Between 2006 and 2008, *tutela* claims for included benefits consisted of 75% of surgeries, 63% of exams, 67% of treatments and 78% of procedures claimed.[79]

Colombians also pursued litigation to obtain ancillary materials or procedures that were needed to complete surgeries included in the national plan. These ancillary benefits fell into a

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[72] For an overview of Colombia's healthcare system following the 1993 reforms, see Young & Lemaitre, *supra* note 30 at 187–188.
[73] Yamin & Parra-Vera, *supra* note 19 at 435–436; Young & Lemaitre, *supra* note 30 at 191–192.
[74] Young & Lemaitre, *supra* note 30 at 191–192.
[75] On the abruptness of the 1993 healthcare reforms and resulting lack of regulation and oversight, see Lamprea & García, *supra* note 64 at 50–51; see also *El Derecho a la Salud en perspectiva de DERECHOS HUMANOS y el Sistema de Inspección, Vigilancia y Control del Estado Colombiano en Materia de Quejas en Salud*, by Procuraduría General de la Nacíon & DeJuSticia (Bogotá: Procuraduría General de la Nación, 2008) at 81–104; Yamin, Pichon-Riviere & Bergallo, *supra* note 64 at 106–107; Yamin & Parra-Vera, *supra* note 19 at 436; *La tutela y el derecho a la salud (2006-2008)*, by Defensoría del Pueblo (Bogotá: Defensoría, 2009).
[76] Young & Lemaitre, *supra* note 30 at 189.
[77] Yamin, Pichon-Riviere & Bergallo, *supra* note 64 at 107; Alicia Ely Yamin, "The Right to Health in Latin America: The Challenges of Constructing Fair Limits" (2019) 40:3 U Pa J Int'l L 695 at 719–720.
[78] Defensoría del Pueblo, *supra* note 75 at 30.
[79] Yamin & Parra-Vera, *supra* note 19 at 443; citing Defensoría del Pueblo, *supra* note 75 at 64–77; Young & Lemaitre, *supra* note 30 at 189.

recognized "gray zone",[80] and included lenses for cataract surgery and orthopedic surgeries to complete joint replacements.[81] By 2003, the Court had settled on the view that these benefits also deserved to be paid for, unless explicitly excluded.[82] Underlying these decisions is an assumption of hypothetical state support – namely that public officials would have included these goods and services in the national plan, if they had turned their minds to it.

This logic can be extended further. Administrative disfunction can thwart efforts to keep an updated list of benefits. There are some treatments that would make uncontroversial inclusions, because they stand to benefit everyone. For instance, some new treatments can increase average cost-effectiveness over existing therapies.[83] In South Africa, expanding access to nevirapine for preventing mother-to-child transmission of HIV – the crux of the debate in *Treatment Action Campaign* – proved to be highly cost-effective.[84] Colombia has also seen litigation encourage access to more cost-effective treatments.[85]

These cases challenge the view that individualized relief produces regressive outcomes or represents unwarranted judicial activism. Instead, courts work to close the gap between the law's promise and its practice. These orders do not subvert or sidestep distributive schemes, they often enforce them.[86] Its limited but important contribution lies in reducing coverage gaps and inefficiencies.[87] Some of these claims might have even been litigated through contract or

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[80] Yamin & Parra-Vera, *supra* note 19 at 443.
[81] These examples were explicitly listed in Defensoría del Pueblo, *supra* note 75 at 59.
[82] *Decision T-859/03*, *supra* note 45.
[83] Mæstad, Rakner & Ferraz, *supra* note 8 at 295.
[84] *Ibid*; *Minister of Health and Others v Treatment Action Campaign and Others*, [2002] ZACC 16, [2002] (5) SA 703 (CC) [*TAC*].
[85] Mæstad, Rakner & Ferraz, *supra* note 8 at 295.
[86] Yamin, Pichon-Riviere & Bergallo, *supra* note 64 at 107–108; Yamin & Parra-Vera, *supra* note 19 at 443; for a defense on health rights litigation on this basis, see Benedict Rumbold et al, "Universal Health Coverage, Priority Setting, and the Human Right to Health" (2017) 390 Lancet 712 at 713.
[87] Mæstad, Rakner & Ferraz, *supra* note 8 at 292.

administrative law. If this kind of litigation distorts public spending in favour of the affluent, the wrong lies in the government's underfunding of its programs. For better and for worse, judicial relief can serve as an escape valve for a failure of administrative oversight and responsiveness. For the better, because vital needs would have otherwise gone needlessly unfulfilled. For the worse, because judicial relief may relieve pressure on other public actors to undertake needed internal reforms.[88]

Admittedly, Colombian jurisprudence has awarded individual relief in cases that stretch far beyond the weak capacity problems described in this section. As I described in Chapter 2, the Constitutional Court's early jurisprudence seized on a justiciable right to health connected to the right to life.[89] This recognition later matured into a free-standing right to health that contains a structural dimension – subject to progressive realization – and a core ripe for immediate enforcement.[90] This core is said to include both benefits that have already been promised by Colombia's national plan, as well as "other required services" that sustain a dignified life.[91] The treatments that are "required" have shifted over time, but the category has proven to be expansive and deeply subjective. Courts have ordered penile enlargement surgery and Viagra, but have refused fertility treatments for women.[92] The Constitutional Court has also wavered on the requirements for obtaining an individual remedy. It has only occasionally enforced a requirement that the claimant be "absolutely incapable" of providing for themselves, as well as a

[88] Procuraduría General de la Nacíon & DeJuSticia, *supra* note 75 at 147.
[89] See eg *Decision T-426/92*, *supra* note 44; *Decision T-533/92*, (CC); see generally Libardo José Ariza, "The Economic and Social Rights of Prisoners and Constitutional Court Intervention in the Penitentiary System in Colombia" in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013) 129 at 139.
[90] *Decision T-760/08*, (CC).
[91] *Ibid*.
[92] *Decision T-079/09*, (CC); *Decision T-926/99*, (CC); Yamin & Parra-Vera, *supra* note 19 at 441.

demonstration that the government has sufficient financial capacity.[93] This more rigid, categorical trend in rights enforcement is more likely to produce the regressive mis-enforcement problem described above.

b) Attention and respectful engagement

Court orders to engage and to negotiate with vulnerable individuals can also be valuable. These remedies have become a staple of South African jurisprudence. Starting in a series of eviction cases, the Constitutional Court has demanded "respectful engagement" between state actors and specific impoverished communities. The Court's individualized, procedural remedy reduces legitimacy and capacity concerns.[94] For the cynic, this approach has allowed the Court to avoid scrutinizing the general elements of South African housing policy, as it did in *Grootboom.*[95] More generously, meaningful engagement has led to the discovery of solutions for fulfilling rights, generally without harming the interests of non-litigants. If anything, these interventions likely ease the pressure on the proverbial queue. They also encourage state actors to invest in their "rights-respecting capacities".[96]

Many South Africans continue to suffer as a result of the country's large housing backlog. In 2014, some 1.8 million households waited for housing allocation or support.[97]

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[93] *Decision T-533/92*, *supra* note 89 at sections 5 and 7; *Decision SU-111/97*, (CC); *Decision SU-480/98*, (CC); *Decision T-227/03*, *supra* note 45; see also Pablo Rueda, "Legal Language and Social Change During Colombia's Economic Crisis" in Javier Couso, Alexandra Huneeus & Rachel Sieder, eds, *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2010) 25 at 44–45.
[94] Sandra Liebenberg, "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32:4 Nordic J Hum Rts 312 at 319.
[95] See eg Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (Cambridge: Cambridge University Press, 2016) at 107; on the proceduralization of social rights litigation more generally, see Danie Brand, "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" (2011) 22:3 Stellenbosch Law Review 614.
[96] Ray, *supra* note 95 at 117.
[97] Young, *supra* note 16 at 94.

Apartheid-era housing and land policy left a legacy of "deeply entrenched patterns of spatial injustice", which cannot be easily redressed.[98] Matters are complicated further still by modern urban "regeneration" strategies, which have made mass evictions a regular occurrence in cities like Johannesburg.[99] Evictions have thus pitted the perceived needs of modernization against the needs of the poor and landless,[100] becoming an important site of contention in social rights litigation in the process.

Early on, in *Port Elizabeth,* Sachs J signaled that when it came to evictions, courts could not be relied on to correct "all the systemic unfairness to be found in our society", but they might "soften and minimize the degree of injustice".[101] Framing the judicial role in these terms, Sachs J recognized a requirement that the evicting party – in that case a municipality – undertake "respectful face-to-face engagement or mediation" prior to eviction.[102] Following *Port Elizabeth,* respectful "engagement" has become a generalized requirement – even hardening into a "de facto bar"[103] – and has also been imposed on private parties.[104]

A mass inner-city eviction was eventually challenged in *Olivia Road*.[105] 400 residents contested their expulsion in Johannesburg. Insensitive to the risk of ejecting poor families into homelessness, the City relied on the *National Building Standards and Buildings Regulations Act*

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[98] Stephen Berrisford, "Unravelling Apartheid Spatial Planning Legislation in South Africa" (2011) 22 Urban Forum 247; Juanita M Pienaar, "The Housing Crisis in South Africa: Will the Plethora of Policies and Legislation Have a Positive Impact?" (2002) 17 S Afr Pub L 336.
[99] Stuart Wilson, "Litigating Housing Rights in Johannesburg's Inner City: 2004-2008" (2011) 27 S Afr J Hum Rts 127 at 134–135.
[100] Liebenberg, *supra* note 94 at 320.
[101] *Port Elizabeth Municipality v Various Occupiers*, [2004] ZACC 7, [2005] (1) SA 217 (CC) at paras 37-38.
[102] *Ibid* at paras 39 and 43.
[103] Ray, *supra* note 95 at 89–90.
[104] See eg *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*, [2004] ZACC 25, [2005] (2) SA 140 (CC) ; *Gundwana v Steko Development CC and Others*, [2011] ZACC 14, [2011] (3) SA 608 [*Gundwana*].
[105] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*, [2008] ZACC 1, [2008] (3) SA 208 (CC) [*Olivia Road*].

to proceed with summary expulsions. Litigants staged the case as a sequel to *Grootboom*. In their view, the City was attempting to proceed with mass eviction without a reasonable policy addressing the urgent needs of the evicted.[106] The High Court sided with them. It condemned the City for failing to give "adequate priority and resources to people in the inner city of Johannesburg who are in a crisis situation" and forbade eviction until the City had implemented a comprehensive program addressing this failure.[107] The Supreme Court of Appeal lifted the injunction, but ordered the City to provide "at least minimum shelter to those occupants who have no access to alternative housing".[108] After hearing oral argument, the Constitutional Court preferred to issue an interim order, directing the parties to "engage with each other meaningfully […] in an effort to resolve the differences and difficulties aired in this application in light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned".[109] The parties were also obliged to file affidavits detailing the results of negotiations.

The resulting agreement represented a startling victory for the community. The city promised broad changes to its inner-city housing policy, and agreed to desist from its planned eviction.[110] The city also committed to make the buildings safer and more livable, and to provide access to essential services at reasonable cost.[111] In its final judgment – a moot victory lap, given the parties' agreement – the Constitutional Court celebrated and formalized its requirement for respectful engagement whenever eviction is a possibility. It also insisted that this requirement

[106] Wilson, *supra* note 99 at 140–141.
[107] See the text of the order, reproduced in *City of Johannesburg v Rand Properties (Pty) Ltd*, [2007] SCA 25 at para 15.
[108] *Ibid* at para 5.
[109] See text of the Court's interim order, reproduced in Ray, *supra* note 95 at 115–116.
[110] Wilson, *supra* note 99 at 147–148.
[111] Ray, *supra* note 95 at 115–116.

must be met in every case, and so public institutions would have to invest in their rights-respecting capacities.[112] Cities would have to listen to the concerns of the affected population, engage carefully on all matters of import, and demonstrate sensitivity, flexibility, reasonableness and good faith.[113] Likewise, the process ought to be transparent, with a record kept for reviewing courts.[114]

Joe Slovo later tested this remedy in a proceeding with higher stakes.[115] That case considered a mass expulsion of some 20,000 persons in an informal settlement in Cape Town. However, these evictions were intended to make room for low-cost rental and social housing. The residents initially agreed to the city's plans because they were offered temporary accommodation – albeit on the outskirts of the city – and because they were promised a path to acquire housing once development was complete. However, as the project began the city started to renege on its promises.[116] During the first phase of development, community residents were not offered housing at the reduced rate that was promised. As the project moved forward, it became clear that only market-rate housing would be available to them.[117] When the residents protested, the government sought their expulsion. The Court's diverging opinions all agreed that the government had failed to adequately communicate and engage with the affected community.[118] Nevertheless, the Court allowed the eviction to proceed, subject to a highly structured process of engagement over the details of relocation.[119]

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[112] *Olivia Road*, *supra* note 105 at paras 14-15, 19 and 21; Ray, *supra* note 95 at 117.
[113] *Olivia Road*, *supra* note 105 at paras 14-15 and 19-21.
[114] For a closer examination of this model and its promise, see Liebenberg, *supra* note 94 at 324–325.
[115] *Residents of Joe Slovo Community, Western Cape v Thubelish Homes and Others*, [2009] ZACC 16, [2010] (3) SA 454 (CC) [*Joe Slovo*].
[116] *Ibid* at paras 31-33.
[117] *Ibid*.
[118] See eg *ibid* at paras 378 (per Sachs J), 246 (per Ngcobo J), and 301 (per O'Regan J).
[119] *Ibid* at para 7.

The judgment was heavily criticized. It sanctioned the largest eviction in post-apartheid South Africa, accepted without scrutiny the government's claim that relocation was preferrable to an on-site upgrade, and failed to hold the state accountable for its botched consultation process.[120] The Court was unwilling to halt such a project. In the end, however, its order did just that. The following negotiations gave rise to "grave concerns" that relocation would be more costly than an on-site upgrade of the settlement, leading state officials to abandon their previous plans.[121] The resulting solution gave residents what they had wanted. They had long maintained that an on-site upgrade was feasible and would be less disruptive to their community, their opportunities for work, and their children's schooling.[122]

In *Schubart Park*, the Court ordered engagement for residents that had already been forcibly removed from their apartment complex.[123] Between three and five thousand individuals had been hastily evicted on the basis of alleged health and safety concerns, many becoming homeless in the process. The Court found that the former residents had a right to reoccupy their homes, and structured a process of engagement to produce agreement on matters of concern.[124] Items to be negotiated included the circumstances in which residents would have their occupation restored, how essential services would be paid for at the Schubart Park complex, and how the city would provide temporary accommodation in the interim period.[125]

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[120] See eg Sandra Liebenberg, "Joe Slovo Eviction: Vulnerable Community Feels the Law from the Top Down", *Business Day* (22 June 2009), online: <www.businessday.co.za/articles/Content.aspx?id=73812>; Kate Tissington, "South Africa: Joe Slovo Residents Let Down by Court", *All Africa* (26 June 2009), online: <http://allafrica.com/stories/printable/200906260735.html>.
[121] Liebenberg, *supra* note 94 at 325; Ray, *supra* note 95 at 126; see also Anna Majayu, "Evictions Suspended - Shack Dwellers Reprieved", *Sowetan* (4 September 2009), online: <http://abahlali.org/node/5665/>.
[122] Liebenberg, *supra* note 94 at 325.
[123] *Schubart Park Residents' Association v City of Tshwane*, [2012] ZACC 26 .
[124] *Ibid* at paras 42-51.
[125] *Ibid* at para 53.

Less often, the Constitutional Court has relied creatively on orders for payment. In *Modderklip*, the Court ordered damages to compensate a landowner for the use of its property by landless occupiers.[126] Modderklip Boerdery (Pty) Ltd had obtained an eviction order against the community, but had been unable to enforce it privately. The firm sought the assistance of the state, which refused to intervene. The queue-jumping concern figured prominently in the case. Government lawyers argued that a favourable outcome for the occupiers would encourage others to encroach on land unlawfully.[127] The Supreme Court of Appeal allowed the community to reside on the land until an alternative site was identified – but it ordered the Department of Agriculture and Land Affairs to pay damages to Modderklip as compensation, as if what had taken place was an expropriation.[128] The Constitutional Court maintained the award for damages.[129] The remedy compensated Modderklip, ensured that occupiers can maintain their accommodations until a suitable site was found, and relieved some pressure on the government to relocate the community urgently.[130]

The Court's favoured mode of enforcement remains individual and procedural in character. Relief is limited to the communities who contest their eviction. This pivot allows judges to avoid the ambitious, structural questions posed in cases like *Grootboom*.[131] Indeed, the Court in *Olivia Road* and *Joe Slovo* championed respectful engagement while side-stepping the litigants' general challenge to South African housing policy.

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[126] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*, *supra* note 59.
[127] *Ibid* at para 33.
[128] *Ibid* at para 21.
[129] *Ibid* at paras 62-65.
[130] *Ibid* at para 59.
[131] Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge: Cambridge University Press, 2013) at 328–329; Ray, *supra* note 95 at 80–81.

This species of individualized relief is effective, even if its ambitions are limited. Brian Ray has argued that respectful engagement offers an effective framework to fulfill social rights through "political and administrative reforms" rather than through "judicial elaboration of substantive constitutional requirements".[132] The Court's jurisprudence might be short on substantive guidance to state actors, and it shies away from articulating a political philosophy underlying social rights.[133] But it has produced rights-fulfilling outcomes that were – at least in the short term – more promising than *Grootboom*'s declaratory remedy.

The approach's success may also lie in the way it repositions the poor. In the cases considered above, city officials often viewed residents as "obnoxious social nuisances",[134] "faceless and anonymous squatters",[135] or "rodents".[136] Government actors were plainly indifferent to the risk that some families would be ejected into homelessness.[137] The Court has preferred to describe these vulnerable communities as rights-bearing claimants, deserving of governments that listen attentively and respectfully to their needs, and that respond reasonably and flexibly. The Court has not only structured (and occasionally supervised) the process of engagement, it has attempted to reframe how each party sees themselves and engages with one another.[138] The approach thus affords rights' claimants special attention and attempts to cast them in a new light, with the hope that practical solutions will present themselves in the ensuing process.

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[132] Ray, *supra* note 95 at 11.
[133] *Ibid* at 86.
[134] *Port Elizabeth Municipality v Various Occupiers*, *supra* note 101 at paras 45-46.
[135] *Schubart Park Residents' Association v City of Tshwane*, *supra* note 123 at para 46.
[136] Annette Christmas, "The Modderklip Case: The State's Obligation in Evictions Instituted by Private Landowners" (2005) 6:2 ESR Review 6 at 9.
[137] Ray, *supra* note 95 at 116.
[138] See eg *Olivia Road*, *supra* note 105 at paras 19-20; *Schubart Park Residents' Association v City of Tshwane*, *supra* note 123 at para 46.

Reflecting the Court's deferential posture, this intervention has a lighter footfall than the strong-form remedies preferred in Colombia. Judges do not dictate outcomes, state actors retain their prerogative on policy, and the risk of unintended outcomes are curbed. Respectful engagement also creates a valuable space for activists and civil society organizations to mobilize.[139] Furthermore, building the state's rights-respecting capacities in this way may serve as a counterweight to the capture of local institutions by wealthy white elites and property developers, a process decried by critics of modern South African housing policy.[140]

Respectful engagement might offend the "law-and-order" dimension of the queue-jumping critique. Viewed in a cruel and unsympathetic light, the remedy provides relief to communities that have abandoned the queue. Government lawyers have argued as much,[141] but the argument does not succeed. The decision to occupy land is typically borne out of necessity, not choice. Furthermore, meaningful engagement with these vulnerable communities does not need to jeopardize the interests of non-litigants. Instead, it encourages state actors to identify new ways of fulfilling rights, and might even relieve pressure on the queue. In *Olivia Road* and *Joe Slovo*, the government desisted from its planned evictions which would have vacated poor residents and replaced them with more affluent ones. *Modderklip*, although not an engagement case, regularized a settlement on a private farm. The on-site upgrade ultimately pursued after the *Joe Slovo* litigation also represented a less costly solution for Cape Town. Everyone appears to have benefited from the city being forced to take a closer look at its relocation plans.[142]

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[139] Ray, *supra* note 95 at 7–9.
[140] See eg Benjamin Bradlow, "Weapons of the Strong: Elite Resistance and the Neo-Apartheid City" (2021) 0:0 City & Community 1.
[141] See eg *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*, *supra* note 59 at paras 33-35; *Port Elizabeth Municipality v Various Occupiers*, *supra* note 101 at para 55; see also *Blue Moonlight*, *supra* note 58.
[142] Liebenberg, *supra* note 94 at 325.

Admittedly, the risk of unintended consequences persists. Engagement prior to eviction might unduly bias public officials towards the current residents (even though such an outcome might still be justified on the basis of the social, emotional, and financial costs of relocation). Likewise, an order for damages, like the one in *Modderklip,* might create a potent financial incentive for the state to relocate a community earlier than it should. There is also the matter of opportunity costs: the state funds required to satisfy the award may have been drawn from existing social programs. The hope for judicially-supervised engagement is that concerns like these can be raised during negotiations, so that solutions that impinge on the social rights of non-litigants can be discarded.

c) Last resort remedies, sensitive to context

This section ventures beyond orders that offer institutional support, and defends a third form of judicial intervention. The approach I have in mind is one which is both limited and sensitive to context. The most pressing risk associated with individualized relief flows from a rigid, categorical approach that ignores distributive consequences. In this tradition, judges attempt to define precisely what social rights guarantee, and then issue an order that compels the delivery of that entitlement.[143] When such strong-form remedies are more sensitive to context, they can avoid, at least to some extent, the distorting and regressive outcomes associated with this form of relief.

This area represents another instance where it is helpful to uncouple right from remedy. Courts can be more responsive to institutional limitations and to polycentric consequences once they acknowledge the distinction between what rights guarantee in the abstract, and what

[143] For a recent treatment of this argument, see Ferraz, *supra* note 7 at 134–192 and 225–274.

assistance courts can offer in specific cases.[144] This move means abandoning one of the attractions of individualized relief – namely, that this kind of intervention resembles traditional, rights-enforcing activity.[145] But attending to context and to distributive consequences is necessary. An overly rigid formalism can do harm by suppressing open discussion of these orders' aggregate and opportunity costs, and by ignoring whether the benefits commanded in a particular case can be universalized.[146] The guideposts I outline here represent a novel contribution, and they draw for inspiration on trends in judicial practice and some recommendations from the academic literature.

The two kinds of interventions considered above represent compelling starting points. Courts should award relief for unenforced legal entitlements. These cases help enforce public policy and can – where broadly accessible – serve as a potent antidote to administrative disfunction. As I suggested above, the logic underlying the unenforced benefits cases can be extended to cases for ancillary benefits, or for goods and services that increase average cost-effectiveness.[147]

In other cases, courts ought to consider weak-form remedies. Such orders might take the form of structural remedies, considered in Chapter 3, or individual engagement orders, considered above. As the South African eviction cases show, engagement orders can encourage attentiveness to the poor and respect for their dignity, and can build state actors' rights-

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[144] This division has already been theorized in areas of private law, see eg Stephen Smith, "Rights and Remedies: A Complex Relationship" in Hon Robert Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2009) 33; it likewise follows the trend of uncoupling rights and remedies in public law, see eg Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford: Oxford University Press, 2012).
[145] See eg Hoffmann & Bentes, *supra* note 10 at 127–128.
[146] See eg *Decision T-654/04*, *supra* note 36 (per Uprimny J); translated in Yamin & Norheim, *supra* note 22 at 323; see also Hoffmann & Bentes, *supra* note 10 at 139.
[147] Mæstad, Rakner & Ferraz, *supra* note 8 at 295.

respecting capacities. Meanwhile, ambitious structural remedies can encourage a priority-setting process that is more transparent, participatory, evidence-based, and responsive.[148] They may likewise promote democratic deliberation and create spaces for the involvement of civil society.

In some cases, courts should be willing to push further still, and issue last resort assistance. In order to avoid some of the risks of regressive mis-enforcement, these interventions should be guided by the following concerns. First, relief should be strictly limited. Reflecting a "less as more" philosophy,[149] courts should intervene only when the stakes are highest – namely, when an individual's life is endangered or where they face personal catastrophe.[150] Circumscribing relief in this way would lessen these orders' fiscal impact, and pose fewer strains on curial relationships with state actors. It would also simplify line-drawing exercises, and limit the space for discriminatory assessments. Troublingly, Brazil and Colombia's expansive jurisprudence has seen courts order penile enlargement surgery and Viagra, while refusing fertility treatments for women.[151] Limiting relief to the most flagrant of cases would also position courts to claim hypothetical state support; that is, any competently administered, rights-respecting government would wish to extend vital relief if it turned its mind to the plight of the litigating individual.

Second, the relief sought should be supported by compelling evidence of its efficacy. This requirement can pose difficulties in healthcare litigation. A significant share of orders

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[148] For similar recommendations for healthcare, see Yamin & Norheim, *supra* note 22 at 318; see general prescriptions for building an "accountability for reasonableness" framework in resource allocation in Sofía Charvel et al, "Challenges in Priority Setting from a Legal Perspective in Brazil, Costa Rica, Chile and Mexico" (2018) 20:1 Health & Hum Rts J 173 at 175.
[149] See eg Melish, *supra* note 48.
[150] See eg Bilchitz, *supra* note 48 at 187–191 (defending judicial enforcement where it is urgently needed to protect survival interests).
[151] Hoffmann & Bentes, *supra* note 10 at 124 (noting order for prosthetic penis surgery); *Decision T-079/09*, *supra* note 92; *Decision T-926/99*, *supra* note 92; Yamin & Parra-Vera, *supra* note 19 at 441.

issued in Brazil and Costa Rica were for "low-priority" or "experimental" medications.[152] These treatments tend to be expensive and their therapeutic value is either marginal or unproven.[153] Before reforms to Costa Rican judicial practice were initiated in 2014, approximately 70% of the medicines ordered by the Supreme Court were for such therapies.[154] Starting in 2014, with the support of the World Bank Institute and the Cochrane Collaboration, the Costa Rican Supreme Court introduced an independent layer of medical assessment which has been credited with reducing the number of experimental medications ordered by the court and improving fairness outcomes more generally.[155]

Evaluating medical efficacy is not traditional judicial work, but there are resources to assist judges in the task. Comprehensive Health Technology Assessments are already available for a vast array of medications and they traditionally evaluate both efficacy and cost effectiveness.[156] These assessments are indeed extensively relied upon by other jurisdictions. With modest levels of support for training and translation, Costa Rica's Supreme Court now navigates this voluminous international literature.[157] Judges might then limit relief to medicines that meet the definition of high or medium priority, which occurs when the condition is relatively severe, the medication's efficacy is proven, and the treatment is relatively cost effective.[158] To reduce the evidentiary burden on claimants, courts should leave it to the government to prove

[152] See eg Norheim & Wilson, *supra* note 19; Hoffmann & Bentes, *supra* note 10 at 123 and 131.
[153] Norheim & Wilson, *supra* note 19 at 52.
[154] *Ibid* at 53; Loaiza et al, *supra* note 19 at 85–86; for more on the reforms undertaken for improved priority setting, see also Alessandro Luciano & Alex Voorhoeve, "Have Reforms Reconciled Health Rights Litigation and Priority Setting in Costa Rica?" (2019) 21:2 Health & Hum Rts J 283.
[155] Loaiza et al, *supra* note 19; for the view that post-reform resource allocation may be less fair, see Luciano & Voorhoeve, *supra* note 154.
[156] Yamin & Norheim, *supra* note 22 at 310–311.
[157] Loaiza et al, *supra* note 19 at 89.
[158] *Ibid* at 85.

that the claimed treatment falls below the judicially-established threshold, relying on credible independent sources.

Third, individuals should have to demonstrate that they are unable to pay for the good or service they are claiming. This restriction can mitigate the regressive impact of court orders, without practically restricting affluent individuals' access to vital goods. The Colombian Constitutional Court has wavered on this point in its healthcare jurisprudence. An important early decision insisted on evidence of financial incapacity, so as to reduce fiscal strain on the system.[159] However, the Court recanted this restriction the following year,[160] before re-instating it sometime after.[161]

Fourth, before ordering relief, courts should also be satisfied that what is claimed could be universalized. That is, the benefit could be offered to any person similarly situated, without representing an exaggerated strain on the public purse. In theory, this requirement respects the possibility of equal treatment among individuals.[162] It would also help promote financial sustainability.[163] In practice, the requirement would be difficult to operationalize. Courts might not have reliable information on how many other deserving individuals there are. It can be even more difficult to evaluate whether a particular intervention is too costly, since this involves an openly political judgment, and budgets are not necessarily fixed. But a rough and imperfect line-

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[159] *Decision SU-111/97*, *supra* note 93 at 97; for a similar requirement articulated in the context of social security, see *Decision T-533/92*, *supra* note 89.
[160] *Decision SU-480/98*, *supra* note 93; Young & Lemaitre, *supra* note 30 at 188–189; Rueda, *supra* note 93 at 44–45.
[161] *Decision T-227/03*, *supra* note 45.
[162] For criticism that failing to attend to whether a claimed good is "universalizable" can lead to profound inequalities, see *Decision T-654/04*, *supra* note 36 (per Uprimny J); reproduced and translated in Yamin & Norheim, *supra* note 22 at 323.
[163] Rodrigo Uprimny & Diana Rodríguez Franco, "Aciertos e insuficiencias de la sentencia T-760 de 2008: implicaciones para el derecho a la salud en Colombia" in *Observatoria de la Seguridad Social* (Medellín: Universidad de Antioquia, 2008) 18.

drawing exercise may be preferrable to its alternatives – namely, the total rejection of strong-form individual remedies in South Africa, on the one hand, or the outright refusal to consider matters of cost in Brazil, on the other.[164]

On the subject of cost, courts should also seek some assurance that the funds to pay for relief will not come from the same budgets that sustain general social programs. This would be one practical way of avoiding judicial decisions' regressive, anti-poor consequences. Practically, courts might also have to leave the state with more time to comply with individual orders. Scholars have suggested that litigation-related health expenditures are typically sourced in healthcare budgets because courts demand compliance within a matter of hours or days, leaving state officials with no other choice.[165] As was the case for the South African eviction decisions, providing time to expand existing funds can represent an opportunity to fulfill rights without harming the interests of non-litigants.

Fifth, courts ought to take up in-house reforms to facilitate access to justice. The regressive impacts of individualized relief can be mitigated if the poor can access courts on more equal terms.[166] As I discussed in Chapter 2, courts in Colombia have already gone to considerable lengths to deformalize their proceedings with a view to making courts available even to those with no legal representation. The sheer number of cases decided suggests that they have achieved some measure of success.[167] Democratizing access might also mean shifting burdens of proof to the state and a judicial commitment to follow precedent, since these measures can further reduce the burden on litigants.

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[164] See eg Hoffmann & Bentes, *supra* note 10 at 123 and 131.
[165] Mæstad, Rakner & Ferraz, *supra* note 8 at 294.
[166] Brinks & Gauri, *supra* note 21 at 387.
[167] See also statistics drawn from Costa Rican healthcare litigation, see Loaiza et al, *supra* note 19 at 81.

Finally, courts ought to decline relief where the claimant's urgent needs were denied on reasonable grounds, within a rights-conscious, priority-setting process.[168] Tragically, even when one's needs are dire, certain resources may still be sensibly prioritized for others.[169] The Constitutional Court of South Africa sensibly rejected a man's claim for access to renal dialysis on the basis that the provincial hospital had prioritized the needs of those with curable conditions.[170] Similarly, when queues, lotteries or need-based schemes have been reasonably designed, judges should avoid subverting them by awarding individualized relief. As I have indicated above, one instance where it is justifiable to subvert a queue is for the purposes of introducing need-based differentiations. An oversimplified system for distributing public resources can offend the project of gradually realizing social rights if it is completely insensitive to the intensity of a person's needs.

The solutions considered in this section are admittedly imperfect. Individual remedies may be a potent remedy for state disfunction, but they can also reduce pressure to reform poorly functioning administrative systems. At worse, they might encourage state actors to "more or less deliberately wait for judicial mandates" before taking action.[171] Courts are incapable of solving every rights deprivation; in the long run, more robust institutions remain the better path. And although context-sensitive relief aims to be more alert to cost considerations, judges are still poorly positioned to know the true aggregate and opportunity costs of their orders. Judicial interventions can also produce other, unanticipated consequences – as has been the case in healthcare litigation. Ordering the supply of medications can undermine state officials' efforts to

[168] Yamin, Pichon-Riviere & Bergallo, *supra* note 64 at 108–110.
[169] *Ibid*.
[170] *Soobramoney v Minister of Health (Kwazulu-Natal)*, *supra* note 18.
[171] Landau, *supra* note 2 at 121–122; Yamin & Parra-Vera, *supra* note 19 at 432; Hoffmann & Bentes, *supra* note 10 at 138.

negotiate down the cost of drugs, since they can no longer threaten to exclude the medication from national plans.[172] In Colombia and Brazil, pharmaceutical companies have also colluded with doctors to convince courts of the necessity of certain therapies, unnecessarily expanding the market for their product.[173] The next section touches on individual remedies' relationship to transformative change, and suggests that, once relief has been properly tailored, the remaining risks are worth taking.

IV. Individualized Relief and Transformative Constitutionalism

Individual remedies are occasionally disparaged for failing to achieve either structural change or a significant aggregate impact.[174] Their focus on the needs of specific litigants are thought to fall short of the aspirations of transformative constitutionalism. In this section, I challenge this view as mistaken. There are three ways in which individualized relief participate in transformative change. First, the number of successful claimants in jurisdictions like Colombia suggest that individual remedies can offer an accessible vehicle for fulfilling the needs of millions of individuals. That is, even when individual remedies do not prompt general reform or structural change, their sheer numbers still suggest an important cumulative impact. Second, individual cases can catalyze policy changes or produce valuable administrative reforms, even for the benefit of those who never litigate. Third, a wave of individual claims can galvanize, facilitate and legitimize ambitious structural remedies.

a) Reliable vehicle to secure vital needs

The sheer number of *tutela* decisions in Colombia suggests that judicial enforcement has become a major route for accessing vital relief. The numbers tell a convincing story. Over 7

[172] Loaiza et al, *supra* note 19 at 87.
[173] Mæstad, Rakner & Ferraz, *supra* note 8 at 286; Yamin & Parra-Vera, *supra* note 19 at 442.
[174] See notably Rodríguez-Garavito & Rodríguez-Franco, *supra* note 6 at 6.

million *tutelas* were filed between 1992 and 2018.[175] An average of 600,000 claims were made in each of the years between 2015 and 2018, representing a yearly average of over 120 applicants per 10,000 residents.[176] Healthcare has been an important staple of the *tutela* docket. Some 2.7 million healthcare claims were litigated between 1998 and 2010.[177] In 2018, over 207,000 *tutelas* sought relief to fulfill the right to health, representing approximately 34% of all applications filed that year.[178] Evidence of the fiscal impact of this litigation is scarce, but one study suggested that in 2009, claims for treatments excluded from the national health plan totaled over $750 million USD.[179] Most *tutelas* appear to succeed. One study suggested that from 2011 to 2014 in Medellín, 95.9% of *tutela* applications for healthcare were successful, with the average case taking less than 11 days to resolve, and government compliance following in 76.2% of cases.[180]

These figures reflect a conscious effort by constitutional reformers and courts to make *tutela* relief broadly accessible.[181] These efforts represent an important point of difference between Colombia from South Africa. Procedural formalities have been significantly relaxed, proceedings can be instituted before any court, and first-instance decisions must be rendered within ten days.[182] Judges are also comfortable awarding individual remedies. Admittedly, there is a dearth of reliable empirical evidence on whether vulnerable Colombians are accessing courts in appropriately high numbers. However, one study found that 49% of individuals filing *tutelas*

[175] Defensoría del Pueblo de Colombia, *supra* note 30 at 52.
[176] *Ibid*.
[177] Young & Lemaitre, *supra* note 30 at 186; Defensoría del Pueblo de Colombia, *supra* note 30 at 53.
[178] Defensoría del Pueblo de Colombia, *supra* note 30 at 53.
[179] Mæstad, Rakner & Ferraz, *supra* note 8 at 290.
[180] Gómez-Ceballos, Craveiro & Gonçalves, *supra* note 31.
[181] Rodrigo Uprimny Yepes, "Las transformaciones de la administración de justicia en Colombia" in Boaventura de Sousa Santos & Mauricio Garciá Villegas, eds, *El caleidoscopio de las justicias en Colombia* (Bogotá: Siglo de Hombres, 2001) 261 at 300–302; see also Yamin, "Constructing Fair Limits", *supra* note 77 at 718.
[182] See Article 86 of the *Constitution of Colombia, 1991*; Landau, *supra* note 43 at 269.

were indeed poor, with many falling below the minimum wage.[183] Others have suggested that the regressive pattern of enforcement first noted in Brazil and Costa Rica also prevails in Colombia.[184]

The *tutela* represents a sweeping rights intervention. Millions of vulnerable individuals now have an expedient vehicle for fulfilling vital needs that they lacked prior to Colombia's 1991 constitutional reforms. That these claims continue to be made in such staggering numbers suggests that rights deprivations remain systemic. The *tutela*'s success may thus represent a serviceable – but not ideal – substitute for structural reform. They may indeed rival such reforms in their aggregate impact. Judged in this generous light, the *tutela* represents a stirring rights outcome.

b) Policy and administrative reform

Individual orders can also catalyze reforms. This effect frustrates the view that individualized relief cannot confront "patterns of constitutional violations embedded in institutions".[185] State actors occasionally respond to individual decisions by reforming social programs to reflect the content of the ruling.[186] Governments might do so out of a genuine desire to promote rights. Conceivably, these decisions might also reflect strategic cost considerations. At some point, reforming programs will be less costly than contesting thousands of individual claims in court.[187] The costs of litigation include not only complying with eventual orders, but also expenses associated with maintaining government lawyers, administrative costs, and the

[183] Bernal et al, *supra* note 34 at 311.
[184] Landau, *supra* note 4 at 201.
[185] Kent Roach, "The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies" (1991) 33 Ariz L Rev 859 at 859–861.
[186] See eg Daniel Brinks & William Forbath, "Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-Poor Interventions" (2011) 89:7 Tex L Rev 1943 at 1952–1953.
[187] Mæstad, Rakner & Ferraz, *supra* note 8 at 302.

potential reputational harms – before both judges and the broader public – of losing legal battles. On occasion, these costs can exceed the expense of making social programs more generous. If there are few claims, and many are unsuccessful, the pressure to reform will be low. However, if there are many claims, each with a high likelihood of success – two conditions that characterize many Latin American jurisdictions, including Colombia – then occasional reform should be expected. A judicial commitment to following precedent can also influence state actors' anticipated costs. So too can access to justice measures, which appear to have a multiplier effect: they not only make relief available to the less affluent, they increase the likelihood of general reform.

Healthcare litigation in Colombia has occasionally produced such reform.[188] The government amended the national plan to include diagnostic tests for HIV/AIDS and other conditions in response to a slew of judicial decisions.[189] Across the region a similar pattern emerges, with new therapies being introduced to public lists, and governments increasing amounts allocated to curative care.[190] This is how antiretroviral drugs for HIV/AIDS became publicly provided in Costa Rica and Brazil.[191] Similarly, medications to treat leukemia, hepatitis C and rheumatoid arthritis became generally accessible in Brazil in response to a wave of individual cases.[192] Even unsuccessful litigation and can occasionally spur policy changes. A

[188] However, see Landau, *supra* note 4 at 201 (arguing that individual remedies in Colombia appear to have rarely altered bureaucratic behaviour); See Alicia Ely Yamin, "Shades of Dignity: Exploring the Demands of Equality in Applying Human Rights Frameworks to Health" (2009) 11:2 Health & Hum Rts J 1.
[189] Yamin & Parra-Vera, *supra* note 19 at 441; citing *Decision T-500/07*, (CC); *Decision T-654/04*, *supra* note 36.
[190] Mæstad, Rakner & Ferraz, *supra* note 8 at 287 and 292; Roach, *supra* note 5 at 44–45.
[191] Hoffmann & Bentes, *supra* note 10 at 100–101, 113–125; Santos, *supra* note 20 at 500; Norheim & Wilson, *supra* note 19 at 58; Loaiza et al, *supra* note 19 at 87.
[192] Hoffmann & Bentes, *supra* note 10 at 137–138; Mæstad, Rakner & Ferraz, *supra* note 8 at 287.

medication to treat epilepsy was included on the public list following a first-instance Brazilian decision, and was left on even after the decision had been overturned on appeal.[193]

Administrative reforms are conceivable as well. The South African eviction decisions seek explicitly to build up state actors' rights-respecting capacities. Public efforts to resist these demands – for instance, by arguing that there are simply too many evictions for meaningful engagement to be performed in every case – have been rejected.[194] An order that is staged as an individual remedy can therefore have structural implications for how public power is exercised.[195]

Scholars sometimes assume that, through a formal commitment to *stare decisis*, individual decisions matter more in common law jurisdictions.[196] It is true that a commitment to precedent can influence the anticipated future costs of litigation. State officials might worry that a successful claim will be consistently reproduced, or take comfort in the idea that a losing claim will dissuade future litigation. However, a closer look at judicial practice complicates this reliance on binding precedent. For India's "polyvocal" Supreme Court, adherence to precedent is sometimes described as an ideal rarely achieved in practice.[197] Meanwhile, Colombian jurisprudence often achieves consistency. Judges routinely articulate tests for relief that are applied in subsequent cases. This preference for consistency can, in practice, substitute for formal recognition of *stare decisis*.

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[193] Mæstad, Rakner & Ferraz, *supra* note 8 at 302.
[194] See eg *Olivia Road*, *supra* note 105 at paras 14-21; Ray, *supra* note 95 at 117.
[195] Indeed, in *Olivia Road*, *supra* note 105, the Constitutional Court of South Africa needed only to approve the concluded settlement. The juridical framework it elaborated appears to have been purely motivated by structural aspirations; see Ray, *supra* note 95 at 117.
[196] See eg Rodríguez-Garavito & Rodríguez-Franco, *supra* note 6 at 6 (noting the possibility of contradictory decisions in Colombia due to the absence of a binding doctrine of precedent); see also Brinks & Gauri, *supra* note 21 at 385.
[197] Nick Robinson, "Structure Matters: The Impact of Court Structure on the Indian and US Supreme Courts" (2013) 61:1 Am J of Comp L 173 at 184–185.

Admittedly, individual orders remain an unreliable path to structural change. In Colombia, waves of successful *tutela* applications have not always resulted in reform. David Landau suggests that the thousands of cases filed against health insurers for shirking their obligations to fund included benefits did not curb private behaviour or state policy.[198] Indeed, as I discuss below, their persistent refusal prompted the Constitutional Court to pivot to an ambitious structural remedy in *T-760/08*. The absence of a structural response can have several causes. Governments may not care much for rights, the anticipated costs of contesting applications may be low, or state actors may lack the capacity needed to be responsive to financial incentives.

c) Structural remedies and judicial legitimacy

Individualized relief can also contribute to transformative change by facilitating and legitimizing structural remedies. As discussed in Chapters 2 and 3, there are several forces that limit the availability of structural orders. These ambitious remedies often result in judicial scrutiny of government policy and the continued oversight of state actors. This dynamic can easily stretch courts beyond the limits of their capacity and legitimacy,[199] and jeopardize judicial relationships with other public institutions.[200] Furthermore, structural engagement is a resource-intensive endeavor, often requiring a sustained level of investment that courts can rarely afford to

[198] Landau, *supra* note 43 at 290.
[199] Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012) at 111–116; Katharine G Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012) at 134, 161–165; Frank Cross, "The Error of Positive Rights" (2003) 48:3 UCLA L Rev 857.
[200] See notably Theunis Roux, "Principle and Pragmatism on the Constitutional Court of South Africa" (2008) 7:1 Int'l J Con L 106 (arguing that the South African Constitutional Court's light-touch approach to constitutional remedies represents a strategic choice to maintain healthy relationships in a political environment dominated by the African National Congress); see also Roux, *supra* note 131.

make.[201] For these reasons, some courts are more comfortable engaging in individualized relief.[202]

Given the right conditions, however, individual remedies can encourage judges to favour complex, structural responses. In Colombia, many of the Constitutional Court's most ambitious complex remedies – including its responses to the country's mortgage crisis, to the plight of the internally displaced, and to systemic deficiencies in healthcare – were prompted by an earlier spike in *tutela* applications.[203] This dynamic is not surprising. A series of cases can alert courts to the existence of a systemic crisis.[204] As litigants flood in, individual cases can make a structural response appear necessary. Likewise, each proceeding further familiarizes judges with a given area. Eventually, they become well-acquainted with the shortcomings, impasses and blockages that impede rights fulfillment.[205] Embarking on structural reform can even be strategic. Faced with an open floodgate of individual cases, structural relief might represent the only way of reducing the court's caseload. This dynamic reverses one of Mark Tushnet's early predictions. Rather than a trend of courts "convert[ing] weak remedies into strong ones",[206] stronger-form individualized relief often precedes and provokes structural, "weak" responses.

Individualized relief can also influence the content of structural orders. David Landau has argued that a spike in individual cases will both trigger, and orient the direction of, the

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[201] Landau, *supra* note 2 at 111.
[202] Landau, *supra* note 4 at 201 (suggesting individualized enforcement represents low legitimacy and capacity costs for courts).
[203] Landau, *supra* note 2 at 114–115.
[204] *Ibid*.
[205] On the importance of blockages and impasse for rights' fulfillment, see Rosalind Dixon, "Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited" (2007) 5:3 Int'l J Con L 391.
[206] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) at 256.

courts' structural response.[207] If affluent individuals dominate individual proceedings, then their concerns may shape the course of what follows. However, the opposite trend is also conceivable. The lingering possibility of strong-form individual orders can increase the remedial options available to judges overseeing structural reform. Some strategies that appear too invasive may look modest when compared to that alternative. In a similar vein, the threat of a wave of individual orders can make state actors more compliant with the "dialogic" processes that often characterize structural relief.[208] The American experience with structural injunctions suggests that this threat was often understood. In prison reform cases, courts preferred weak-form, structural remedies but threatened to issue a mass of damages orders or habeas corpus writs in the event state officials proved too recalcitrant.[209]

The Colombian Constitutional Court's ambitious undertaking in Decision T-760/08 – targeting systemic failures in the healthcare system – showcases some of these dynamics. In the years preceding the decision, the Court received thousands upon thousands of *tutelas* seeking emergency healthcare relief. These applications resulted from lengthy delays (or unjustified refusals) in making reimbursements for treatments included on Colombia's public list or ordered by a court, and a state of mismanagement that resulted in "increasing government expenditures […] not always reflected in improved healthcare provision".[210]

The Court's shift, from the individual to the structural, was motivated by this spike in cases.[211] Overreliance on the *tutela* was framed by litigants as a symptom of deep, structural

[207] Landau, *supra* note 2 at 115.
[208] See eg Tushnet, *supra* note 206 at 256.
[209] William Fletcher, "The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy" (1982) 91:4 Yale LJ 635 at 650–651.
[210] Young & Lemaitre, *supra* note 30 at 191–192; Lamprea & García, *supra* note 64 at 57.
[211] Landau, *supra* note 2 at 109–110.

problems.[212] The Court agreed: public healthcare had failed to realize the right to health, and still required thousands of Colombians to seek appropriate relief through the *tutela*.[213] There was also a concern that the mass of individual claims could be inefficient and distorting.[214] By this point, through its docket, the Court had extensive exposure to Colombia's healthcare system and its enduring problems. This experience staged its ensuing response. The decision represented a "response to the Court's own diagnosis of the situation", leading the institution to be unusually proactive. In the words of Justice Manuel José Cepeda, the decision's author, "we were the NAACP and the Warren Court wrapped into one".[215]

Decision T-760/08 marked the pivot from a judicial practice of relying on mass individual litigation towards an ambitious structural proceeding seeking transformative change. Its initial decision catalogued many of the failings of the healthcare sector, but recognized that the political branches ought to determine the content of public policy.[216] The Court would serve as a backstop, ensuring that state policy appropriately prioritized rights fulfillment, and that the design and implementation of policy permitted sufficient democratic participation.[217] As in past structural cases, the Court retained oversight jurisdiction, constituted a special chamber devoted to overseeing progress, and issued follow-up orders.[218]

Tutelas have also legitimized the Constitutional Court's ambitious interventions and have insulated the institution from political attack. The *tutela* has come to possess "a kind of mythic

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[212] Yamin, "Constructing Fair Limits", *supra* note 77 at 721; Yamin & Parra-Vera, *supra* note 19 at 445–446.
[213] *Decision T-760/08*, *supra* note 90 at section 2.2.
[214] Yamin, "Constructing Fair Limits", *supra* note 77 at 721.
[215] See the interview with Justice Manuel José Cepeda, reproduced in Yamin & Parra-Vera, *supra* note 19 at 445–446.
[216] *Decision T-760/08*, *supra* note 90 at section 3.3.15.
[217] *Ibid* at sections 3.3.11-3.3.14; see also *Decision T-595/02*, (CC) at section 4.2; *Decision T-792/05*, (CC); *Decision T-133/06*, (CC); *Decision T-884/06*, (CC).
[218] Young & Lemaitre, *supra* note 30 at 192.

status" as a pillar of constitutional change.[219] They have helped shape public perceptions of the Court as a champion for the vulnerable, and a vital check on state disfunction.[220] As I suggested in Chapter 2, this institutional capital has proved decisive in the Court's clashes with hostile presidential administrations.[221]

Occasionally, individual remedies can undermine the possibility of structural judicial responses. This has been the experience in South Africa, where the Constitutional Court's reliance on meaningful engagement has allowed it to avoid litigants' systemic critique of South African housing policy.[222] Colombia and South Africa's diverging experiences may be a function of the volume of individual litigation, and the availability of strong-form relief. Compared to Colombia, social rights litigation in South Africa remains rare and modest. The dynamics promoting structural responses in Colombia are not present there.

Ultimately, individualized relief can make a valuable contribution to transformative constitutionalism. Indeed, as I have attempted to demonstrate, these proceedings can be socially useful, and individual remedies can be reframed and partially justified as a reward for litigants. By catalyzing policy and administrative reform, and by facilitating structural interventions, these orders can have cascading benefits for non-litigants. For this same reason, courts should tolerate some degree of risk that their orders produce inefficient or regressive outcomes.

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[219] See Landau, *supra* note 43 at 269; Landau, *supra* note 2 at 119–120.
[220] Rodrigo Uprimny Yepes, "The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates" in Roberto Gargarella, Pilar Domingo & Theunis Roux, eds, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor* (Burlington: Ashgate, 2006) 127 at 149; Uprimny Yepes, *supra* note 181 at 300–302; Sepúlveda, *supra* note 43 at 152.
[221] Landau, *supra* note 2 at 111.
[222] Ray, *supra* note 95 at 117.

V. Conclusion

This Chapter has offered a defense of individualized relief in social rights litigation. This mode of enforcement is often maligned for facilitating queue-jumping, and the inefficient and regressive outcomes that follow. I have argued that there are several approaches to individualized relief that remain desirable, even for those who take the queue-jumping concern seriously. This will often be the case where individual orders offer institutional support. Specific, strong-form orders can provide relief from administrative disfunction and weak state capacity, without subverting public priority-setting processes. Engagement remedies can identify novel, practical solutions to fulfilling rights, while building rights-awareness in public decision-making. Tailored narrowly, individual remedies can also provide vulnerable individuals with vital, last resort assistance from unreasonable priority-setting schemes, while running only low or moderate risks.

Individual orders also have an underappreciated relationship to transformative change. When courts are broadly accessible, these proceedings can be an effective vehicle for delivering much-needed relief. Individual litigation also boasts a decent track record of catalyzing policy reform and improving public institution's rights-respecting capacities. Finally, these orders play a crucial role in making more ambitious, structural remedies possible.

Chapter 5:
Social Rights and Transformative Private Law[1]

I. Introduction

This Chapter marks a shift in focus towards private law and the norms that help structure a community's economic life. Areas such as contract and property law set the terrain for market activity. Occasionally, their core commitments – including freedom of contract, and the right to exclude from property – can deny individuals access to life-sustaining goods and services.[2]

[1] This Chapter was published as "Social Rights and Transformative Private Law" (2023) 60:2 OHLJ 373 with the knowledge and consent of supervisor and committee.

[2] Mark Tushnet thus writes of the private law's role in creating "conditions of unconstitutionality", see Mark Tushnet, "Dialogue and Constitutional Duty" in Tsvi Kahana & Anat Scolnicov, eds, *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors and Positive Obligations* (Cambridge: Cambridge University Press, 2016) 94 at 98; see also Gary Peller & Mark Tushnet, "State Action & A New Birth of Freedom" (2004) 92:4 Geo LJ 779 at 779–780; on the role of private law in managing access to vital goods, see Helen Hershkoff, "Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings" in Varun Gauri & Daniel Brinks, eds, *Courting Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) 270.

Judicial efforts to realize social rights therefore cannot be cabined to litigation against the state. These rights require at least *some* scrutiny of the background rules that shape market activity. This Chapter also marks a second shift. I move from the process-oriented judicial remedies and "institutional support" considered in previous Chapters, towards more substantive, ideologically-driven judicial interventions in this Chapter.

Private law is often neglected in the comparative literature on social rights, leading some scholars to underestimate these rights' transformative potential. Roberto Gargarella argues that social rights have diverted attention away from needed economic reforms – as if the two were unrelated, and not intrinsically linked.[3] Samuel Moyn writes that whole corpus of human rights are "unambitious" and "ineffectual" in the face of market fundamentalism.[4] However, his brief review of comparative materials neglected social rights' role in private law entirely. And when Mila Versteeg mounted a defense to Moyn's criticisms, her survey of comparative developments altogether failed to mention private law as a site of change.[5]

In this Chapter, I offer a partial response to these critiques by taking up the role that social rights play as catalysts in private law. I make several contributions. First, I argue that social rights not only promote access to vital goods in the private sphere, they can inspire

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[3] Roberto Gargarella, "Inequality and the Constitution: From Equality to Social Rights" in Philipp Dann, Michael Riegner & Maxim Bönnemann, eds, *The Global South and Comparative Constitutional Law* (Oxford: Oxford University Press, 2020) 235 at 246–249; see also Roberto Gargarella, "Equality" in Rosalind Dixon & Tom Ginsburg, eds, *Comparative Constitutional Law in Latin America* (Cheltenham: Edward Elgar, 2017) 176 at 176, 183, 188–194.

[4] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge: Harvard University Press, 2018) at 216; in a similar but less critical vein, David Landau and Rosalind Dixon write recently that "courts are often less interested (or less able) in using social rights to promote social transformation than is commonly assumed", see David Landau & Rosalind Dixon, "Constitutional Non-Transformation: Socioeconomic Rights Beyond the Poor" in Katharine Young, ed, *The Future of Economic and Social Rights* (Cambridge: Cambridge University Press, 2019) 110 at 110; see also Rosalind Dixon & Julie Suk, "Liberal Constitutionalism and Economic Inequality" (2018) 85:2 U Chicago L Rev 369 at 395–397.

[5] Mila Versteeg, "Can Rights Combat Economic Inequality?" (2020) 133:6 Harv L Rev 2017.

transformations in the private law's values and modes of reasoning.[6] Private law cultures marked by a libertarian streak and that present as "neutral" or "apolitical" can become aware of their role in entrenching private power, domination, and inequality. Second, I argue that the depth of this transformation will depend on how judges approach the public–private divide. Some approaches will produce a far more limited impact than others.

To this end, I develop a system of classifying distinct methods by which social rights and private law may relate to one another. The basic approaches I chart can be plotted out on a spectrum. At one extreme, social rights denialism maintains a sharp public–private divide and rejects any role for these rights in the private sphere. One notch further along, there are approaches that reserve positive social duties for firms that, in some meaningful way, resemble the state. Moving along further still, there are approaches that prefer maximum flexibility and pragmatism, but which fail to invest much effort in elaborating legal doctrine or a theory of relationships. This kind of flexible remedialism can impose ambitious social duties, but it does so overtop private law, and conceives of the two spheres in separate terms.

The last approach integrates constitutional aspirations into private law. In the process, private law rules are re-evaluated for their potential to promote constitutionally desired outcomes. Of the paths considered, the integrative approach is best placed to shift private law's values and its prevailing modes of legal reasoning. It also offers a language for confronting

[6] In this chapter, I have drawn on the classifications of modes of legal thought outlined in Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000" in David Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 19 (distinguishing between classical legal thought, socially-oriented legal thought, and contemporary legal thought).

private power and inequality, developments that have been championed by the flourishing recent scholarship on "law and political economy".[7]

Legal systems tend to have a preference for one method or another. Indian law is marked by denialism. Colombian law appears to favour flexible remedialism. South African law trends towards normative integration. It is worth adding that these contrasting methods are influenced by—but are not reducible to—the formal distinctions between direct and indirect horizontal application of constitutional rights, and the progressive development of general law.[8]

Each of the following sections takes up one of these approaches. I consider the legal environments that foster (or limit) each approach, as well as their normative dynamics, internal limits, and shortcomings. Much of this analysis sets up the next Chapter, where I offer a defense of "normative integration", and suggest that it is preferrable to its peers.

II. Social Rights Denialism

A sharp public–private divide can deny any role for social rights in the private sphere. This division labour can be the product of constitutional text, ideology, legal culture, and the incentives created by the local legal procedure. Whatever its cause, denialism confines the work of redistribution to tax-and-spend programs and to other legislative or administrative measures. In this section, I develop a brief account of the forces that produce denialism in India, where it remains dominant. I also argue that this trend is ultimately unsatisfying.

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[7] For a recent collection of contributions to this emerging field, see Poul F Kjaer, ed, *The Law of Political Economy: Transformation in the Function of Law* (Cambridge: Cambridge University Press, 2020); see also Jedediah Britton-Purdy et al, "Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis" (2020) 129:6 Yale LJ 1784.

[8] For more on these distinctions, see Stephen Gardbaum, "Horizontal Effect" in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 600 at 601; Hershkoff, *supra* note 2 at 282–286; Cheryl Saunders, "Constitutional Rights and the Common Law" in András Sajó & Renáta Uitz, eds, *The Constitution in Private Relations: Expanding Constitutionalism* (Utrecht: Eleven International Publishing, 2005) 183 at 183–184 and 213.

Social rights' limited influence on Indian private law is perhaps surprising, since the Indian Supreme Court has – at least in certain periods – enforced these rights in aggressive ways.[9] But as Stephen Gardbaum writes in his recent review of the jurisprudence, there has been "little general discussion and few general principles established" on the Fundamental Rights' reach into private law.[10] Although constitutional duties are occasionally imposed onto private parties, the law continues to be marked by "significant pockets that retain a fairly sharp public–private divide".[11]

There are several factors that produce India's denialism. The first is textual. With only a few exceptions, the *Constitution of India*, *1950* identifies "the State" as the bearer of constitutional duties.[12] This wording reflects an explicit decision, by the members of India's Constituent Assembly, to keep constitutional duties out of the private sphere.[13] The Supreme Court has generally respected this choice. Judgments have expressed the view that, unless specified otherwise,[14] the Fundamental Rights bind only the State.[15]

These textual constraints are further supported by a confident liberal ideology. Leading theorists such as John Rawls and Ronald Dworkin have argued that access to basic entitlements

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[9] See eg Manoj Mate, "Public Interest Litigation and the Transformation of the Supreme Court of India" in Diana Kapiszewski, Gordon Silverstein & Robert A Kagan, eds, *Consequential Courts* (Cambridge: Cambridge University Press, 2013) 262.
[10] Gardbaum, *supra* note 8 at 608.
[11] *Ibid*.
[12] See articles 12 & 13 of *The Constitution of India, 1950*.
[13] Gardbaum, *supra* note 8 at 602–603.
[14] *People's Union for Democratic Rights v Union of India*, [1982] 3 SCC 235 (recognizing that certain specific rights are subject-less, and are "indubitably enforceable against everyone"); see Arts 23 and 24 of *The Constitution of India, 1950*, *supra* note 12; see also Stephen Gardbaum, "Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?" in Vicki Jackson & Mark Tushnet, eds, *Proportionality: New Frontiers, New Challenges* (Cambridge: Cambridge University Press, 2017) at 23.
[15] Gardbaum, *supra* note 8 at 602–603; *Zoroastrian Cooperative Housing Society v District Registrar*, [2005] 5 SCC 632 ("The Fundamental Rights in Part III of the Constitution are normally enforced against State action or action by other authorities who may come within the provision of Article 12 of the Constitution").

should be guaranteed by state institutions, leaving individuals free to pursue their own ends without excessive constraints.[16] Modern Kantians fear that if private law were to become a site for compelled redistribution, wealthier individuals would be at risk of being subordinated to others, and denied the freedom to pursue their own ends.[17] Corrective justice theorists add that any attempt to address extreme need through a system of bilateral justice risks imposing an arbitrary burden on the defendant, since the "underlying injustice is systemic".[18] In their view, private law should be limited to correcting private injustices.[19] In a rare moment of agreement, lawyer-economists have argued that tax-and-transfer schemes achieve the desired level of

[16] John Rawls, "The Basic Structure as Subject" in Alvin Goldman & Jaegwon Kim, eds, *Values and Morals* (Boston: Springer, 1978) 47 at 54–55; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 283 (writing that "[t]he difference principle holds, for example, for income and property taxation, for fiscal and economic policy. It applies to the announced system of public law and statutes and not to particular transactions or distributions, nor to the decisions of individuals and associations, but rather to the institutional background against which these transactions and decisions take place"); Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at 295–312; note that several authors suggest that, properly interpreted, the Rawlsian basic structure does indeed require some measure of redistribution through the private law, see eg Samuel Scheffler, "Distributive Justice, the Basic Structure and the Place of Private Law" (2015) 35:2 Oxford J Leg Stud 213; Kevin Kordana & David Tabachnick, "Rawls and Contract Law" (2005) 73 Geo Wash L Rev 598; Kevin Kordana & David Tabachnick, "The Rawlsian View of Private Ordering" (2008) 25 Soc Phil & Pol 288.

[17] See eg Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1991) at 63; Ernest Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 36; Jules Coleman & Arthur Ripstein, "Mischief and Misfortune" (1995) 41:1 McGill LJ 91 at 112; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009) at 35.

[18] Aditi Bagchi, "Distributive Justice and Contract" in Gregory Klass, George Letsas & Prince Saprai, eds, *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014) 193 at 195; Melvin Eisenberg, "Theory of Contracts" in Peter Benson, ed, *Theory of Contract Law: New Essays* (Cambridge: Cambridge University Press, 2001) 206 at 257 (rejecting redistribution in contract law as "completely haphazard"); Eric Posner, "Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract" (1995) 24:2 J Legal Stud 283 at 284.

[19] Ernest Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) at 63–64.

redistribution more efficiently.[20] They also note that private law rules can be contracted around, and are liable to be over- or under-inclusive.[21]

In India, incentives created by legal procedure have also contributed to a hollowing out of private litigation.[22] The Supreme Court's original writ jurisdiction, coupled with its public interest litigation reforms, are reserved for the protection of Fundamental Rights.[23] Their various procedural and evidentiary advantages tempt plaintiffs to frame their case in public law terms, against the state, even when a private law claim might be available.[24] With lawsuits reconfigured in this way, judges can avoid addressing the extent to which the Constitution reaches into the private sphere. Meanwhile, traditional contract, tort and property cases rarely make it to the higher courts.[25]

Lastly, the dynamics of the local private law limit the Constitution's influence. Much of this law is set out in 19th century statutes that were intended to constrain judicial discretion. Through codification, the British imperial government sought to stunt the kind of organic change familiar to most common law jurisdictions.[26] This legacy endures. Indian private law remains

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[20] See notably Louis Kaplow & Steven Shavell, "Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income" (1994) 23 J of Leg Stud 667; Louis Kaplow & Steven Shavell, "Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income" (2000) 29 J of Leg Stud 821; Ronen Avraham, David Fortus & Kyle Logue, "Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell" (2004) 89:4 Iowa L Rev 1125 at 1126; see also Robert Cooter & Thomas Ulen, *Law and Economics*, 3rd ed (Boston: Addison-Wesley, 2000) at 112.

[21] Kaplow & Shavell, *supra* note 20 at 674; see also Lee Anne Fennell & Richard McAdams, "The Distributive Deficit in Law and Economics" (2016) 100 Minn L Rev 1052 at 1065.

[22] Gardbaum, *supra* note 8 at 613; Shyamkrishna Balganesh, "The Constitutionalisation of Indian Private Law" in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 680 at 680–683 (writing that these new procedures' "long-term effects on India's private law edifice have been devastating").

[23] See article 32 of *The Constitution of India, 1950*, *supra* note 12.

[24] Balganesh, *supra* note 22 at 686–688; Gardbaum, *supra* note 8 at 613.

[25] Balganesh, *supra* note 22 at 692–693.

[26] Shyamkrishna Balganesh, "Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint" (2015) 63 Am J of Comp L 33.

marked by a formalism that treats statutes as exhaustive, and that limits courts to applying bright-line legislative norms.[27]

From this list, the constitutional text and ideology are likely the weaker constraints. Constitutional text might rule out the direct horizontal application of constitutional norms, but it does not prevent courts from creating or shaping private law rules that are inspired by social rights' aspirational dimensions. The Supreme Court has also sidestepped textual constraints in the past. It is the Court that identified a core set of justiciable social rights, notwithstanding the drafters' choice to frame them as non-justiciable Directive Principles of State Policy.[28]

The ideological arguments are also unsatisfying. Social rights represent a collective commitment to ending extreme need. That communal promise should, at least some of the time, be capable of placing demands on the more powerful, or the more affluent. Furthermore, the leading liberal theorists' defense of autonomy was always conditional on the state accomplishing the necessary background distribution.[29] Entrenched poverty and inequality undermine the value of such a minimalist private law.[30] Faced with this kind of background injustice, an autonomy-centered private law might demand some level of redistribution, since destitution also threatens meaningful freedom. Poor individuals can be more vulnerable to private domination, and their paths to a flourishing life can be thwarted by the endless task of securing their basic needs.[31]

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[27] Balganesh, *supra* note 22 at 683–685.
[28] See notably *Francis Coralie Mullin v Administrator, Union Territory of Delhi*, [1981] 2 SCR 516 .
[29] Scheffler, *supra* note 16 at 214.
[30] For a recent articulation of this idea, see Hanoch Dagan, *A Liberal Theory of Property* (Cambridge: Cambridge University Press, 2021) at 23 and 244.
[31] See generally Robert Hale, *Freedom Through Law: Public Control of Private Governing Power* (New York: Columbia University Press, 1952); Robert Hale, "Coercion and Distribution in Supposedly Non-Coercive States" (1923) 38 Poli Sci Q 470; on the threat that homelessness in particular poses for freedom, see Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 JL & Equal 69 at 74–79; Christopher Essert, "Property and Homelessness" (2016) 44 Phil & Pub Aff 266 at 275–276; Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991) 39 UCLA L Rev 295 at 304, 315 and 397.

Instead of a strict division of labour, private law and tax-and-spend measures could both recognize limits to freewheeling autonomy and demand a degree of shared concern. Indeed, there are benefits to having these two areas aligned. Strident individualism in private law can undermine social solidarity, and foster resistance to the taxes and social programs that are relied on to do the necessary redistributive work.[32] Moreover, the dynamics of interest group politics can limit the political branches' ability to introduce new taxes or spending programs. The result is a "distributive deficit" that might be best addressed through reform to the general law.[33] Finally, as many scholars have stressed, a redistributive private law is not necessarily less efficient.[34]

Intriguingly, the ideological reasons for sustaining a sharp public–private divide appear to have already failed in India. Although rare, the Supreme Court has hinted at positive redistributive duties in the employment and insurance contexts. In *Life Insurance Corporation of India*, the Court suggested that private healthcare insurers should offer "just and fair terms and conditions accessible to all segments of the society".[35] In *Consumer Education and Research Centre*, the Court added that private employers have some duty to promote the health of their employees during employment and into retirement.[36] In the lower courts, judges have challenged

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[32] Hanoch Dagan, "The Utopian Promise of Private Law" (2016) 66:3 UTLJ 392 at 411.
[33] See notably Fennell & McAdams, *supra* note 21.
[34] See eg Anthony Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale LJ 472 at 502–510; Bruce Ackerman, "Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy" (1971) 80 Yale LJ 1093 at 1097–1098, 1102–1119 and 1186–1188; Duncan Kennedy, "The Effect of the Warranty of Habitability on Low Income Housing: 'Milking' and Class Violence" (1987) 15 Fla St UL Rev 485 at 497–506; Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 Md L Rev 563 at 613; Avraham, Fortus & Logue, *supra* note 20 at 1144–1148; Fennell & McAdams, *supra* note 21 at 1061; Rashmi Dyal-Chand, "Sharing the Cathedral" (2013) 46:2 Conn L Rev 647.
[35] *Life Insurance Corporation of India v Consumer Education and Research Centre*, [1995] Supp (1) SCR 349 .
[36] *Consumer Education and Research Centre v Union of India*, [1995] 3 SCC 42 .

shameless profiteering in private education.[37] More importantly still, judges have defended regulatory measures that compel redistribution on the basis that they promote social rights. In *Chameli Singh*, for instance, the Court upheld measures that expropriated land for low-income housing on the grounds that these measures buttressed "social and economic justice" and the "right to housing".[38]

As a result, social rights' lack of influence appears to be a product of India's ossified private law and – perhaps ironically – by its public interest procedural vehicles that encourage litigants to frame their claims against the state. Substantively, denialism is not only unsatisfying, but it appears to have failed to persuade judges. By contrast, Colombian and South African law contemplate more permissive channels of influence.

III. Relying on State Resemblance

The second approach is also hesitant about crossing the public–private divide, but is willing to do so for firms that sufficiently resemble the state. This group of private entities might include a business that exercises near-sovereign control over an export processing zone, or a corporation that has been charged by the government with supplying water and electricity. For them, constitutional duties might be imposed or heightened due to their "state-like" qualities.

Jurists who prefer this approach may disagree on the features that create a sufficient degree of resemblance. At the more sophisticated end, Jean Thomas has attempted to list the qualities that are needed by charting the characteristics of the citizen-state relationship.[39] In her

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[37] *Hindi Vidya Bhavan Society v State of Maharashtra*, [2005] (4) BomCR 676 ; see also *Ravneet Kaur v The Christian Medical College*, [1997] AIR 1998 PH1, (1997) 116 PLR 320 .
[38] *Chameli Singh and Others v Uttar Pradesh*, [1996] 2 SCC 549 at para 3.
[39] Jean Thomas, *Public Rights, Private Relations* (Oxford: Oxford University Press, 2015); Jean Thomas, "Our Rights, But Whose Duties? Re-conceptualizing Rights in the Era of Globalization" in Tsvi Kahana & Anat Scolnicov, eds, *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge: Cambridge University Press, 2016) 6.

view, this public relationship is marked by a special kind of dependency: the state exercises coercive powers over the individual, and the individual willingly follows the rules that the state enacts.[40] This degree of reliance is present in the private sphere whenever a powerful party exercises total control over the depending party's enjoyment of some good or interest, all within the context of an "undertaking by the controlling party".[41] Within such a relationship, the private entity can be the object of public duties, including obligations to fulfill positive social rights.[42] Judicial attempts at locating state-like defendants tend to be less rigorous. Courts are sometimes content to make fleeting reference to a firm's work supplying a "public service" or performing a function that is connected to the "public interest". At some point, the work of establishing a sufficient degree of resemblance has likely been abandoned in favour of an openly discretionary approach that is considered in the next section.

Courts in South Africa and Colombia seem comfortable deploying this method for bridging the public–private divide. In both jurisdictions, this approach acts as a basis for heightened duties and usually complements – rather than crowds out – other pathways of influence. It was on display in the Constitutional Court of South Africa's decision in *All Pay 2.* In that case, Cash Paymaster had agreed to administer a social security grant program.[43] The firm's contract had been nullified because of irregularities in the bidding process. A new tender was underway, but the Court ordered Cash Paymaster to continue administering the program until a new contract with another firm could be concluded. On its reading, the business "undertook constitutional obligations" by entering into the social grant payment contract.[44] The

[40] Thomas, *supra* note 39 at 22.
[41] *Ibid* at 21; see also Thomas, *supra* note 39 at 20 (Private Relations).
[42] Thomas, *supra* note 39 at 23 (Whose Duties?).
[43] *AllPay Consolidated Investment Holdings and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)*, [2014] ZACC 12 [*AllPay 2*].
[44] *Ibid* at paras 56, 59, 64.

function it performed was "fundamentally public in nature", exercising a "public power" to "give effect to the right of social security".[45] In these circumstances, the unanimous Court bluntly opined that "considerations of obstructing private autonomy […] do not feature prominently, if at all".[46] The Court even directed Cash Paymaster to disclose its "break-even point", so that its services could be maintained without making a profit.[47]

This kind of reasoning is also evident in cases where service providers contribute to the realization of social rights. For instance, judges in South Africa have reasoned that private schools have (at least) a negative duty not to impede children's access to education.[48] *Pridwin* considered whether this negative duty was breached when a private institution cancelled two students' enrollment after a series of disruptive clashes with their father.[49] The Court reasoned that Pridwin Preparatory was performing a "constitutional function" but, in the absence of an explicit assumption of state responsibility, was not "fulfil[ling] a constitutional duty".[50] Such an institution could not be obliged to educate a child, but any school that did would be constrained in the ways it could later limit access to education.[51] The Court reasoned that before terminating the relevant contracts, Pridwin was bound to implement a fair process, to consider the children's best interests, and to invite their parents to make representations on their behalf.[52] The performance of a "constitutional function" was enough to attract heightened obligations, but perhaps not the state's duties.

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[45] *Ibid* at paras 52-54.
[46] *Ibid* at para 66.
[47] *Ibid* at para 67.
[48] *Governing Body of the Juma Musjid Primary School v Essay NO*, [2011] ZACC 13, 2011 (8) BCLR 761 (CC) at paras 57-58 [*Juma Musjid*].
[49] *AB and Another v Pridwin Preparatory School and Others*, [2020] ZACC 12 [*Pridwin*].
[50] *Ibid* at para 179.
[51] *Ibid* at paras 85, 179-180 and 200.
[52] *Ibid* at paras 152, 198, 207-208.

In Colombia, this approach even structures its law of procedure. The *tutela* – traditionally reserved for urgent actions against the state – can be deployed against the providers "public services".[53] This term has been broadly interpreted to capture not just education, healthcare, and utilities, but also services such as banking.[54] The concept of the "public service" has come to serve as an important basis for obligations, with these businesses seen as pillars of the common interest. Seizing on the "public" nature of their work, the Colombian Constitutional Court has ordered firms to maintain the provision of vital goods, even when the "client" is no longer able to pay. It has directed entities to maintain the supply of a minimum of 50 litres of water per person,[55] to resume educating students enrolled in a school,[56] to continue providing electricity to healthcare facilities and prisons,[57] and to complete vital medical treatments.[58] In less pressing cases, the Court has scrutinized decisions to suspend public services or to refuse contracts altogether, claiming that these choices must be based on reasonable and proportionate business grounds.[59] Admittedly, the Court's fleeting reliance on the concept of a "public service" is a shallow attempt at explaining why these moves are justified. In the next section, I consider whether some of these cases might better be thought of as exhibiting a flexible and discretionary approach to the public–private divide.

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[53] *Decree 2591 of 1991 of the Colombian Congress for the Implementation of Article 86 of the Constitution* at Article 42(1)-(3) and (8).
[54] See eg *Decision T-583/13*, (CC) at section 6.2; *Decision SU-157/99*, (CC).
[55] See generally *Decision T-928/11*, (CC); *Decision T-740/11*, (CC); *Decision T-077/13*, (CC).
[56] *Decision T-428/12*, (CC).
[57] Jimena Murillo Chávarro, "Access to Effective Remedies for the Protection of Human Rights in Essential Public Services Provision in Colombia" in Marlies Hesselman, Antenor Hallo de Wolf & Brigit Toebes, eds, *Socio-Economic Human Rights in Essential Public Services Provision* (New York: Routledge, 2017) 256 at 267.
[58] *Decision T-603/2010*, (CC).
[59] See eg *Decision T-1016/99*, (CC); *Decision T-467/94*, (CC); *Decision T-583/13*, *supra* note 54.

This method of relying on state resemblance is attractive for a few reasons. It offers a straightforward account for why duties that would normally fall on the state can nevertheless be imposed on private actors. Any other method might be at risk of reflecting "purely pragmatic decision[s]" or principles that are "external to the rights themselves".[60] It can also preserve a healthy space for autonomy. A limited class of defendants might be held to a higher, state-like standard, while the rest can continue to enjoy the relative liberty afforded by a sharp public–private divide. When this method is applied carefully, and to the exclusion of other approaches, courts can avoid problems "of indeterminacy and overbreadth associated with conventional methods of applying public rights to private relations".[61]

But there are also risks in relying on a supposed resemblance between private and public actors. These risks can be compounded when this approach is relied on as the sole path for bridging the public–private divide. First, this method can be difficult to operationalize. To be practicable, an ideologically diverse set of judges would need to be in some agreement over the essential qualities of the citizen-state relationship, and in their identification of meaningfully similar relationships in the private sphere. For Thomas, for instance, these relationships require a powerful party to exercise total control over another person's enjoyment of an important good, all within the context of some explicit undertaking.[62] This degree of dependency is reflected in the situation of workers subjected to inhumane conditions in factories, and nursing home patients living at the mercy of their doctors and nurses.[63] These choices are bound to be controversial. As

[60] Thomas, *supra* note 39 at 20 (Whose Duties?); citing Onora O'Neill, "The Dark Side of Human Rights" (2005) 81 Int'l Aff 427; and Joseph Raz, "Human Rights Without Foundations" in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 321.
[61] Thomas, *supra* note 39 at 19 (Private Relations).
[62] Thomas, *supra* note 39 at 21; see also Thomas, *supra* note 39 at 20 (Private Relations).
[63] Thomas, *supra* note 39 at 20 (Private Relations).

Cass Sunstein and Stephen Smith have persuasively argued, legal doctrines can more easily achieve the necessary degree of assent by reasoning at lower levels of abstraction.[64]

Second, this approach is an awkward fit with positive social rights because firms will always lack the qualities that make the state the most appropriate site of redistribution. Constitutionalized social rights represent a collective commitment to ending extreme need. Each individual member of that community might be thought of as bearing an "imperfect duty" to create and sustain a distribution where this poverty no longer exists.[65] These imperfect duties can then be realized by the state, which has the power to tax individual members for their contributions, and to represent them as a collective body. These are the features that make government action a principled site for redistribution, and they have no parallel in the private sector.

Third, this approach can reify the public–private divide in ways that can limit valuable transformations. Rhetorically, judges who rely on this method are often tempted to insist that the particular relationship before them is meaningfully different from a "normal" transaction. In *Pridwin*, the provision of education was said to be "distinctly different" from "ordinary commercial transaction[s]".[66] As a result, the search for state-like defendants can simultaneously buttress the image of a traditional economic space that is free from social rights and their redistributive tendencies. This trend is regrettable. Even outside these classes of relationships, private law has an important role in constituting private power, producing inequality, and

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[64] Cass Sunstein, "Incompletely Theorized Agreements" (1995) 108:7 Harv L Rev 1733; Stephen Smith, "Intermediate and Comprehensive Justifications for Legal Rules" (2020) [Draft on file].
[65] Aditi Bagchi, "Distributive Injustice and Private Law" (2008) 60:1 Hastings LJ 105 at 108 (suggesting that social rights are held not against any single person, but rather against every other member of a polical community, and derivatively against the state).
[66] *Pridwin*, *supra* note 49 at para 183.

managing access to life-sustaining goods. These roles justify at least some degree of influence for social rights.

To take just one example, a private fund that purchases vacant land for investment purposes does not resemble the state in any meaningful way. However, the right to shelter for vulnerable communities should be capable of placing at least some demands on these kinds of firms. In South Africa, the Constitutional Court has recognized a duty to temporarily accommodate the landless – especially when the land is vacant – while the local municipality works to identify an alternative site.[67] Extrapolative approaches are not capable of challenging private law's traditional emphasis on autonomy and exclusion in this way.

What is more, the task of identifying state-like defendants – when performed rigorously – can yield a narrow class of duty-bearers. Thomas' sophisticated method requires a degree of near total control over another person's well-being, and this may limit public duties to certain employment and fiduciary relationships. It is indeed rare for a private entity to have complete control over whether an individual has access to a vital good. Taken to an extreme, this new public–private division can create the risk that the costs of redistribution will be borne uniquely by private actors in certain sectors, when in theory constitutionalized social rights represent a collective commitment.

IV. Flexible Remedialism

This approach reflects the way that social rights center human needs.[68] This "perspective of recipience" entails a flexibility to "allocate responsibility in whichever way best ensures their

[67] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*, [2011] ZACC 33, [2012] (2) SA 104 (CC) [*Blue Moonlight*].
[68] David Bilchitz, "A Chasm Between Is and Ought? A Critique of the Normative Foundations of the SRSG's Framework and Guiding Principles" in Durya Deva & David Bilchitz, eds, *Human Rights*

realization".[69] David Bilchitz thus argues that corporations, nestled somewhere between the individual and the state, are appropriate duty-bearers.[70] This flexibility can promote generous rights outcomes, but it can sometimes result in a neglect of theory. Judges can stridently cross the public–private divide, but without articulating a theory for why a particular defendant ought to be held responsible. Put plainly, this method sees courts engage in practical problem-solving, an exercise that resembles discretionary remedialism. Once confronted by extreme need, a judge redistributes resources from a powerful or deep-pocketed defendant towards a vulnerable applicant, occasionally taking care to avoid unduly onerous burdens.

Flexible remedialism can result from the horizontal application of constitutional norms, coupled with an overly rigid private law. As an approach, it is generous but it can ultimately be unsatisfying. Because it tends to neglect elaborating a theory of relationships, it can produce results that are indeterminate and arbitrary. It can also be anti-transformative, since its separateness from private law leaves traditional areas of contract and property largely intact and undisturbed. Indeed, this approach risks stunting the growth of private law, and neglects the ways that private law entrenches domination and inequality. I develop this argument by focusing on Colombia, where flexible remedialism is prevalent.

a) Colombia's nurturing environment: *tutela* protection & civil law formalism

There are a few features of the Colombian legal environment that appear to have allowed flexible remedialism to flourish. First, Colombian law allows for the direct horizontal application

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Obligations of Business: Beyond the Corporate Responsibility to Protect (Cambridge: Cambridge University Press, 2013) 107 at 125–126.

[69] *Ibid* at 126–127; Bilchitz elaborates on this model more recently in David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (Cambridge: Cambridge University Press, 2021).

[70] Bilchitz, *supra* note 68 at 129–130; see also David Bilchitz, "Do Corporations Have Positive Rights Obligations?" (2010) 125:1 Theoria 1; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (Oxford: Oxford University Press, 2008) at 72–74.

of constitutional norms.[71] Most importantly, the Constitution of 1991 recognizes an obligation of solidarity when someone's life or health is threatened.[72] This norm creates a space for public duties that are conceptually separate from private law and its focus on relationships. The Constitutional Court has said that although the state bears the first-order responsibility of ensuring that basic needs are met,[73] when the state fails, such horizontal obligations can "exceptionally" be imposed on individuals.[74] On occasion, judges have not been shy about having insurance companies, healthcare providers and financial institutions fulfill some of the basic needs of those experiencing poverty. The Court has simply attempted to balance the demands of solidarity against the importance of individual autonomy,[75] which has its roots in constitutional values such as liberty and equality, freedom of association, and freedom to pursue economic activities and private initiatives.[76]

Second, the *tutela* can be deployed against private defendants. Although the Colombian writ of protection is generally limited to claims against the state,[77] Decree 2591 of 1991 identifies nine instances where *tutelas* may be sought against private parties.[78] Such direct

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[71] Direct application of constitutional norms is indeed a regional trend. On one author's count, Argentina, Bolivia, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Honduras, Paraguay, Peru, Puerto Rico, and Uruguay all recognize direct horizontal effect: Willmai Rivera-Perez, "What the Constitution Got to Do With It: Expanding the Scope of Constitutional Rights Into the Private Sphere" (2012) 3:1 Creighton Int'l & Comp LJ 189.
[72] *Constitution of Colombia, 1991* at Articles 1 and 95 (2); *Decision T-468/03*, (CC).
[73] See eg Yira López-Castro, "Viviendo bajo un contrato: La constitucionalización del derecho contractual" (2016) 13:1 Revista Jurídicas 82 at 87–88.
[74] *Decision T-520/03*, (CC) at section 3.3.1; *Decision T-463/17*, (CC) at section 2.1.
[75] Mariana Bernal-Fandiño, "El principio de solidaridad como límite a la autonomía privada" (2016) 13:2 Revista Jurídicas 60 at 64–67; although note López-Castro, *supra* note 73 at 91 (suggesting that although the constitutionalization of contract law, contract solidarity, and the social function of private rights are often discussed together, they remain formally distinct doctrines).
[76] See arts 13 (equality), 16 (liberty), 33 (freedom of association), 333 (freedom to pursue economic activity and private initiatives) in the *Constitution of Colombia, 1991*, *supra* note 72; see also *Decision T-423/03*, (CC); and Bernal-Fandiño, *supra* note 75 at 64.
[77] Article 86 of the *Constitution of Colombia, 1991*, *supra* note 72.
[78] *Decree 2591 of 1991 of the Colombian Congress for the Implementation of Article 86 of the Constitution*, *supra* note 53.

recourse is available when a private entity provides a public service,[79] as described above, but also where the complainant is in a position of subordination or defencelessness,[80] or where certain specific norms have been violated.[81] "Defenselessness" includes instances where there is a severe power imbalance between contracting parties,[82] and acts as perhaps the most important jurisdictional basis for Colombian litigants.[83] Beyond falling into one of these categories, the applicant's constitutional rights must be in jeopardy.[84] Barring an emergency, they must have also exhausted their recourses before the ordinary civil courts.[85] Although the *tutela* represents the most prominent vehicle for elaborating private parties' constitutional duties, these obligations have also been invoked in defense of impugned legislation and regulation.[86]

Third, Colombian private law has historically been encased in a rigid formalism that is resistant to judge-led change.[87] The country's Civil Code is a replica of the earlier Chilean Civil Code, which in turn drew heavily on the French Napoleonic Code for its law of obligations.[88]

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[79] *Ibid* at Article 42(1)-(3) and (8).
[80] *Ibid* at Article 42 (4).
[81] *Ibid* at 42 (5) and (9).
[82] *Decision T-463/17*, *supra* note 74 at section 1.2.2; *Decision T-517/06*, (CC) at section 2.
[83] For its extensive use in litigating consumer insurance disputes, see *Decision T-032/98*, (CC); *Decision T-118/00*, (CC); *Decision T-1165/01*, (CC); *Decision T-171/03*, (CC); *Decision T-751/12*, (CC); *Decision T-058/16*, (CC); *Decision T-463/17*, *supra* note 74.
[84] *Decision T-160/10*, (CC) at section 4.
[85] *Decision T-051/18*, (CC).
[86] See eg *Decision C-367/95* (CC), *Decision C-192/6* (CC), *Decision C-252/98* (CC), *Decision C-251/99* (CC), *C-664/00* (CC), *Decision C-332/01* (CC), *Decision C-936/03* (CC), and *Decision C-313/13* (CC).
[87] Daniel Bonilla, "Liberalism and Property in Colombia: Property as a Right and Property as a Social Function" (2011) 80 Fordham L Rev 1135 at 1135–1136 and 1141–1149 (describing a civil law and liberal property system as an "ideologically coherent machinery that [historically] prioritized the principle of autonomy over equality and solidarity"; on Colombian civil law's traditional reputation for formalism, see Jorge Esquirol, "The Turn to Legal Interpretation in Latin America" [2011] 26:4 Am U Int'l L Rev 1031 at 1036; Alfredo Fuentes-Hernández, "Globalization and Legal Education in Latin America: Issues for Law and Development in the 21st Century" [2002] 21:1 Penn State Int'l L Rev 39; David Landau, "The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America" [2005] 37 Geo Wash Int'l L Rev 687 at 689, 709–710.
[88] MC Mirow, "Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoléon in Drafting the Chilean Civil Code" (2001) 61 Louisiana L Rev 291.

The Civil Code's application is often mythologized as a technical exercise in deductive reasoning, with little room for judicial "interpretation", and no room for judicial innovation.[89] Although the constitutional reforms of 1991 have helped unsettle the formalist tradition,[90] it retains a hold on private law reasoning.

As a result, public law norms and private law rules can appear incommensurable. Constitutional principles such as solidarity and the "Social state" are abstract and are moulded by judges who demonstrate confidence and self-awareness in the judicial role.[91] By contrast, the rules of private law remain more specific, are assumed to be comprehensive, and are applied deductively. Partly for this reason, private law is sometimes dismissed for its ineffectiveness in protecting fundamental rights in a society marked by radical deprivation.[92] One of the legacies of Colombian formalism is that it may have left judges without the ideological resources needed to unearth and transform private law's implicit politics.

b) Continued medical treatments & debt restructuring

Two lines of decisions showcase this approach at work. In the first, the Constitutional Court has compelled the funding of medical treatments, even where the patient is unable to pay. In an important early case, a pre-paid healthcare provider was ordered to cover the full cost of a

[89] See generally Esquirol, *supra* note 87 at 1032–1036.
[90] Esquirol also highlights the role of American legal education and international development programs in prompting the region-wide shift away from formalism: see Esquirol, *supra* note 87.
[91] For a review of the implications of the Colombian Constitution on private relationships, see Bernal-Fandiño, *supra* note 75 at 60–61; for a review of the Constitution's implications for property, see Bonilla, *supra* note 87; see also Esquirol, *supra* note 87 at 1041 (noting a region-wide shift from an "unrelentingly formalist Latin American practice" to "post-legal-realist reconstructive theories of liberal law"); and José Luis Benavides, "Contencioso contractual en Colombia: Flexibilidad del control e inestabilidad del contrato" (2006) 18 Revista Derecho del Estado 183 at 183 (discussing the wider shift in the self-conception and role of the judge in contractual disputes).
[92] Rivera-Perez, *supra* note 71 at 205-206, citing Decisions T-524/92, T-251/93, T-507/93, T-28/94, T-463/94, T-379/95, T-100/97, T-351/97, T-767/01, T-222/04.

patient's chemo- and radiotherapy.[93] Under the terms of their contract, the firm was only bound to cover 79% of the cost of treatment. However, for the patient, the remaining share remained prohibitively expensive. Ms Rueda de Rendón was 72 years old, had lost her ability to speak, had little income, and was living in an apartment owned by a friend, paying no rent.

In the Court's view, if a patient is confronted by a health emergency, is already affiliated with a private healthcare provider, and is unable to pay for the full cost of a prescribed treatment, the balance must be paid by the provider. The Court was careful to insist that this private entity would then have a right to seek reimbursement from the state-funded *Fondo de Solidaridad y Garantía del Sistema de Salud (Fosyga)*.[94] Since the business could be compensated through *Fosyga,* the decision did not perceive a threat to the entity's commercial viability. On similar grounds, the Court has insisted that private firms that provide (or fund) healthcare cannot discontinue treatments that have already begun.[95] Treatment must be completed, even if the patient cannot pay and the contract could lawfully be put to an end.[96] Again, *Fosyga* could later reimburse firms for these expenses.[97]

These cases do not attempt to carve out a theory of liability. They instead ground their reasoning in the vulnerabilities of the applicants and the importance of healthcare. Some decisions make passing reference to the concept of a "public service", but some firms, such as insurers, have been similarly obliged even though they fall outside of that scope. Fortuitously, compensation from *Fosyga* provides a convenient path for fulfilling these vital needs without compromising autonomy interests or commercial viability.

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[93] *Decision T-448/03*, (CC).
[94] *Ibid* at section 3.
[95] *Decision T-603/2010*, *supra* note 58 at section 2.4.3.1; *Decision T-081/12*, (CC) at para 16.
[96] See eg *Decision T-797/09*, (CC); *Decision T-573/08*, (CC); *Decision T-603/2010*, *supra* note 58; *Decision T-081/12*, *supra* note 95.
[97] *Decision T-081/12*, *supra* note 95 at para 16.

The healthcare cases also demonstrate how flexible remedialism can lead to artificial line-drawing between public and private norms. For instance, the Court has struggled to explain how a private firm could be bound by some positive duty if, under the terms of Colombian civil law, the parties' contract could be put to an end. Instead of challenging an important tenet of contract law, the Court's solution was to distinguish a "formal juridical relationship", governed by the norms of civil law, from a "material juridical relationship", which can contain public duties that outlast the contract.[98] Separating the two leaves private law intact, even though the Court meant to say something important about the law governing private ordering.

Judges have also drawn on the duty of solidarity in reshaping the debt of vulnerable borrowers. In an early decision, the debtor had been kidnapped. Shortly after he was released, his lender began enforcement proceedings on the loan that was then in default. Given the debtor's circumstances and mindful of the threat that the proceedings posed for the debtor's financial life, the lender was ordered to propose more accommodating terms of payment.[99]

The reasoning in that case was later extended to protect debtors who were victims of forced displacement, and later still to debtors who suffered from serious illness and disability.[100] The importance of this protection is heightened in cases of secured debt, because enforcement can result in the loss of the home.[101] In these decisions, judges stress that the principal debt is not being forgiven or cancelled.[102] They add that property sold in the process of debt execution cannot be recovered, unless the third-party purchaser is another financial institution.[103] However,

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[98] *Ibid*; citing *Decision T-597/93*, (CC).
[99] See *Decision T-520/03*, *supra* note 74.
[100] See *Decision T-448/10*, (CC) (forced displacement); *Decision T-170/05*, (CC) (illness); *Decision T-463/17*, *supra* note 74 (illness); *Decision T-058/16*, *supra* note 83 (disability).
[101] See eg *Decision T-170/05*, *supra* note 100; and *Decision T-448/10*, *supra* note 100.
[102] *Decision T-448/10*, *supra* note 100 at sections 10 and 13.
[103] *Ibid* at sections 10 and 17.

the results can still be dramatic. Execution proceedings are stayed, at least a portion of the accrued interest is forgiven, and the existing loan is subject to novation, replaced with a new contract on more forgiving terms of payment.[104]

c) Discretionary duties and a new public–private divide

Throughout these cases, the Court's approach remains flexible. It has attempted to strike sensible balances between competing interests, without articulating much of a theory of liability. Firms that fund healthcare can be obliged to pay the full cost of treatments because their expenses can be compensated. Accrued interest on a loan can be forgiven, but the principal debt cannot be. Sold property cannot be recovered, unless the purchaser is another financial institution. Some of these decisions have been sensibly criticized for producing law that is arbitrary and indeterminate.[105] Occasionally gesturing towards concepts such as "solidarity", "public service" or "public interest" do not suffice as a theory of liability,[106] since these concepts themselves remain broad and unexplored.

This approach resembles discretionary public law remedies. In both cases, a constitutional right must first be in jeopardy and the state's legislative and regulatory framework must be judged inadequate.[107] These novel obligations are then introduced as exceptional, remedial interventions, borne out of extreme need. Consistent with other discretionary remedies, the Court has made little effort to elaborate a doctrinal edifice, or to undertake a deeper transformation of the underlying private law. These norms simply represent case-by-case

[104] *Decision T-463/17*, *supra* note 74 at section 2.3 and Part III; *Decision T-448/10*, *supra* note 100 at section 13.
[105] Fabricio Mantilla Espinosa, "El solidarismo contractual en Francia y la constitucionalización de los contratos en Colombia" (2011) 16 Revista Chilena de Derecho Privado 187 at 208, 216 and 226.
[106] *Decision T-448/10*, *supra* note 100 at sections 11 and 17.
[107] *Decision T-520/03*, *supra* note 74 at section 3.3.1; *Decision T-463/17*, *supra* note 74 at section 2.1; see also López-Castro, *supra* note 73 at 87–88.

responses to deprivation. As with other discretionary remedies, they can appear highly malleable and jettison "adherence to principle" in decrees that resemble "administrative or executive action".[108]

There are some benefits to this flexibility. The debt restructuring cases demonstrate that it can produce generous outcomes for individuals experiencing poverty. Furthermore, its sensitivity to context means that judges can avoid rigid rules that can be over- or under-inclusive, a well-known problem for redistributive norms.[109] There may also be limits to how much judges can theorize redistributions within a system of bilateral justice. The initial deprivation will typically be the product of systemic factors, or the actions of other private actors not before the court. Relying on private litigation to respond to extreme need is destined to be at least somewhat arbitrary.[110] The best a court might do is to insist that the political branches have the first-order responsibility for creating an environment capable of fulfilling everyone's basic needs, but reserving its discretion to impose a non-ideal solution in the event the state fails.

Ultimately, however, flexible remedialism is unsatisfying. The gulf between public and private norms leaves both bodies of law impoverished. For their part, the positive social duties sourced in the Constitution are left without private law's focus on elaborating theories of relationships. The outcome is a jurisprudence that can seem arbitrary and indeterminate, provoking resistance to social rights among local actors.[111]

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[108] On these qualities of more conventional public law remedies, see Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford: Oxford University Press, 2012) at 11; William Fletcher, "The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy" (1982) 91:4 Yale LJ 635 at 644.
[109] Kaplow & Shavell, *supra* note 20 at 674–675; Bagchi, *supra* note 65 at 116 (writing that "it is not at all clear which general rules of contract law consistently disadvantage the socially disadvantaged").
[110] Bagchi, *supra* note 18 at 194–195.
[111] See eg Mantilla Espinosa, *supra* note 105.

Moreover, these constitutional duties are imposed over top private law, instead of helping to transform it. That process of foundational change is neglected when the two bodies of norms are considered and elaborated in separate spheres. In recent Colombian decisions, for instance, judges continue to describe the civil law as a "crystallization of the principle of the autonomy of the will", even though positive social duties now mark many different private relationships.[112] Similarly, the Court has described solidarity as "fulfilling the function of systematically correcting some of the harmful effects that social and economic structures have on long-term political coexistence".[113] The statement echoes a common framing; the "free" market is naturalized and valued, so long as the state curbs its excesses.[114] The statement is also revealing in the way that it fails to acknowledge how those "social and economic structures" are themselves constituted by Colombian private law, and how their continued application risks reproducing injustice. The Court might be able to remedy some of those wrongs through *tutela* proceedings – but only by imposing *ad hoc* duties, and only when fundamental rights have been threatened.

On the substantive front, private law doctrines that could be developed to be more responsive to poverty are stunted, as judges and litigants rely instead on the constitutional duty of solidarity. This public–private division also produced the contrived distinction between a "formal juridical relationship" and a "material juridical relationship". Overall, the approach resembles the modes of thought associated with what Duncan Kennedy has called "the Social", represented by an effort to carve out specific relationships out of the traditional private law (eg labour, tenancy,

[112] *Decision T-463/17*, *supra* note 74 at section 2.2.
[113] *Decision T-520/03*, *supra* note 74.
[114] See eg Rob Hunter, "Critical Legal Studies and Marx's Critique: A Reappraisal" (2021) 31:2 Yale J Law & Hum 389 at 409.

or consumer protection), while leaving its classical core intact.[115] The integrative approach, considered in the next section, presents a more direct challenge to some of the old law's central assumptions.

V. Normative Integration

The two previous approaches neglect to address how property and contract rules distribute resources, create power and entrench inequality. Searching for state-like defendants can lead to a limited class of duty-bearers, and leaves other private actors untouched by the influence of social rights. Flexible remedialism imposes a range of constitutional obligations over top private law, conceiving of the two spheres in separate terms. By contrast, this final approach, normative integration, attempts to reshape the foundations of private law in light of constitutional rights and their aspirations.

This channel of influence can have a transformative impact on private law's values and its modes of reasoning. Conservative legal cultures steeped in a myth of neutrality and formalism begin to favour arguments that are openly political, historically-situated, and that acknowledge legal indeterminacy. Judges increasingly acknowledge the law's consequences on power and distribution. They also rely less frequently on appeals to tradition, and favour instead appeals to change, substantive equality, and orderly transformation. A sharp public–private divide might gradually be replaced by public–private *alignment*, where the redistributive work accomplished by the state dovetails with the shared concern and solidarity promoted by private law. Abandoning the myth of legal determinacy and objective meaning also means that judges must find new ways of legitimizing their (now overtly) political decisions.

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[115] Kennedy, *supra* note 6 at 43; Marija Bartl, "Socio-Economic Imaginaries and European Private Law" in Poul F Kjaer, ed, *The Law of Political Economy: Transformation in the Function of Law* (Cambridge: Cambridge University Press, 2020) 228 at 237.

Substantively, the outcomes can still be modest. The proliferation of constitutional norms and human rights means that traditional liberty interests also receive a constitutional gloss, acting as a bulwark against radical change. Indeed, judicial efforts to balance competing rights sometimes replicate pre-constitutional debates in private law. Sensibly, courts continue to prefer incremental change to sweeping reform. The integrative approach's most important contribution might therefore be discursive. It succeeds in bringing private power and distribution to the surface in a way that has been privileged by critical legal theorists and the recent wave of "law and political economy" scholarship.

Some developments in Colombia reflect normative integration. Early examples include the constitutional effort to reframe property rights and the corporate form as being animated by a "social function", that extends beyond the interests of owners.[116] More recently, the Constitutional Court has brought the duty of solidarity into conversation with concepts such as freedom of contract, good faith and reasonable reliance.[117]

More profound change is evident in a series of contract refusal cases. In the name of solidarity, the Court has scrutinized insurers' reasons for refusing to issue policies, insisting that decisions must be motivated by reasons that are "objective", "reasonable" and "proportionate" relative to the risks involved.[118] In one case, an applicant was denied access to social housing because he could not secure a life insurance policy; his would-be insurer declined to contract on the grounds that he was an asymptomatic carrier of HIV.[119] The Court was incredulous: insurers undertake "commercial activity that will always be risky", and refusing to contract in these

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[116] On the historical development of the social function in the law of property, see Bonilla, *supra* note 87; for companies, see *Constitution of Colombia, 1991*, *supra* note 72 at article 333; and *Decision T-375/97*, (CC) at section 5.
[117] See eg *Decision T-240/93*, (CC) at section 3; *Decision T-603/2010*, *supra* note 58 at section 2.4.3.1.
[118] *Decision T-517/06*, *supra* note 82 at section 3.
[119] *Decision T-1165/01*, *supra* note 83.

circumstances "is discriminatory and does not reflect the purposes that animate the social state of law and respect for human dignity".[120] When a bank later refused to open an account for a person on probation, the Court insisted that banks must also adopt policies that are reasonable and proportionate, responding to real risks to the business.[121] The way that these judgments challenge autonomy and situate private activity within the aspirations of the constitution suggest a more meaningful influence than in the cases considered above.

Integration is the dominant approach in South Africa, which will be the focus of this section. There, the Constitution's transformative aspirations have been invoked to reframe the contract doctrine of public policy, to impose duties of sharing on landowners, and to limit commercial lenders' ability to seize property in execution of debt. The Constitutional Court's reasons reveal a significant discursive shift. Libertarianism, neutrality and formalism have given way to a private law that centers history, power, distribution, and a shared concern for one another.

a) South African private law's transformative mandate

Historically, much of South African private law was encased in a form civil law absolutism. Its modes of reasoning were structured around a "scientific method" of "strict deductive and syllogistic logic", favoured for its ostensible neutrality, universality, and certainty.[122] This "technicist" framing naturalized the law's preference for individualism and freedom from constraint.[123] A rigid version of contractual liberty was thus treated as an

[120] *Ibid* at Part IV.
[121] *Decision T-583/13*, *supra* note 54 at section 3 and 6.2.
[122] AJ Van der Walt, "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" (1995) 11:2 S Afr J Hum Rts 169 at 171–179.
[123] Deeksha Bhana, "The Role of Judicial Method in Contract Law Revisited" (2015) 132:1 SALJ 122 at 123, 126–127; Van der Walt, *supra* note 122 at 178–180 and 193–194; on the naturalism that has spanned market thinking and private law, see Bartl, *supra* note 115 at 234–235.

"axiomatic truth rather than a controversial premise in an ongoing argument".[124] Meanwhile, the right of ownership was cast in absolute terms, winning "any straight contest of power against any other right".[125]

Towards the end of apartheid, South African jurists clashed over the legacy and fate of this classical private law. There were some who argued that Roman-Dutch law could be excised of apartheid's influences and returned to its ideal state – neutral and universal.[126] The view that prevailed preferred to link private law's development to the wider "transformative project of renovating [the country's] legal infrastructure".[127] The supporters of this view were alert to the risk that, if left untransformed, the country's private law would entrench an unjust distributional status quo, and that change was thus needed for the "countless quotidien background rules that structure social and economic life".[128] The transition to democracy had to be matched by a shift in wealth distribution, reversing the disparities in land ownership inherited from apartheid.[129] Property thus occupied a symbolic position in the nation's future. As Gregory Alexander has written, "[w]hether and how South Africa will be able to fully transform itself […] is substantially a matter of property".[130]

The Constitutions' final text thus provides that rights may bind private individuals where it is appropriate, given "the nature of the right and the nature of any duty imposed by the

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[124] Alfred Cockrell, "Substance and Form in the South African Law of Contract" (1992) 109:1 SALJ 40 at 45–46.
[125] Van der Walt, *supra* note 122 at 179.
[126] See eg JM Potgieter, "The Role of the Law in a Period of Political Transition: The Need for Objectivity" (1991) 54 J Contemp Roman-Dutch L 800.
[127] Dennis Davis & Karl Klare, "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 S Afr J Hum Rts 403 at 410–411.
[128] *Ibid*.
[129] AJ Van der Walt, *Property in the Margins* (Oxford: Hart Publishing, 2009) at 2.
[130] Gregory Alexander, *The Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence* (Chicago: University of Chicago Press, 2006) at 12.

right".[131] More importantly in practice, the Constitution recognizes that courts "must" develop the common law – including its Roman-Dutch rules of contract, delict, and property – to "promote the spirit, purport and objects of the Bill of Rights".[132] This indirect influence has been generally preferred.[133] Furthermore, civil law's malleability creates room for gradual, rights-oriented development. As an uncodified body of law, South African civil law has been compared to the common law in its capacity "to sustain development in new directions, to branch out when necessary, to absorb concepts from elsewhere and generally to adapt to the needs of society".[134] Moreover, the project of renovating private law has not been left entirely to the courts. Several post-apartheid statutes were introduced with the specific objective of improving access to secure tenure and housing. This body of legislation includes the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*, *Extension of Security of Tenure Act*, the *Rental Housing Act* and the *Alienation of Land Act.*

South African courts have been criticized for their perceived reluctance to take up this mandate for transformation.[135] Blame is often placed on the lingering influences of South

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[131] Section 8(2) of the *Constitution of the Republic of South Africa, 1996, Bill 108 of 1996*. Although this directive is a source of controversy, in some cases the Bill of Rights is explicit; under section 9(4), for instance, the prohibition on unfair discrimination binds every person.
[132] Sections 39(2) and 173 of *ibid*.
[133] Saunders, *supra* note 8 at 214–215.
[134] The Hon Michael Corbett, "Trust Law in the 90s: Challenges and Change" (1993) 56:2 J Contemp Roman-Dutch L 262 at 264.
[135] Davis & Klare, *supra* note 127; Dennis Davis, "Developing the Common Law of Contract in the Light of Poverty and Illiteracy: The Challenge of the Constitution" (2011) 22:3 Stellenbosch L Rev 845; Sandra Liebenberg, "Socio-Economic Rights Beyond the Public-Private Law Divide" in Malcolm Langford, ed, *Socio-Economic Rights in South Africa: Symbols or Substance* (Cambridge: Cambridge University Press, 2013) 63; Emile Zitzke, "A Case of Anti-Constitutional Common-Law Development" (2015) 49 De Jure 467; Emile Zitzke, "Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development" (2016) 6 Con Court Rev 259; Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Claremont: Juta Academic, 2010) at 361–365; Deeksha Bhana, "The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract" (2015) 26:1 Stellenbosch L Rev 3 at 3, 9–10; Bhana, *supra* note 123 at 123–127, 133–134; Stuart Woolman, "The Amazing, Vanishing Bill of Rights" (2007) 124 SALJ 762; Philip Sutherland, "Ensuring Contractual Fairness and Consumer Contracts After Barkhuizen v Napier" (2008) 19 Stellenbosch L Rev 390; Marius

Africa's conservative legal culture. Dennis Davis and Karl Klare have argued that the old private law's formalism and neutrality are still valued, and indeed preferred by local jurists to the "high profile constitutional decisions" with their "political overtones that strain the legitimacy of judicial power".[136] It is true that substantive developments in South African private law have remained modest, although Davis and Klare may have mistaken its cause. Judicial reticence reflects the fact that traditional values such as freedom and stability of contract have been recast as pillars of the rule of law, human dignity, and economic development.[137] A focus on the need for economic growth has come to the defence of traditional contract and property rules, precisely at the moment when formalism is no longer up to the task.[138] The Constitutional Court also remains cautious. The Court's recurring fears of judicial overreach dovetail with private law's native incrementalism,[139] and with the Constitution's commitment to realize social rights progressively.

Despite these modest outcomes, private law's discourse and modes of reasoning have undergone a substantial transformation. Recent cases bristle with references to the country's

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Pieterse & Deeksha Bhana, "Towards Reconciliation of Contract Law and Constitutional Values" (2005) 122 SALJ 865.

[136] Davis & Klare, *supra* note 127 at 452–453; see also Bhana, *supra* note 123 at 123, 126–127.

[137] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*, [2020] ZACC 13 at paras 80-88 [*Beadica*].

[138] On the importance of contract enforcement and the protection of private property for international development institutions and development rhetoric more generally, see Bartl, *supra* note 115 at 228–229; see also Priya Gupta, "Judicial Constructions: Modernity, Economic Liberalization, and the Urban Poor in India" (2014) 42:1 Fordham Urb LJ 25 at 31–35.

[139] *Carmichele v Minister of Safety and Security*, [2001] ZACC 22, 2001 (4) SA 938 (CC) at paras 36 and 55 (cautioning against "overzealous judicial reform", noting that "the major engine for law reform should be the legislature and not the judiciary", and suggesting that "common law [must] be developed [...] within its own paradigm"); *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another*, [2015] ZACC 34 at paras 39 and 44 (writing that "[t]he principle of separation of powers should thus be respected", and that "fundamental changes to the fabric of the common law and customary law are often more appropriately made by way of legislation").

history, and to the political and distributive dimensions of private law. [140] In an early judgment, Madala J stressed that apartheid-era oppression included domination between individuals, and that the Constitution "must have been intended to address these oppressive and undemocratic practices at all levels […] restructur[ing] the dynamics in a previously racist society".[141] More recent cases draw on the work of American critical legal scholars, such as Duncan Kennedy. Instead of clinging to a worn formalism, the Constitutional Court has accepted that the country's English common law and Roman-Dutch civil law sources will often fail to do justice for modern South Africa, and that judges must therefore create new rules that advance the country's transformative aspirations.[142]

b) Constitutional rights in contract and property law

One of the first sites of influence has been contract law's doctrine of public policy. The two leading cases – *Barkhuizen* and *Beadica* – reveal important shifts in language and reasoning.[143] *Barkhuizen* concerned a time limitation clause in an insurance policy. The policy holder filed a claim for damage done to his motorcycle and the claim had been rejected. Because the insured party failed to serve summons within 90 days, he was deemed by contract to have released the insurer from liability. The time limitation clause had been buried in a dense, unsigned standard form document, and had only been incorporated into the contract by reference.

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[140] See eg *Everfresh Market Virginia v Shoprite Checkers*, [2011] ZACC 30, 2012 (1) SA 256 (CC) at para 71 (Moseneke DCJ recognizing that it is "necessary to infuse the law of contract with constitutional values, including values of ubuntu").
[141] *Du Plessis v De Klerk*, [1996] 3 SA 850 (CC) at para 163 (per Madala J).
[142] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another*, *supra* note 139 at paras 1 and 36 ("The South African common law of contract is as old as the ancient city of Rome. [...] [I]t has proven its value over time, but does not always meet the requirements of a constitutional democracy. Therefore it has to be developed in accordance with the spirit, purport and objects of the Bill of Rights"); see also Dennis Davis, "Where Is The Map to Guide Common-Law Development" (2014) 25:1 Stellenbosch L Rev 3 at 5.
[143] *Barkhuizen v Napier*, [2007] ZACC 5 [*Barkhuizen*]; *Beadica*, *supra* note 137.

The question posed to the Constitution Court was whether this clause was enforceable, even though it appeared to impinge on the constitutional right of access to courts.[144]

The majority upheld the contractual stipulation on grounds that recall a stubbornly neutral private law. Faced with a clause that was – by all appearances – designed to exploit consumers' ignorance, the majority insisted that there was no evidence that the contract "was not freely concluded", that "there was unequal bargaining power", or that "the applicant was not aware of the clause".[145] Likewise, the applicant failed to furnish evidence justifying his non-compliance.[146] The majority went further, and reframed a firm commitment to *pacta sunt servanda* in constitutional language. In its words, the "very essence of freedom and a vital part of dignity" lies in being able to regulate one's own affairs, "even to one's own detriment".[147]

In spite of ample academic criticism,[148] *Barkhuizen*'s conservatism has represented the norm for cases challenging contracts on the basis of public policy.[149] Recently, in *Beadica*, the Court declined to reconsider its approach.[150] *Beadica* concerned the renewal of a commercial lease and franchise agreement for a business supported by South Africa's black economic empowerment initiative. The franchisees had failed to exercise their option to renew the lease by its deadline, and this in turn jeopardized their overall franchise relationship. The franchisees argued that a strict enforcement of the renewal clause would be contrary to public policy. The

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[144] See section 34 of the Constitution of the Republic of South Africa, supra note 131 (providing that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum").
[145] *Barkhuizen*, *supra* note 143 at para 66.
[146] *Ibid* at para 84.
[147] *Ibid* at para 57.
[148] See *supra* note 85.
[149] See also *Afrox Healthcare Bpk v Strydom*, [2002] ZASCA 73; [2002] (6) SA 21 (SCA) ; *Bredenkamp v Standard Bank of SA Ltd*, [2010] ZASCA 75; 2010 (4) SA 468 (SCA) .
[150] *Beadica*, *supra* note 137.

majority disagreed. A merely "subjective view" that contractual terms are "unfair, unreasonable or unduly harsh" would be insufficient.[151] The lease terms appeared in "simple, uncomplicated language", and the franchisees had not explained why they could not comply with the notice requirement.[152] The franchisees were thus left to the same fate as the applicant in *Barkhuizen*.

The majority reasons innovated in the way they contextualize freedom of contract within the country's constitutional aspirations. Theron J accepted that the Constitution's "transformative mandate" will have implications on the "search for substantive justice" in private law.[153] However, the Constitution was interpreted as favouring the strict enforcement of contracts. Clarity and predictability are pillars of the rule of law, a "foundational constitutional value",[154] and *pacta sunt servanda* reflects the "central constitutional values of freedom and dignity".[155] The majority then turned to South Africa's economic development. The "fulfillment of many rights promises made by our Constitution depends on sound and continued economic development of our country", and this growth hinges on "the willingness of parties to enter into contractual relationships".[156] Protecting the "sanctity of contracts" is thus "essential" to achieving South Africa's "constitutional vision".[157] The majority belaboured the point in threatening terms: "our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*".[158] Later in the judgment, Theron J adds that affording preferential treatment to the franchisees might impede equality over the long-term by increasing the risks

[151] *Ibid* at paras 80-81.
[152] *Ibid* at paras 94-95.
[153] *Ibid* at para 74.
[154] *Ibid* at para 81.
[155] *Ibid* at para 83.
[156] *Ibid* at paras 84-85.
[157] *Ibid* at para 85.
[158] *Ibid*.

borne by those who contract "with historically disadvantaged persons who benefit from the National Empowerment Fund".[159]

For their part, the dissenting judgments favoured a more pronounced role for reasonableness, good faith, and *ubuntu*.[160] Froneman J's reasons stress the franchisees' lack of sophistication, the closeness of the business relationship between franchisor and franchisee, as well as the one-sidedness of the notice requirement.[161] Drawing on the work of Duncan Kennedy, Froneman J stressed the distributive and "anti-freedom" consequences of an absolutist approach to freedom of contract in a deeply unequal society.[162]

Both majority and dissenting reasons jettison formalism and any claim to an apolitical private law. In their place stand two approaches rooted in conflicting visions of how the country's constitutional aspirations can best be achieved. Theron J's majority reasons reposition *pacta sunt servanda* as being essential to the country's economic success, demonstrating perhaps how modern development discourse can influence jurisprudence.[163] Although the result marks little change in the substantive law, the judgment's modes of reasoning reveal an important transformation. There is a more open discussion about context and consequence. The Court's doctrinal choices are understood to be contingent. Theron J makes little effort to hide behind tradition, or the presumed universality of private law's principles. Instead, her reasoning mirrors discursive developments in other jurisdictions, where the law's focus has evolved from a classical individualism towards the project of supporting well-functioning markets.[164]

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[159] *Ibid* at 101.
[160] *Ibid* at paras 155-158, 175, 212.
[161] *Ibid* at paras 196-202.
[162] *Ibid* at paras 122 and 143; citing Kennedy, *supra* note 34.
[163] For more on the influence of development discourse on apex court judges in the Global South, see eg Gupta, *supra* note 138.
[164] Kennedy, *supra* note 6 at 64; Marija Bartl, "Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political" (2015) 21:5 Eur LJ 572.

The decisions concerning land and housing are bolder. As before, these disputes have been reframed in constitutional terms. Courts now speak of striking a balance between the constitutional right to property and the right to housing. This process has also been facilitated by recent legislative interventions. But unlike the contract cases, these decisions are influenced by memories of apartheid, and of the land dispossession that was central to it. Property emerges as a symbolically important site for the country's transformative aspirations, lending the Court's judgments a rare confidence and insistence.

The Court seized on this constitutional vision of property in *Port Elizabeth*, an early case which I first discussed in Chapter 2.[165] The Court was tasked with deciding whether a municipality's proposed eviction of some 68 people from privately-owned land was "just and equitable" under the terms of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* ("*PIE*"). According to Sachs J, *PIE* (and the social rights that inspired it) infuse "elements of grace and compassion into the formal structures of the law" ,[166] and reposition "[p]eople once regarded as anonymous squatters" as individuals "entitled to dignified and individualised treatment".[167] Together, they are rooted in a "constitutional vision of a caring society based on good neighbourliness and shared concern", and imbue property rights "with a communitarian philosophy".[168] Sachs J rooted this vision of property as an appropriate response to South Africa's history. Apartheid-era law had given a legal "imprimatur to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations".[169] For the country's black population, "dispossession was nine-tenths of the law".[170]

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[165] *Port Elizabeth Municipality v Various Occupiers*, [2004] ZACC 7, [2005] (1) SA 217 (CC) .
[166] *Ibid* at para 37.
[167] *Ibid* at para 13.
[168] *Ibid* at para 37.
[169] *Ibid* at para 9.
[170] *Ibid*.

Roman-Dutch civil norms then legitimized, in a facially neutral way, the consequences of this institutionalized racism.[171]

Constitutional rights call for a different approach. The Court's task is not to privilege certain rights over others "in an abstract and mechanical way", but rather to strike a balance sensitive to the various interests featured in any particular case.[172] Sachs J recognized that judges cannot undo systemic wrongs, but they can "soften […] injustice" through a "reasonable application of judicial and administrative statecraft".[173] *Port Elizabeth* thus introduced a requirement for municipalities to engage respectfully with occupiers, possibly through the assistance of a mediator, before seeking expulsion.[174] Eviction was refused in that case because the occupiers had lived on the lot for a lengthy period and would otherwise be homeless, the lot had no other use, and the municipality had engaged in no sincere effort to engage with the community and propose a viable alternative.[175]

Judges have been comfortable with this kind of language – and extending these kinds of protections – even in the absence of legislation. The Court extended *Port Elizabeth*'s model of judicial oversight and respectful engagement to sales in execution. In *Jaftha,* the Court confirmed that a person's home could be sold in execution of a debt – even a modest one – but imposed a requirement of judicial oversight and proof of good faith engagement between creditor and debtor.[176] Similar requirements were later extended to proceedings to enforce a mortgage bond in *Gundwana*.[177] The majority resisted the conclusion that mortgage debtors have

[171] *Ibid* at para 10.
[172] *Ibid* at para 23.
[173] *Ibid* at paras 29 and 38.
[174] *Ibid* at para 61.
[175] See summary of reasons in *ibid* at para 59.
[176] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*, [2004] ZACC 25, [2005] (2) SA 140 (CC) .
[177] *Gundwana v Steko Development CC and Others*, [2011] ZACC 14, [2011] (3) SA 608 [*Gundwana*].

somehow accepted the risk of losing their secured property.[178] Although execution of mortgage bonds is "part and parcel of normal economic life", courts and creditors should first consider whether there are reasonable alternative measures of satisfying the debt that avoid the "drastic consequences" of depriving the poor of their homes.[179]

In *Blue Moonlight,* the Court appeared to recognize a positive duty on landowners to accommodate vulnerable occupiers while municipalities work to identify an alternative site.[180] Eviction proceedings had been brought to relocate some 86 unlawful occupiers from dilapidated commercial premises in the City of Johannesburg. The occupiers had taken shelter on the property for a meaningful period of time, and Blue Moonlight had been aware of their presence when the property was bought. These families would be rendered homeless following eviction, and the property was only intended commercial purposes.[181] The Court accepted that an owner "cannot be expected to provide free housing for the homeless […] for an indefinite period", although he might owe patience and "accept that the right to occupation may be temporarily restricted".[182] The eviction order was delayed to give the impleaded municipality time to accommodate the community on an alternative site.[183]

The Court has also had the opportunity to expound on this vision of constitutionalized property in cases concerning the *Extension of Tenure Security Act* (*"ETSA*"), which protects the

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[178] *Ibid* at paras 42-49.
[179] *Ibid* at paras 53-54.
[180] *Blue Moonlight*, *supra* note 67.
[181] *Ibid* at paras 39-40; in another case, the owner was an individual who invested a portion of his pension in the occupied property, and the Court was accordingly more favourable to his position: *Occupiers of Erven 87 and 88 Berea v De Wet NO and Another*, [2017] ZACC 18, [2017] (5) SA 346 (CC) [*Erven*].
[182] *Blue Moonlight*, *supra* note 67 at para 40.
[183] *Ibid* at para 100; for similar judgments, see *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others*, [2011] ZACC 36, [2012] (4) BCLR 382 (CC) ; *Occupiers of Portion R25 of the Farm Mooiplaats 335 JR v Golden Thread Ltd and Others*, [2011] ZACC 35, [2012] (2) SA 337 (CC) .

tenure of tenant-farmers. *Molusi* interpreted *ETSA* as a response to property law's tendency to "entrench unfair patterns of social domination and marginalisation of vulnerable occupiers".[184] Ownership rights – no longer absolute – have to be balanced against the "genuine despair of our people who are in dire need of accommodation".[185] In *Baron*, the Court added that in the absence of a breakdown of the employment relationship, landowners have a duty to assist evicted tenants to find alternative land – or, exceptionally, to provide suitable housing themselves.[186] And in *Daniels*, the Court concluded that where *ESTA* occupiers must renovate their dwelling to live with dignity, the landowner or manager's consent is not required.[187]

Daniels showcases the extent to which property discourse has shifted. Ms. Daniels, a domestic worker and single parent, resided in a home with a leaky roof, no ceiling, and a lack of running water and wash basin. The parties to the dispute all agreed that the dwelling was unfit for habitation. She had been willing to pay the costs of renovating her home, but could not legally proceed without the consent of the property manager, which was refused. She applied to the courts for permission to proceed notwithstanding this absence of consent, but these motions were dismissed at all levels. Ms Daniels was only successful before the Constitutional Court.

Madlanga J began his reasons by reciting the words of an "old man […] at a community meeting" in Eastern Transvaal: "[O]ur purpose is the land […] [W]hen the whites took our land away from us, we lost the dignity of our lives".[188] Madlanga J then recounted how widespread dispossession of land "was central to colonialism and apartheid", and that laws were introduced

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[184] *Molusi and Others v Voges NO and Others*, [2016] ZACC 6, [2016] (3) SA 370 (CC) at para 39 [*Molusi*].
[185] *Ibid*.
[186] *Baron and Others v Claytile (Pty) Limited and Another*, [2017] ZACC 24 at para 37.
[187] *Daniels v Scribante and Another*, [2017] ZACC 13, [2017] (4) SA 341 (CC) at paras 27-36, 61-62 [*Daniels*].
[188] *Ibid* at para 1.

to favour white farmers, creating for them a "pool of cheap labour" dependent "on employment for survival".[189] Black South Africans were subjected to "untold cruelty and suffering".[190] This history contextualizes *ETSA* and the constitutional rights that inspired it.

Froneman J, one of the Court's few white judges, wrote stirring concurring reasons. Writing from a deep "sense of shame", he called for an "honest and deep recognition of past injustice", "acceptance […] of the consequences of constitutional change" and, more fundamentally, a "re-appraisal of our conception of the nature of ownership and property".[191] His reasons go on to reframe the dispute in personal terms: "For many of us who grew up on farms […] the difference between our privileged lifestyle and those of the people who lived and worked on the farm was merely natural. *We* and *they* were *different*".[192] That injustice is "nowadays not easily denied, but rather avoided".[193] The central task for South African jurists is thus to question "the very foundations upon which the current distribution of property rests",[194] since "regulatory restrictions […] cannot do all the transformative work that is required".[195]

For Froneman J, absolutist approaches to ownership must be discarded. They reflect an outdated European response to the "struggle between the modern civil law and feudal law, as well as the socio-political struggle against feudal oppression".[196] Concerns that a redistributive property law might inefficient had to likewise be rejected. In his estimation, the conditions for efficient outcomes are absent from South Africa, which is marked by a variety of market and

[189] *Ibid* at paras 14-16.
[190] *Ibid* at para 18.
[191] *Ibid* at para 109.
[192] *Ibid* at para 116.
[193] *Ibid* at para 117.
[194] *Ibid* at para 136; citing Van der Walt, *supra* note 129 at 16.
[195] *Daniels*, *supra* note 187 at para 136; citing Van der Walt, *supra* note 129 at 16.
[196] *Daniels*, *supra* note 187 at para 134.

government failures.[197] Moreover, poverty and inequality prevent "citizens from not only enjoying the benefits of that efficiency, but from protecting their basic rights".[198]

c) Discursive transformations

Although modest in result, these decisions reveal a few critical transformations in private law's modes of argument. Most obviously, contract and property law have become politicized. Their rules are often situated within the country's constitutional aspirations. It is now common for judges to accept, as Theron J did in *Beadica*, that the Constitution's "transformative mandate" will have implications on the "search for substantive justice" in private law.[199] Judges are openly sensitive to the ways that law can constitute private power and cement inequality. The "old law" of property is remembered for entrenching "unfair patterns of social domination and marginalisation of vulnerable" groups. [200] The majority in *Pridwin* likewise seized on contracts for schooling as important sites where parties could "perpetuate inequality" and were therefore important spaces for the "transformation of private relations".[201] In *Sarrahwitz*, Mogoeng CJ spoke to how difficult it is for homeless persons to maintain their sense of self-worth, having to subject themselves to the "mercy of any landlord, relative or friend".[202] Writing extra-judicially, judges have been equally blunt. Madlanga J suggested recently that "if we refuse to impose human rights obligations on private individuals for fear of interfering with their autonomy, we

[197] *Ibid* at paras 140-142.
[198] *Ibid* at para 142.
[199] *Beadica*, *supra* note 137 at para 74.
[200] *Molusi*, *supra* note 184 at para 39.
[201] *Pridwin*, *supra* note 49 at paras 129, 131.
[202] *Sarrahwitz v Maritz NO and Another*, [2015] ZACC 14, [2015] (4) SA 491 (CC) at para 42 [*Sarrawitz*].

risk maintaining a perverse status quo which entrenches a social and economic system that privileges the haves, mainly white people".[203]

The judges of the Constitutional Court do not attempt to hide judicial power behind formalism's myth of legal determinacy. Instead, the Court now regularly asks what are the "underlying reasons" behind the traditional rules, whether they offend the "spirit, purport and object of the Bill of Rights", how the civil law could be developed, and what the "wider consequences of the proposed change" might be.[204] Judges also rarely invoke the authority of tradition. The old law's legacy is instead appreciated in mixed terms. Roman-Dutch civil law has "proved its value over time", but it also "evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination, sexism" and, of course, apartheid.[205] The formalist tradition represents an important part of this legacy, and post-apartheid legislation has been framed as a deliberate response, infusing the law with "elements of grace and compassion".[206]

This constitutionalized private law does not supply precise answers. Instead, social rights and their transformative aspirations provide a new language within which many different arguments can be developed.[207] They offer a "useful and challenging hook upon which to hang a critical post-apartheid debate about reform, development, stability and change".[208] This is most

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[203] Mbuyiseli Madlanga, "The Human Rights Duties of Companies and Other Private Actors in South Africa" (2018) 29 Stellenbosch L Rev 359 at 364 and 368; see also Dikgang Moseneke, "Transformative Constitutionalism: Its Implications for the Law of Contract" (2009) 20:1 Stellenbosch L Rev 3 (writing that "private power cannot be immune from constitutional scrutiny [...] particularly so [...] when private power approximates public power").
[204] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another*, *supra* note 139 at para 38.
[205] *Ibid* at paras 1 and 36.
[206] *Port Elizabeth Municipality v Various Occupiers*, *supra* note 165 at para 37.
[207] This is the quality that Duncan Kennedy attributes to modes of legal thought: Kennedy, *supra* note 6 at 67.
[208] Van der Walt, *supra* note 129 at 9.

obviously true regarding the place of efficiency analysis. In *Beadica*, Theron J defended the sanctity of contract on the grounds that it would, over time, increase the aggregate wealth, freeing vulnerable South Africans from poverty.[209] This argument reflects a longstanding trend of framing economic efficiency as a neutral value, since wealth maximization presumably leaves everyone better off.[210] Justifying the traditional contract rule on the grounds of efficiency also mirrors the shift in perspective – noted in other jurisdictions – from a naturalized view of private law to one that sees private law as instrumental in supporting well-functioning markets.[211] Froneman J preferred a more critical position. In *Beadica*, he stressed the exploitative consequences of freedom of contract.[212] He had gone further still in *Daniels*, reasoning that efficiency concerns should be excluded from the analysis. In his view, market failures and steep inequality would conspire to deny poorer South Africans the benefits of that greater wealth.[213]

These arguments share the common reflex of recasting private law in light of constitutional aspirations. Contract and property law are embedded in a "constitutional vision of a caring society based on good neighbourliness and shared concern".[214] Even cases that deny assistance, as *Beadica* and *Barkhuizen* did, at least attempt to justify their outcomes from the vantage point of the vulnerable. Private law is positioned as an important space for transformation, one that complements public efforts to lift up individuals experiencing poverty.

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[209] *Beadica*, *supra* note 137 at paras 82-84.
[210] See eg Britton-Purdy et al, *supra* note 7 at 1800, 1813–1815.
[211] Bartl, *supra* note 115 at 239–240.
[212] *Beadica*, *supra* note 137 at paras 122 and 143; citing Kennedy, *supra* note 34.
[213] *Daniels*, *supra* note 187 at paras 140-142.
[214] *Port Elizabeth Municipality v Various Occupiers*, *supra* note 165 at para 37.

Its approach attempts to align all sources of law,[215] and acknowledges that regulation "cannot do all the transformative work that is required".[216]

In embracing arguments that are openly political, the Court has also avoided the "hermeneutic of suspicion".[217] This style of reasoning sees lawyers work to "to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology".[218] Recent decisions in South Africa are beyond the innocence of an apolitical private law. Their disagreements are instead framed as political values and contingent policies.

In contrast to the flexible remedialism considered the previous section, the Court has done more than layer a set of communitarian norms over top the foundations of a classical private law. Instead, the effort is integrative, and sees judges work to unearth and critique the politics of the old law. Thus, Froneman J's concurrence in *Daniels* argued that an absolutist approach to ownership represented a specific European response to the struggles against feudal oppression, and that the transformation of South Africa requires jurists to question the foundations of "the current distribution".[219] This kind of reasoning also marks a departure from the modes of legal thought that have characterized "the Social", where efforts to carve out specific redistributive areas of private law left a classical core intact.[220]

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[215] AJ Van der Walt, "Property Law in the Constitutional Democracy" (2017) 28:1 Stellenbosch L Rev 8 at 23.
[216] *Daniels*, *supra* note 187 at para 136; citing Van der Walt, *supra* note 129 at 16.
[217] Duncan Kennedy, "A Political Economy of Contemporary Legality" in Poul F Kjaer, ed, *The Law of Political Economy: Transformation in the Function of Law* (Cambridge: Cambridge University Press, 2020) 89 at 89.
[218] *Ibid*.
[219] *Daniels*, *supra* note 187 at paras 134-136; citing Van der Walt, *supra* note 129 at 16.
[220] Bartl, *supra* note 115 at 237; Kennedy, *supra* note 6 at 43.

Substantive outcomes, however, trend towards minimal to modest redistributions. The Court appears to be suggesting that although every person can be made responsible for contributing to South Africa's transformative project, no individual can be made fully responsible for lifting another up to the place they would occupy under a just distribution. Described in these terms, this approach resembles Hanoch Dagan and Avihay Dorfman's calls for a private law animated by a mutual respect for one another's "self-determination and substantive equality".[221] In their view, these kinds of just relationships include limited duties of "affirmative interpersonal accommodation", including in cases of poverty.[222] However, this positive duty must remain sensitive to context, and can never be excessive.[223] Otherwise, it would unduly undermine the autonomy of the defendant, and create "interpersonal subordination".[224] Importantly, these obligations are capable of reaching every member of the community, and are rooted in a theory of relationships – one that does not hinge on the extent to which the defendant resembles the state.

d) Radical change and the threat to legitimacy

The integrative approach also entails important risks. By calling for a systemic audit of private law rules, it holds out the possibility of uprooting much of the settled law. By shedding the myth of a neutral, determinate, and apolitical law, it also courts a legitimacy crisis for the judiciary. In South Africa, the first risk has been mitigated by constitutional design, and the second by the Court's artful reliance on historical narrative in its reasoning.

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[221] Hanoch Dagan & Avihay Dorfman, "Just Relationships" (2016) 116:6 Colum L Rev 1395 at 1397; for similar or compatible theories of sharing, particularly in property law, see Gregory Alexander, "The Social-Obligation Norm in American Property Law" (2009) 94 Cornell L Rev 745; and Dyal-Chand, *supra* note 34.
[222] Dagan & Dorfman, *supra* note 221 at 1416–1420, 1451–1455.
[223] *Ibid* at 1423–1424.
[224] *Ibid* at 1423–1424, 1455.

On the first point, there are several constraints that limit the extent to which private law could be rapidly overhauled. Indeed, the dominant academic view in South Africa is that its jurisprudence has not gone far enough, fast enough.[225] For one, the proliferation of human rights has allowed competing interests to receive a constitutional gloss. The right of access to housing gets balanced against the right to property, for instance. Various rights can even conflict in ways that replicate well-known debates native to contract or property law. Judges may also disagree on the best path for realizing social rights, as *Beadica*'s debate over the sanctity of contract demonstrates. Human rights may provide a new language and points of emphasis, but it does not offer a clear ideological agenda in private law. The result is a modest path that accepts the imperative of redistribution without being overly onerous.

Institutional self-restraint and private law's traditional incrementalism also play a role in limiting change. Judges are sensibly hesitant to overturn long-settled precedents, displace legislative norms, or to introduce far-reaching and unpredictable changes. The "inherently preservative nature" of the general law, which is developed only incrementally, must be balanced against the Constitution's "mandate for the transformation of society".[226] The Court's reasons frequently refer to the need to avoid "overzealous judicial reform", and insist that sweeping changes must be made by legislation.[227] Judges speak of their role in modest terms; they engage

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[225] See eg Davis & Klare, *supra* note 127; Bhana, *supra* note 135 at 9.

[226] Davis, *supra* note 142 at 5 (describing the "tension between the inherently preservative nature of the common law, with the central premise being that this body of law is changed in incremental steps [...] and the mandate for the transformation of society and hence the legal underpinnings thereof"); Saunders, *supra* note 8 at 191; Christopher Roederer, "The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy" (2006) 37:2 Colum HRLR 447 at 465.

[227] *Carmichele v Minister of Safety and Security*, *supra* note 139 at paras 36 and 55 (cautioning against "overzealous judicial reform", noting that "the major engine for law reform should be the legislature and not the judiciary", and suggesting that "common law [must] be developed [...] within its own paradigm"); *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another*, *supra* note 139 at paras 39 and 44 (writing that "[t]he principle of separation of powers should thus be respected", and that

in the "reasonable application of judicial […] state craft",[228] balancing "resourcefulness and restraint".[229] Judicial discipline also reflects the Constitution's aspirations to balance transformation with order and stability, the conflicting cores of transformative constitutionalism.[230] In South Africa, striking the right balance between upholding vested interests and promoting restitution and redistribution was a central challenge for its peaceful transformation from apartheid.[231] That test has evidently resurfaced in post-apartheid litigation.

The last constraint is procedural. Only certain kinds of questions can be litigated and cases tend to target one narrow area of law at a time. In an early decision, Froneman J recognized that it would "probably take generations to correct the imbalance" inherited from apartheid, since development of the law by the courts "is by its very nature dependent on litigation" and therefore slow.[232] It can also take time for legal actors to become comfortable with new modes of reasoning. It took the Constitutional Court over two decades to get to decisions as rhetorically ambitious as *Daniels*.

The Court thus addresses these capacity concerns with a familiar blend of modesty and incrementalism. It has responded to the legitimacy concern by turning to history and narrative. This narrative notably locates property as a privileged site where the country can transition from a bleak past of land dispossession, towards one marked by a caring and substantively equal community. In *Port Elizabeth*, Sachs J contextualized this constitutional vision of property as a response to apartheid's history of land dispossession.[233] In *Sarrawitz*, Mogoeng CJ recalled how

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"fundamental changes to the fabric of the common law and customary law are often more appropriately made by way of legislation").

[228] *Port Elizabeth Municipality v Various Occupiers*, *supra* note 165 at paras 29 and 38.

[229] *Beadica*, *supra* note 137 at para 76.

[230] Karl Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14 SAJHR 146 at 153.

[231] Van der Walt, *supra* note 129 at 6.

[232] *Gardener v Whitaker*, [1994] (5) BCLR 19 (E) R at at 30G-32C.

[233] *Port Elizabeth Municipality v Various Occupiers*, *supra* note 165 at para 9.

countless South Africans have suffered the "painful and demeaning experience[] […] [of] not having a place they could truly call home".[234] The country's "painful history abounds with incidents of atrocious forced removals and heartless evictions", and "no vulnerable person who has tasted what it means to have a place they can truly call home should be deprived of it without justification".[235] Madlanga J returned to this past marked by dispossession, cruelty and domination in *Daniels*.[236]

This turn to history has a clear substantive dimension. The Court is centering the politics of private law and contextualizing its rules in a society marked by deep, historic inequality. Judgments like *Port Elizabeth* recognize how an ostensibly neutral private law, applied in such a society, can reproduce and exacerbate these inherited injustices. Some of these judgments also suggest – as scholars have elsewhere – that the value of autonomy and a classical private law depend on a relatively just background distribution.[237]

History has an important legitimizing function as well. It serves to connect developments in property law – which may well be controversial – to the country's collective commitment to peaceful transformation – which should not be. As Paul Kahn has persuasively argued, judgments are most compelling when they draw on these kinds of "broad narrative accounts" that give order to a country's "social and political life", and that connect the law to a people's perspective on themselves, their community and their history. Rooting decisions in this kind of collective self-perception also encourage citizens to see themselves in the judgment, lending the Constitutional Court valuable charismatic authority and a claim to democratic legitimacy.[238] The

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[234] *Sarrawitz*, *supra* note 202 at para 1.
[235] *Ibid* at para 42.
[236] *Daniels*, *supra* note 187 at paras 14-18.
[237] See recently, Dagan, *supra* note 30 at 23 and 244.
[238] Paul Kahn, *Making the Case: The Art of the Judicial Opinion* (New Haven: Yale University Press, 2016) at 58 and 76.

law is also attractively presented "in the image of energy",[239] with an ethic of community ousting a rigid autonomy that helped perpetuate injustice. As Pierre De Vos identified early on in the Court's public law jurisprudence, South African judges are drawn to arguments centered around such a "grand narrative" in order to compensate for the absence of objective constitutional meaning, and an increasingly blurred boundary between law and politics.[240]

VI. Conclusion

This Chapter has considered how social rights can influence private law. I have argued that the shape of this influence can vary considerably, depending on how courts approach the public—private divide. Denialism favours a rigid distribution of labour, leaving social rights out of private relations. The search for state-like defendants delineates a group of individuals and entities who are capable of bearing public duties, while reifying "normal" economic spaces that are free from social rights' redistributive tendencies. Flexible remedialism favours practicality at the expense of legal doctrine, and avoids confronting the elements of private law that can entrench poverty and inequality. Most ambitiously, the integrative approach is devoted to the slow and difficult work of unearthing the private law's politics, and reshaping its modes of reasoning. Although particular jurisdictions tend to favour some methods over others, these choices will not just be a function of constitutional norms or ideology. Legal culture and the incentives created by local procedure can be just as determinative.

This Chapter has generally favoured normative integration, a position I build on in the next Chapter. This approach holds out the potential of centering private law's role in entrenching

[239] For more on the aesthetics of judgments and the various ways law can be cast, see Pierre Schlag, "The Aesthetics of American Law" (2002) 115 Harv L Rev 1047 at 1051–1052.
[240] Pierre De Vos, "A Bridge Too Far? History as Context in the Interpretation of the South African Constitution" (2001) 17:1 SAJHR 1 at 3–8.

poverty and inequality, and of fostering relationships animated by a spirit of shared concern. Contrary to what has been argued by critics such as Roberto Gargarella and Samuel Moyn, integrative approaches demonstrate that social rights can have an important role to play in the transformation of economic relationships. They also center private law as an important site to build social rights' critical and substantive vision.

Chapter 6:
Two Paths for Realizing Social Rights

I. Introduction

This Chapter argues that courts should take different paths for realizing social rights in public law and in private law. For public law litigation, I defend an approach which is process-oriented, and substantially de-politicized. I center the judiciary's role in confronting institutional failure and in building a state's rights-respecting capacities – and not, as is perhaps more conventional, as a guarantor of constitutional rights. I also distinguish this model from its peers, and notably theories of judicial dialogue. By contrast, in "private" law, I argue in favour of more substantive and ideological interventions. Courts should engage in the gradual and ambitious

work of integrating constitutional aspirations into areas such as contract and property law. This approach is characterized by a substantial erosion of the public-private divide, by its comfort in imposing positive duties on individuals and legal persons, and by its attempt to integrate constitutional aspirations into private law's values and its modes of reasoning. On my reading, "integration" is preferable to the alternatives currently championed in the scholarly literature. The resulting divergence in approach between public and private suggests that private law has an important – and under-appreciated – role in nurturing social rights' critical political potential.

My focus here is on the fulfillment of the positive dimensions of social rights. These approaches to enforcement are not necessarily appropriate for claims where the state is alleged to have actively limited or violated social rights. I am also concerned with articulating a baseline approach, a minimum threshold that judges should enforce. Suggesting that this threshold represents a baseline means that courts may wish to go further, without it necessarily being wrong to do so.

These enforcement philosophies require a few shifts in lawyers' thinking. The first is a need to reframe the relationship between rights and the role of judicial enforcement. I stress the need to free our understanding of rights from the narrow limits of what judges order as a remedy. Distinguishing right from remedy is important as a matter of conceptual clarity, but it also has implications for rights' transformative potential. The second shift is towards a more layered understanding of the different – and potentially conflicting – dimensions of constitutional transformation. "Transformation" is better understood as being elaborated across different sites, at different times, and animated by different political visions. These dimensions of transformation are often in tension, and this potential for conflict helps explain courts' slow and chequered success.

This Chapter is structured as follows. I begin by explaining why a divergence in approaches between public and private is appropriate. Next, I describe what I mean by "institutional support". I identify examples, set out a defense of this general orientation, and I contrast institutional support against other ways of conceiving of judicial enforcement. After that, I repeat this exercise for the private law project of "normative integration". Later still, I insist on the importance of divorcing right from remedy and for reframing the relationship between rights and the judicial contribution. Last, I suggest that this approach to social rights enforcement requires a more layered understanding of the dimensions of transformation.

II. A brief word on the value of diverging approaches between public and private

In this Chapter, I defend approaches to realizing social rights that differ considerably across public and private litigation. The approach for private law politicizes judicial interventions in important ways. By infusing private law with the values and aspirations of social rights, judges would be expected to surface conversations about power, history, just distributions, and policy consequences.

By contrast, in litigation against the state, I argue in favour of an approach that is less ideologically strident. I suggest that judges should focus on the effort of offering institutional support, and building government's rights-respecting capacities. The mode of enforcement centers questions of process. Most prominently, these include: Was the decision-making process sufficiently-well informed and deliberative? Did state officials treat the needs and concerns of the vulnerable with respectful attention? Were existing government programs adequately financed, coordinated, and implemented? A focus on process allows judges to make a meaningful contribution to the rights project without wading into overtly political debates on fundamental, distributive issues.

It is worth explaining why such a difference in approach is appropriate. Private law emerges as a better site for ideologically-driven judicial interventions. Courts have a lighter footfall in this area. Their reform of the general, "background" rules can typically be displaced by subsequent legislation. Furthermore, in nearly all common law jurisdictions and in many civil law jurisdictions, courts have an accepted role in developing the general law that applies in the absence of specific enactment. Integrating social rights simply shifts the kind of values and aspirations that guide law's development. Moreover, as I explain below, private law rules already have consequences on both power and distribution, whether decision-makers and members of the public are conscious of them or not. Viewed in this light, normative integration does not represent an arrogation of decision-making authority from other state actors. Instead, it presents courts with a path to exercise their existing powers responsibly, in light of constitutional values and aspirations.

Process-type interventions are also poorly suited for litigation between private parties. In litigation against the state, these kind of procedural or remedial paths have been regularly relied upon in ways that can bolster state capacity. Courts might maintain supervisory jurisdiction over the state's response to an initial order, and may rely on that power to institutionalize a process of stakeholder engagement. Or, a court might order the state to engage respectfully with a vulnerable community in order to achieve some alternative solution that reconciles competing interests. These paths are rarely open in private litigation. Government actors are likely not implicated parties. Furthermore, certain process-related remedies – such as "respectful engagement" – are unlikely to produce much of consequence in the context of a private dispute. State actors are tasked with acting in the public interest, and respectful engagement orders can – and have – encouraged public officials to reflect and revise their own understandings of which

outcome is best. The private actors who fight disputes in court are likely operating on the basis of self-interest. For them, these disputes are typically zero-sum encounters. Demanding that they engage respectfully with a vulnerable, rights-holding group is unlikely to produce a result that is different from the one they were already seeking. Courts will need to balance the relevant interests instead and impose the outcome that appears most appropriate.

The landscape in disputes against the state is meaningfully different. Courts encounter a range of critical legitimacy and capacity-related issues if they attempt to specify the content of social rights and demand that state actors comply. Such orders could also generate sharp political backlash. Furthermore, absent a robust culture of rights dialogue, what courts say may be treated as final, leaving less room for legislative or executive responses. In these circumstances, a more process-oriented approach allows courts to navigate the need to contribute to the fulfilment of social rights while steering clear of these established risks.

It is also worth underscoring what these two paths share. Although they differ considerably in their ideological content, both paths can be understood as responses to a lack of state capacity. In constitutional litigation, aggressive judicial enforcement of social rights has sometimes been understood by scholars as a response to weak state institutions.[1] This Chapter builds on this insight, and argues that court orders should adopt remedial practices that buttress state actors' rights-respecting capacities. The need to prop up weak institutions becomes a central problem animating judicial activity – as opposed to the more traditional need of curbing the exercise of public power and thwarting a potential "tyranny of the majority".[2]

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[1] See eg David Landau, "Institutional Failure and Intertemporal Theories of Judicial Role in the Global South" in David Bilchitz & David Landau, eds, *The Evolution of the Separation of Powers: Between the Global North and the Global South* (Cheltenham: Edward Elgar, 2018) 31.
[2] Madhav Khosla & Mark Tushnet, "Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry" (2022) 70:1 Am J of Comp L 95.

Ideological interventions into private law can be understood as a response to a lack of capacity as well, and for two reasons. First, judges might be more willing to take initiative to reform the general law governing private relations if the legislature is perceived to be lethargic and incapable of mounting responses to established needs. Second, and perhaps more importantly, weak state capacity undermines the division-of-labour arguments that result in distributional and regulatory questions being resolved mostly (if not exclusively) by tax-and-spend programs and public regulation.[3] Lawyer-economists have persuaded many with the argument that it is always more efficient to address matters of distribution through taxation and social programs.[4] However, their argument assumes that the state possesses the requisite level of tax-raising capacity, and that these measures are politically feasible. These premises have been widely challenged, even in countries in the "Global North".[5] If state institutions are perceived to be especially weak, judges might be (rightfully) inclined to begin addressing distributional questions explicitly through private law. That task would quickly become ideologically charged: judges would have to balance the demands made by poverty and inequality with the desire to promote economic efficiency and growth. As the Chapter 5 illustrated, that is precisely the problem confronting South African private law jurisprudence.

III. Focusing on institutional support and capacity building

a) Contours and precedents

Institutional support refers to a variety of court orders which share a common objective – namely, to bolster other state actors' institutional performance and to build rights-respecting

[3] Kevin Davis & Mariana Pargendler, "Contract Law and Inequality" (2022) 107 Iowa L Rev 1485.
[4] See eg Louis Kaplow & Steven Shavell, "Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income" (1994) 23 J of Leg Stud 667.
[5] Lee Anne Fennell & Richard McAdams, "The Distributive Deficit in Law and Economics" (2016) 100 Minn L Rev 1052.

capacity. It builds on other accounts of the judicial contribution centered around capacity building.[6] This basic orientation represents a rejection of traditional forms of rights enforcement, which typically sees judges articulate the content of a constitutional right, and then issue an order which attempts to realize that guarantee. Instead, when courts lend institutional support, judges begin by imagining a humane, rights-conscious and effective state, and then prod public actors towards embodying that ideal.

This pivot is sometimes described as a move from a "substantive" approach to rights enforcement to a "proceduralist" one,[7] but this framing is perhaps insufficiently ambitious. Institutional support presses courts in service of building a caring, well-functioning government – one where public policy is evolving, responsive and data-informed; where social programs are effectively coordinated, financed, and implemented; and where public officials treat the vital needs of the most vulnerable as a top-of-mind concern, with respect, care, and flexibility.

To be sure, these judicial interventions can involve judicial coercion of state actors and officials. The "support" that is imagined here involves some degree of accountability. But it is accountability to a performance ideal, and not to a judicially-defined account of what social rights guarantee. Framing the judicial role as "support" is also a choice that positions other state actors in a more sympathetic light. It assumes that these actors share the desire to reach that performance ideal of the humane, effective, and rights-conscious state, even if they may need a court's intervention to attain it.

Institutional support does not fall neatly within the established categories that remedies scholars rely on to organize the field. The kind of orders that fall under the umbrella of

[6] See especially Khosla & Tushnet, *supra* note 2.
[7] See eg, Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (Cambridge: Cambridge University Press, 2016).

institutional support can occasionally be "weak-form" or "dialogic", and leave the details of a substantive response to other state actors. But they can also assume "strong-form" specific and managerial commands.[8] The manner of judicial intervention matters less than its orienting objective. Similarly, institutional support can be offered either through orders which seek to address structural or systemic rights deprivations, or through individualized relief that only addresses the needs of specific litigants. On occasion, it can also extend beyond courts' remedial activity and shape social rights doctrine.

Many of the examples considered in previous Chapters demonstrate institutional support at work. These examples might be grouped together as follows. First, these interventions might involve compelling policy implementation. A lack of adequate program implementation remains an important structural source of rights deprivations. For instance, in Colombian healthcare litigation, courts once routinely issued orders to deliver benefits promised by the country's national healthcare plan.[9] These orders helped compensate for the insurance industry's refusal to obey its legal duties, and for the government's failure to exercise vigilant oversight.[10] These simple orders effectively worked to close the gap between the law's promise and its practice. They do not subvert or sidestep distributive schemes, but rather enforce them.[11] In a similar vein,

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[8] For a comparison of conversational and managerial remedies, see Katharine G Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012) at 147–155.

[9] Alicia Ely Yamin, Andrés Pichon-Riviere & Paola Bergallo, "Unique Challenges for Health Equity in Latin America: Situating the Roles of Priority-Setting and Judicial Enforcement" (2019) 18 Int'l J for Equity in Health 106 at 107; Alicia Ely Yamin, "The Right to Health in Latin America: The Challenges of Constructing Fair Limits" (2019) 40:3 U Pa J Int'l L 695 at 719–720.

[10] On this particular failing of the Colombian healthcare system, see Alicia Ely Yamin & Oscar Parra-Vera, "Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates" (2010) 33:2 Hastings Int'l & Comp L Rev 431 at 435–436; Yamin, Pichon-Riviere & Bergallo, *supra* note 9 at 106–107; Katharine Young & Julieta Lemaitre, "The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa" (2013) 26 Harv Hum Rts J 179 at 187–189.

[11] Yamin, Pichon-Riviere & Bergallo, *supra* note 9 at 107–108; Yamin & Parra-Vera, *supra* note 10 at 443; for a defense on health rights litigation on this basis, see Benedict Rumbold et al, "Universal Health Coverage, Priority Setting, and the Human Right to Health" (2017) 390 Lancet 712 at 713.

in its displaced internal migrants proceeding, the Constitutional Court of Colombia moved to ensure that existing programs were being adequately financed and could thus be properly implemented. Identifying a "principle of coherence in policy", it directed officials to calculate the amount of financial resources required for full implementation and then ordered those funds to be made available.[12]

A similar function was played by many of the orders in the Indian Supreme Court's right to food proceeding. The Court's initial order worried that food grains in government storage facilities were wasting away and that "mere schemes without any implementation are of no use".[13] Many of its subsequent orders tackled precisely this problem, a topic I canvassed in detail in Chapter 3. Some decisions transformed existing food distribution programs into legal rights by enshrining them in a court order, while others sought to fix coordination breakdowns that impeded policy implementation. The Court later established the Central Vigilance Committee tasked with identifying solutions to reduce corruption in the country's public food distribution system.[14]

Second, institutional support can see courts demand special attention for the vulnerable and greater deliberation to resolve rights deprivations. For instance, South Africa's eviction cases required state actors to engage in "respectful face-to-face engagement" prior to evicting individuals experiencing homelessness.[15] The Constitutional Court laid out instructions: state

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[12] See *Decision T-25/04*, (CC) at sections 8.1 and 6.3.1.1.
[13] *PUCL* Interim Order 20 August 2001.
[14] *PUCL* Interim Orders 12 July 2006 (noting widespread corruption in Public Distribution System and establishing the Central Vigilance Committee), 12 August 2012 (recommending computerization of the Public Distribution System) and 17 September 2012 (cataloguing the 22 reports of the Central Vigilance Committee).
[15] *Port Elizabeth Municipality v Various Occupiers*, [2004] ZACC 7, [2005] (1) SA 217 (CC) ; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*, [2008] ZACC 1, [2008] (3) SA 208 (CC) [*Olivia Road*]; *Residents of Joe Slovo Community, Western Cape v Thubelish Homes and Others*, [2009] ZACC 16, [2010] (3) SA 454 (CC) [*Joe Slovo*].

officials must listen to the concerns of the affected population, engage carefully on all matters of import, and demonstrate sensitivity, flexibility, reasonableness and good faith.[16] The individuals concerned must be treated as dignified, rights-bearing claimants, and a record of proceedings must be kept for reviewing courts.[17] These orders outline an immediate procedure for the communities involved, but they also signal to state actors that they must invest in their rights-respecting administrative capacities for the future.[18] In practice, this process of engagement can also yield practical solutions for the communities affected. Variations on this kind of order can also target structural rights problems. In India's right to food proceeding, the Supreme Court used its regular hearings as a forum to disseminate novel policy suggestions, often requiring state actors to consider and to respond to proposals via affidavit. This iterative process encouraged actors at the state level to be more responsive and dynamic, and to treat vital human needs as top-of-mind concerns.

Third, courts can promote the gathering of vital data and responsive, evolving policy. The Constitutional Court of South Africa has occasionally conceived of the judicial role in these terms. On *Mazibuko*'s authority, courts can step in to ensure that *some* action be taken to protect vulnerable groups, or to regularly revise government policy.[19] Courts might likewise require state actors to review policies that were adopted on the basis of inadequate or incomplete information.[20] For the Constitutional Court, this approach contributes to a "deepening of

[16] *Olivia Road*, *supra* note 15 at paras 14-15 and 19-21.
[17] For a closer examination of this model and its promise, see Sandra Liebenberg, "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32:4 Nordic J Hum Rts 312 at 324–325.
[18] *Olivia Road*, *supra* note 15 at paras 14-15, 19 and 21; Ray, *supra* note 7 at 117.
[19] *Mazibuko and Others v City of Johannesburg and Others*, [2009] ZACC 28, [2010] (4) SA 1 (CC) at paras 66-67 [*Mazibuko*].
[20] *Ibid*.

democracy", to building a certain kind of state.[21] Similarly, in litigation challenging social rights regressions,[22] the Constitutional Court of Colombia occasionally subjects the decision-making process to scrutiny to ensure that the decision was made on the basis of sufficient data and that adequate attention was paid to the policy's impact on the vulnerable.[23]

As with poor program implementation, a lack of reliable data can the source of quotidian rights deprivations. This was understood by the judges in India and Colombia presiding over the right to food and internal migrants cases, respectively. The Constitutional Court of Colombia directed state officials to gather data regarding how many internally-displaced persons there were, where they were located, and what kinds of circumstances they were facing.[24] In a similar vein, it launched a participatory process to construct "rights-based indicators" to measure the effects of government action.[25] The Supreme Court of India also found itself regularly ordering public officials to gather data including, for instance, orders to obtain up-to-date figures on the number of families below the poverty line.[26]

The form the intervention takes may depend on the nature of the problem and its breadth. Some orders provide relief from coordination breakdowns, broken government agencies, or a

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[21] *Ibid* at para 71.
[22] See eg *Decision T-602/03*, (CC); David Landau, "The Promise of a Minimum Core Approach: the Colombian Model for Judicial Review of Austerity Measures" in Aoife Nolan, ed, *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014) 267 at 295–296; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (Oxford: Oxford University Press, 2008) at 208–213.
[23] See the review of the Constitutional Court's regression jurisprudence in Magdalena Correa Henao & Alejandra Osorio Alvis, "Socioeconomic Rights in the Colombian Constitutional Jurisprudence" in Francisca Pou-Giménez, Laura Clérico & Esteban Restrepo-Saldarriaga, eds, *Proportionality and Transformation: Theory and Practice from Latin America* (Cambridge: Cambridge University Press, 2022) 137.
[24] César Rodríguez-Garavito & Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge: Cambridge University Press, 2015) at 3–4.
[25] Rodríguez-Garavito & Rodriguez Franco, *Radical Deprivation on Trial, supra* note 54 at 22.
[26] *PUCL* Interim Orders 3 September 2001, 5 May 2010 and 6 September 2010.

lack of adequate financing. Others address policy inertia and the absence of dependable data. They can also identify issues to address, promote deliberation, and encourage the dissemination of best practices. Others still speak to a lack of a rights culture, and rights-respecting capacity. These orders might compel administrative processes that are respectful and participatory. The breadth and scope of the perceived problem can determine whether individualized relief is sufficient, or whether it ought to be paired with the kind of complex, structural injunctions that can instigate wider change – or both.[27]

b) Justification

Institutional support represents a compelling, baseline approach for remedial interventions. To begin, it offers a valuable contribution to realizing rights by addressing (or compensating for) weak state capacity and a lack of a robust rights culture. A lack of state capacity is at the root of countless rights deprivations.[28] The rights project can be stalled by weak institutions. Responding to this structural problem, ambitious interventions in the tradition of "institutional support" have boasted impressive returns. In *PUCL*, India's right to food proceeding, the Supreme Court engaged in many of the forms of institutional support described above. For instance, the Court issued orders to implement several nutrition-related programs and to ease coordination breakdowns between different levels of government. It also encouraged the dissemination of best practices and the gathering of valuable data. The proceedings are commonly credited with expanding India's Mid-Day Meal program by 61 million children from 2001 to 2006, increasing the recipients' intake of calories, proteins and carbohydrates by 50-

[27] On pairing individual and structural responses, see Kent Roach, "Polycentricity and Queue-Jumping in Public Law Remedies: A Two-Track Response" (2016) 66:1 UTLJ 3.
[28] Landau, *supra* note 1.

100%.[29] The Court played a role in that process without unduly straining its relationships with other state actors.

Next, these interventions can sidestep deep divisions on matters of political economy and distributive justice. Judges do not have to become enmeshed in difficult debates pitting economic growth against redistribution, to take but one important fault line. Instead, these interventions are marked by political commitments that are more moderate, and are more likely to be widely shared. These commitments include an emphasis on effective state action, reasonable information-gathering processes, participation and transparency in public decision-making, heightened attention for individuals experiencing poverty, and public policy that is responsive to changing conditions and to fresh evidence. This political palatability helps in a couple of ways. Its widely shared political commitments can help rally judges to the cause, reducing resistance and dissent within the judiciary. Political palatability reduces the risk of lower courts refusing to earnestly follow a higher court's lead, or of judges of a high court softening or rejecting precedent once the court's political composition has changed.[30] The transformative project depends on a constancy in judicial support – between courts within a country, and across time.

Furthermore, shifting to an approach which is light on political commitments may also encourage compliance, and reduce state actors' resistance to judicial interventions. Controversial apex court rulings on constitutional matters can often provoke backlash, inviting fresh criticism over courts' democratic legitimacy and policy-making capacity. Orders can also be ignored,

[29] Daniel Brinks & Varun Gauri, "The Law's Majestic Equality: The Distributive Impact of Judicializing Social and Economic Rights" (2014) 12:2 Perspectives on Politics 375.
[30] Mark Tushnet has suggested that political backlash to judicial decisions, which can lead to a change in a court's political composition over the long-term, might be considered a species of long-term dialogue: Mark Tushnet, "Dialogue and Constitutional Duty" in Tsvi Kahana & Anat Scolnicov, eds, *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors and Positive Obligations* (Cambridge: Cambridge University Press, 2016) 94 at 65–70.

often with impunity.[31] But, to take just one example, it may be harder for officials to publicly disagree with rulings which essentially oblige them to follow-through on their own plans and policies. Evidence from Colombia suggests that some state actors might even welcome this kind of direction. In 2013, for instance, the national pension regulator asked the Court to find that its various institutional failings constituted an unconstitutional state of affairs, inviting its intervention.[32] Of course, not all orders that fall within the umbrella of institutional support will invite willing compliance. However, one advantage of positioning this intervention as "support" is that it casts courts and other public actors as fruitful collaborators. Rather than relying on a practice of naming-and-shaming wrongdoers, courts might – and in practice occasionally do – present other state actors as earnest (but failing) right-doers.

Institutional support is also more sensitive to judges' legitimacy and capacity limitations than traditional forms of rights enforcement. Courts can avoid dictating precisely how rights are meant to be realized, which usurps policy-making prerogatives from the political branches. They instead shift their efforts to ensuring that governmental activity is performed in accordance with certain principles of good governance. They might also help build governments' rights-respecting capacity, and promote a rights-affirmative culture more generally. That elements of institutional support have already been deployed at different times in South Africa, India and Colombia suggests that judges are at least somewhat comfortable engaging in this kind of work.

Finally, institutional support can also present a more realistic yet coherent vision of the judicial role, signaling its limits to members of the public and rights activists alike. The

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[31] On the general problem of social rights non-compliance, see Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, "Introduction: From Jurisprudence to Compliance" in Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, eds, *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge: Cambridge University Press, 2017) 3.
[32] David Landau, "Choosing Between Simple and Complex Remedies in Socio-Economic Rights Cases" (2019) 69:Supp 1 UTLJ 105 at 115.

transformative constitutions frequently place judges in a central role. Judges' perceived legitimacy can be buoyed by the sense that they represent an institution that can be depended on to deliver the constitution's aspirations for vulnerable communities. However, this faith can slide into frustration when deep transformation fails to arrive, in spite of decades of litigation. Institutional support represents a more modest vision of the judicial role, but it may succeed in setting more manageable public expectations. Clarifying the limits of the judicial role in this way is also helpful for rights advocates. It provides useful guidance for how lawyers ought to organize and frame litigation. It also gives civil society organizations and litigation financiers a clearer sense of which claims are most promising.

To be sure, there are costs to this approach. The turn from substance means that these judicial interventions can be light on ideological vision. Many impactful orders simply facilitate the implementation of government policy. They typically eschew substantive scrutiny and decline to elaborate on what, specifically, these rights might guarantee. This political modesty comes at an added cost: judges risk curbing social rights' critical and ideological potential. Orders that bolster institutional performance can achieve meaningful change for many, but they largely forfeit the effort (or, at least the *judicial* effort) of elaborating what kind of political economy and what kind of distribution is envisaged by the constitution. This particular trade-off suggests a tension in the wider project of transformative constitutionalism, a matter I take up later in this Chapter.[33]

There are other trade-offs in this turn away from substance. Most obviously, it becomes more difficult for vulnerable individuals to claim that social rights guarantee them something.

[33] On the relationship between socio-economic rights and the broader tradition of transformative constitutionalism, see Philipp Dann, Michael Riegner & Maxim Bönnemann, eds, *The Global South and Comparative Constitutional Law* (Oxford: Oxford University Press, 2020).

These individuals are at risk of losing one of the signal virtues of rights – that is, their moral clarity and imperative. For now, it is worth underscoring a related advantage. The procedural turn can help uncouple constitutional rights from the (sometimes narrow) confines of judicial interventions and remedies, because the shape of the intervention is driven by a particular judicial role conception, not by a comprehensive account of the right in question. By uncoupling rights and judicial orders, individuals might be better able to image rights as aspirations, and as invitations to challenge and to rethink the *status quo*. Rights discourse can then grapple with a wider set of socio-economic issues. No longer confined to framing claims for specific resources, those who invoke positive social rights might set their sights on structural features of the economic and legal environment that can produce precarity to begin with. I return to this particular debate in the next section.

Lastly, courts may not have the appetite to engage frequently in the most ambitious forms of institutional support. The dramatic interventions of the Constitutional Court of Colombia in its internal migrant and healthcare cases – which taken together consumed years of the Court's attention and involved hundreds of orders – are said to have left judges without much appetite to re-embark on such ambitious undertakings in the future. The Supreme Court of India has avoided committing itself to marathon proceedings like *PUCL,* its right-to-food case, and has in recent years lurched towards a much more deferential posture. In response, it is perhaps enough to say that there are less demanding forms of institutional support that are available, including simple orders of respectful engagement or strong-form commands to deliver promised benefits to individual litigants. And even though appetite for ambitious structural responses have been dampened, judges have at least shown a willingness to participate in this kind of relief.

c) Distinguishing institutional support from traditional rights enforcement and from judicial dialogue

This approach represents a departure from more traditional forms of rights enforcement, which tend to imagine courts as guarantors of constitutional norms. Applied to social rights, this species of rights enforcement is sometimes expected to look something like judicial managerialism, where judges issue specific, mandatory orders to realize the social right's identified content.[34] The approach I have outlined occasionally contemplates strong-form enforcement, but it does not involve courts assuming authority over the minutiae of state policy. Quite the opposite: it denies judges a role in attempting to fix precise content on rights such as healthcare or housing. Instead, the approach is informed by humility, deference and by an ethic of assistance. That "role conception" was in display at the outset of the *PUCL* proceedings, where the presiding judges noted that, although policy is "best left to the Government", "mere schemes without implementation are of no use", and that public officials might be called on to ensure that food grains which were already rotting and overflowing in public storage facilities be delivered to their intended beneficiaries.[35]

Institutional support also differs from traditional accounts of judicial "dialogue". Mark Tushnet popularized weak-form dialogic remedies in the socio-economic rights literature,[36] and they command a considerable scholarly following.[37] These approaches tend to share the assumption that judicial dialogue with the legislative or executive helps determine the *content* of

[34] Young, *supra* note 8 at 155.
[35] *PUCL* Interim Order, 20 August 2001.
[36] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008).
[37] Rosalind Dixon, "Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited" (2007) 5:3 Int'l J Con L 391; Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012); Young, *supra* note 8 at 147 (labelling the approach "conversational"); see also Rodríguez-Garavito & Rodríguez-Franco, *supra* note 24 (championing "dialogic judicial activism").

constitutional rights. That is, dialogue is positioned as a shared exercise in constitutional interpretation.[38] Institutional support may well promote judicial conversation and debate over the treatment of rights with other state actors, and is in that sense part of the "dialogic" family. However, its ultimate end differs subtly.

This approach does not represent an exercise in constitutional interpretation or of shaping rights' "true" content. It instead begins with a vision of the humane, well-functioning state, and prods actors towards embodying that ideal. Some versions of dialogue imagine judges first deciding cases according to their view of the law, while allowing for subsequent disagreement from the legislative or executive branches.[39] In theory, under institutional support, courts need not even take that first step of articulating the right's content. Meanwhile, unlike weak-form dialogic remedies, institutional support often contemplates the possibility of strong-form commands, including to facilitate implementation and coordination among state actors.

It might instead have more in common with "experimentalist" or "new governance" approach,[40] but here too there are key differences. Experimentalists imagine a process whereby stakeholders are engaged in a process of consultation, information-generation, and deliberation. Rather than completely articulate rights' content, courts set rough normative boundaries for what is desired and attempt to ensure that actors have engaged in a serious and inclusive effort to

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[38] See eg Barry Friedman, "Dialogic and Judicial Review" (1993) 91:3 Mich L Rev 577 at 653 (writing that, under dialogic review, "[c]onstitutional interpretation is an elaborate discussion between judges and the body politic").

[39] Kent Roach puts this point forcefully when he suggests that, under dialogic review, judges "do not dialogue with legislatures. They decide cases according to their view of the law", but those interpretations may subsequently be "limited or overridden by the ordinary legislation of a democratically elected legislature": Kent Roach, "Dialogic Review and Its Critics" (2004) 23 SCLR 49 at 51 and 55.

[40] See notably Charles Sabel & William Simon, "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 Harv L Rev 1016; Alana Klein, "Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights" (2008) 39 Colum Hum Rts L Rev 351.

realize that goal. This process can also be paired with improved standards for measuring an institution's performance.[41] Institutional support is perhaps better thought of as forming part of the experimentalist tradition. It shares the crucial pivot away from attempting to fix precise content to social rights. It likewise stresses the value of engaging stakeholders, generating more reliable information on which to set policy, and improving institutional performance, particularly for public institutions which have persistently failed to achieve their objectives and which are relatively insulated from accountability.[42]

Nevertheless, there remain some differences. As an approach, institutional support depends on an articulation of the human, well-functioning state, which serves as its ultimate lodestar. Furthermore, experimentalists tend to favour downloading some of this work onto a process of stakeholder deliberation. Institutional support contemplates a more active and present role for judges. And while both approaches attempt to "institutionalize [ ] a process of ongoing learning" and policy development,[43] institutional support might also occasionally turn to forms of managerialism for the baser forms of state under-performance, including coordination breakdowns and bureaucratic impasses.

For similar reasons, institutional support is not fully captured by "proceduralist" approaches.[44] The two share a similar pivot away from rights substance and towards matters of process. However, institutional support is perhaps more ambitious in the way it imagines the humane, well-functioning state. It also likes differs in the way it casts other state actors in a fairly sympathetic light, as earnest collaborators who likely share the court's aspirations. It also

[41] Klein, *supra* note 40 at 397.
[42] Sabel & Simon, *supra* note 40 at 1020.
[43] Klein, *supra* note 40 at 397.
[44] As applied to social rights, see notably Ray, *supra* note 7.

remains more open to experimenting with different kinds of orders, including strong-form commands, where doing so is necessary to coerce policy implementation.

IV. Embracing the law that shapes market activity as a site of constitutional change

a) Normative integration

In this section, I turn to the project of promoting social rights through private law. I defend an approach called "normative integration" against other alternatives. Normative integration is distinct from its peers because of its critical posture towards the public/private divide. That divide remains an important structural feature of much of contemporary legal thought – its enduring critics notwithstanding.[45] It rests on a basic distinction between realms that are "public" – which are, in this telling, political, concerned with just distributions, guided by public policy, and marked by the presence of the state – and the realms of the "private" – those ostensibly "natural" spaces, often thought to be apolitical or pre-political, insulated from public values, and marked by the free activity of individuals unconstrained by state regulation.[46]

Integration begins from an understanding that social rights and private law are instead related. Contract and property law can have the effect of denying individuals access to the vital goods and services necessary to sustain a dignified life.[47] Private law also plays an important role in shaping the distribution of resources within a political community, since rules governing

[45] See especially Morton Horwitz, "History of the Public/Private Distinction" (1981) 130:6 U Pa L Rev 1423; Duncan Kennedy, "Stages of the Decline of the Public/Private Distinction" (1981) 130:6 U Pa L Rev 1349.
[46] For a summary of the public/private divide as it is cast in both libertarian and liberal scholarship, see Hanoch Dagan & Avihay Dorfman, "Just Relationships" (2016) 116:6 Colum L Rev 1395 at 1401–1402.
[47] See eg Tushnet, *supra* note 30; Helen Hershkoff, "Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings" in Varun Gauri & Daniel Brinks, eds, *Courting Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) 270.

entitlement and power set the terrain for market activity.[48] Social rights, with their promise of support for the vulnerable, can pose pointed challenges to the ways that contract and property allocate rights and powers.[49]

Normative integration thus contemplates an infusion of constitutional aspirations and values into private law. It identifies areas such as contract and property as important sites of transformative constitutionalism. Integration can proceed by several paths. The process sometimes involves the recognition of novel positive duties, either directly or through a mediating doctrine. For instance, South African property law scholars have contemplated a temporary servitude (or easement) over uninhabited land for members of landless communities.[50] But integration also contemplates an indirect influence, sometimes referred to as a radiating effect.[51] Beyond imposing specific obligations, constitutional values might shape the development and justification of existing rules and principles. General doctrines including public order, good faith, duress and unconscionability might be especially vulnerable to change. This influence works to make private law responsive and accountable to the project of transformative constitutionalism – including its hope to promote substantive equality, dignity, and meaningful

[48] These ideas were at the heart of legal realists' critique of the public/private distinction, and subsequently influenced the critical legal studies movement. See eg: Duncan Kennedy, "The Stakes of Law, or Hale and Foucault!" (1991) 15 Leg Stud Forum 327; Joseph William Singer, "Legal Realism Now" (1988) 76 Calif L Rev 465; citing notably Robert Hale, "Coercion and Distribution in Supposedly Non-Coercive States" (1923) 38 Poli Sci Q 470; and Robert Hale, "Bargaining, Duress, and Economic Liberty" (1943) 43:5 Colum L Rev 603.

[49] Dennis Davis & Karl Klare, "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 S Afr J Hum Rts 403; Philipp Dann, Michael Riegner & Maxim Bönnemann, "The Southern Turn in Comparative Constitutional Law" in *The Global South and Comparative Constitutional Law* (Oxford: Oxford University Press, 2020) 1 at 23.

[50] For a survey on the South African literature regarding property law doctrines promoting access under the Constitution, see AJ Van der Walt, "Property Law in the Constitutional Democracy" (2017) 28:1 Stellenbosch L Rev 8 at 14–15.

[51] Cheryl Saunders, "Constitutional Rights and the Common Law" in András Sajó & Renáta Uitz, eds, *The Constitution in Private Relations: Expanding Constitutionalism* (Utrecht: Eleven International Publishing, 2005) 183 at 186.

autonomy. This influence may also act as a check on private law's libertarian streak, with its emphasis on formal equality and non-interference.

The result can be a meaningful shift in private law's values and its modes of reasoning. I charted similar recent shifts in South Africa in Chapter 5. Legal cultures steeped in myths of legal determinacy and deductive logic instead come to recognize indeterminacy, political values, and historical context. In that sense, integration's influence is meant to be foundational. For that same reason, integration does not necessarily imply change to existing rules – so long as those norms are still justifiable in light of these new, "constitutionalized" modes of reasoning.

Integration is justified by a critical view of the public-private divide. The content of contract and property rights are far from natural or apolitical.[52] Instead, these areas of law are infused with political values and their enforcement depends on state institutions.[53] "Private" law might be recast as a delegation of public power, justifiable only by some genuinely public purpose.[54] Private law can also shape distributions. For property law, every additional "stick" in the owner's proverbial bundle is necessarily a burden on nonowners.[55] Contract law, for its part, shapes bargaining dynamics. It governs the parties' conduct during negotiations, it selects which agreements to enforce, and it imposes some terms and limits.[56] Corporations are likewise constituted by state law – again very much for public purposes – and their internal decision-

[52] Kennedy, *supra* note 48 at 339; Singer, *supra* note 48 at 481; Hanoch Dagan, "The Distributive Foundation of Corrective Justice" (1999) 98:1 Mich LJ 138 at 149–150; Alan Freeman & Elizabeth Mensch, "The Public/Private Distinction in American Law and Life" (1987) 36:2 Buff L Rev 237 at 246; Gerald Turkel, "The Public/Private Distinction: Approaches to the Critique of Legal Ideology" (1988) 22:4 L & Soc Rev 801.
[53] Singer, *supra* note 48 at 483–484; Dagan, *supra* note 52 at 149–150.
[54] Horwitz, *supra* note 45 at 1426; Morris Cohen, "Property and Sovereignty" (1927) 13:1 8.
[55] Dagan, *supra* note 52 at 149–150.
[56] Kennedy, *supra* note 48 at 332–333; Singer, *supra* note 48 at 485–486; Hale, *supra* note 48.

making dynamics are shaped by the same.[57] Normative integration thus takes as its starting point the need to engage with the public values and wider socio-economic outcomes of these areas of law often considered "private".

The process of normative integration does not simply flow in one direction – from public to private. Private law's influence might be perceptible in efforts to nest new duties in theories of private relationships, and to avoid treating all of private law as a mere species of public regulation. That is, lawyers might recognize that areas such as contract law can be responsive to public values, while remaining a relational form of legal ordering. The result might resemble Hanoch Dagan and Avihay Dorfman's framework of the "just relationship", as I suggested in Chapter 5.[58] In a community committed to realizing basic socio-economic guarantees and promoting greater equality, the elbow room that courts have traditionally afforded to parties to pursue their own self-interest at the expense of others might need to be curbed. Private law's mode of social ordering premised on autonomy and an absence of external constraint would no longer be sufficient. Instead, members of such a community should be expected to express some concern and solidarity with the vulnerable. Strangers should be expected to maintain reciprocal respect for one another's dignity, need for self-authorship, and substantive equality.[59] Positive obligations to provide some limited care for the vulnerable might naturally find a place in such a relationship. In South Africa, the Constitutional Court gestures towards this kind of theory of

[57] For a recent and clear articulation of this idea, recent work on shareholder power in the United States has found that shareholder primacy, combined with increased concentration of institutional ownership, has resulted in higher shareholder returns but lower employment and wages: Antonio Falato, Hyunseob Kim & Till von Wachter, *Shareholder Power and the Decline of Labor* (NBER Working Paper w30203, 2022).
[58] Dagan & Dorfman, *supra* note 46.
[59] *Ibid* at 1397.

relationships when it weighs whether property owners might owe individuals experiencing homelessness some temporary right of accommodation on their property.[60]

This process of normative integration does not churn out predetermined results. Instead, it may shift ideas about private law's values, its fundamental concerns, and its modes of reasoning. It might also spark debate over how private law ought to fulfill the constitution's aspirations. There is plenty of room for fundamental disagreements, including on political questions such as the importance of economic efficiency and the relative importance of promoting economic growth versus economic redistribution.[61] These tensions have already emerged in South African decisions and scholarly commentary. Recall that in *Daniels*, Froneman J's concurrence underscored the need to question "the very foundations upon which the current distribution of property rests", and suggested that "regulatory restrictions […] cannot do all the transformative work that is required".[62] He suggests that a new property law is needed – one which responds to constitutional aspirations of socio-economic transformation, as opposed to an inherited European law that responds to memories of feudal oppression.[63] Froneman J also counselled against relying on economic efficiency as a yardstick: the conditions for efficient outcomes were absent from South Africa, and wealth inequalities would likely prevent vulnerable communities from sharing properly in the resulting growth.[64] By contrast, in *Beadica*, the majority stressed its understanding that the "fulfillment of many rights promises made by our Constitution depends on sound and continued economic development of our country", and that such growth might be

[60] See eg *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*, [2011] ZACC 33, [2012] (2) SA 104 (CC) [*Blue Moonlight*].
[61] See eg *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*, [2020] ZACC 13 [*Beadica*] (reasons of Theron J); *Daniels v Scribante and Another*, [2017] ZACC 13, [2017] (4) SA 341 (CC) [*Daniels*] (reasons of Froneman J).
[62] *Daniels*, *supra* note 61 at para 136.
[63] *Ibid* at para 134.
[64] *Ibid* at paras 140-142.

"imperilled" if judges were to soften the demands of *pacta sunt servanda*.[65] The resulting debates can slow the pace of change – and create capacity risks and legitimacy risks for judges – but they likely cannot be avoided.

The integrative process likewise depends on judges having some accepted role in developing private law doctrine. In South Africa this judicial agency is openly acknowledged.[66] Even during apartheid era, judges had some role as elaborators of civil law doctrine, which could "sustain development in new directions" and "adapt to the needs of society".[67] Such judicial agency is less accepted in places like Colombia, where reasoning is still imagined to be a technical exercise in deductive reasoning, applying the country's Civil Code.[68] Integration's promise might be more limited in such places, at least without deliberate effort to reshape accepted modes of reasoning and judges' sense of role.

b) Contrasting normative integration with its peer approaches

This section contrasts normative integration with other approaches to managing the relationship between private law and social rights. It also defends normative integration from recent criticism. Integration is distinct in the way it challenges the public-private divide. Other prevalent approaches maintain this divide in some form or another, failing to take seriously the role that private law plays in shaping economic outcomes.

Most evidently, integration rejects the kind of institutional division of labour which confines "redistribution" solely to the realm of tax-and-spend measures. Such division of labour

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[65] *Beadica*, *supra* note 61 at para 85.
[66] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another*, [2015] ZACC 34 .
[67] The Hon Michael Corbett, "Trust Law in the 90s: Challenges and Change" (1993) 56:2 J Contemp Roman-Dutch L 262 at 264.
[68] Jorge Esquirol, "The Turn to Legal Interpretation in Latin America" (2011) 26:4 Am U Int'l L Rev 1031 at 1032–1036.

arguments have been deployed by lawyer-economists – who stress that it is categorically more efficient to achieve desired levels of distribution through tax-and-spend programs[69] – and liberal philosophers – who contend that out of respect for personal autonomy, duties to treat others with care and concern should fall on the shoulders of the state, not private individuals.[70] Even some business and human rights scholars accept sharp limits on what firms can be required to do, stressing that the "corporation in essentially a private vehicle".[71]

Proponents of normative integration would find these arguments unsatisfying. This kind of distribution of labour can maintain a strident individualism in private law that is contrary to solidarity. It might promote autonomy for those more powerful and well-resourced, but it increases the likelihood of exploitation among those less fortunate. Vulnerable members of a community can also see their ability to pursue self-authorship thwarted by the constant fight to secure their vital needs.[72] Furthermore, the division of labour can result in a legal system lacking normative integrity. It invites a strident libertarianism in private law to co-exist – potentially, and perhaps not sustainably – with redistributive tax-and-spend programs. Notably, by endorsing rugged individualism in private law, the law risks providing rhetorical resources to those who would challenge social redistributive programs.[73] It is also unclear whether tax-and-spend, on its own, ever succeeds in achieving the desired levels of redistribution. Fresh taxes can provoke

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[69] Kaplow & Shavell, *supra* note 4; Louis Kaplow & Steven Shavell, "Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income" (2000) 29 J of Leg Stud 821.
[70] See notably Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at 296.
[71] Barnali Choudhury & Martin Petrin, *Corporate Duties to the Public* (Cambridge: Cambridge University Press, 2019) at 235.
[72] Robert Hale, *Freedom Through Law: Public Control of Private Governing Power* (New York: Columbia University Press, 1952); Hale, *supra* note 48; Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 JL & Equal 69 at 74–79; Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991) 39 UCLA L Rev 295 at 304, 315 and 397.
[73] Hanoch Dagan, "The Utopian Promise of Private Law" (2016) 66:3 UTLJ 392 at 411.

steep resistance, and this political dynamic can produce "distributive deficits".[74] State actors may likewise lack legislative or administrative capacity to implement social programs.

This ambitious integrative project would also reject approaches which confine public duties to entities that resemble the state. This approach takes a suppler view of the public-private divide, and acknowledges that some private entities can occasionally rival governments in their power or in the work they accomplish.[75] There may be good reason to foist additional duties on such firms. However, it would be misguided to rely on state resemblance as the exclusive basis for extending social duties into the private sphere. Doing so would have the effect of reifying the view that there are "normal" commercial spaces that should be free from constitutional values and aspirations. Such a view can lead lawyers to abandon scrutiny of the ways in which law works to deny individuals vital goods and services and shift distributions within a community. Furthermore, the approach is an awkward fit for positive social rights. Some firms can resemble the state either because of their size, their power, or because of the goods and services they deliver. However, firms will always lack the qualities that make the state the ideal site of redistribution: only governments possess the power to represent the collective and to tax individual members for their contributions.

An approach focused on integration would also take issue with relying exclusively on direct horizontal application of constitutional norms. This approach commonly takes the form of imposing positive duties on businesses, subject to reasonable limits offered by a case-by-case

[74] Fennell & McAdams, *supra* note 5.
[75] Jean Thomas, *Public Rights, Private Relations* (Oxford: Oxford University Press, 2015); Jean Thomas, "Our Rights, But Whose Duties? Re-conceptualizing Rights in the Era of Globalization" in Tsvi Kahana & Anat Scolnicov, eds, *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge: Cambridge University Press, 2016) 6.

balancing analysis of competing interests. [76] I termed this approach "flexible remedialism" in Chapter 5. I suggested that it is represented heavily in current Colombian practice, where courts commonly extend a "duty of solidarity" onto individuals and corporations alike. As an approach, it largely leaves the underlying bodies of private and corporate law intact and unchallenged.

Such reliance on direct horizontal application has nevertheless benefited from a recent defense from David Bilchitz. He argues that approaches which prefer a gradual integration of constitutional values reduce rights to mere values, diminishing their "normative force".[77] He also suggests that the process of integration provides no structured reasoning process, obscures rights' moral clarity, [78] and inevitably collapses into direct horizontal application.[79] Responding to this recent, strident criticism provides fruitful space to underscore some of integration's cardinal virtues.

First, normative integration – and its "radiating effect" – allows human rights to catalyze change across a greater field. We cannot forget that human rights sceptics often complain that rights discourse focusses on narrow claims, while neglecting the structural forces that entrench precarity and inequality.[80] Integrating social rights (and their underlying values and aspirations) into private law can lend rights the kind of broad catalytic effect that sceptics claim rights lack. For example, social rights could precipitate shifts in contract doctrines like good faith,

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[76] See especially: David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (Cambridge: Cambridge University Press, 2021) at Chapter 8.
[77] *Ibid* at 111.
[78] *Ibid* at 105–111.
[79] *Ibid* at 105.
[80] See eg Joe Wills & Ben Warwick, "Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse" (2016) 23:2 Ind J Global Legal Stud 629; Roberto Gargarella, "Inequality and the Constitution: From Equality to Social Rights" in Philipp Dann, Michael Riegner & Maxim Bönnemann, eds, *The Global South and Comparative Constitutional Law* (Oxford: Oxford University Press, 2020) 235 at 176; Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge: Harvard University Press, 2018) at 216.

unconscionability, duress, or public order in ways that broadly assist more vulnerable transacting parties.[81] In South Africa, the debates central in *Beadica* (regarding the enforcement of clause requiring notice to renew a lease),[82] or *Barkhuizen* (regarding the enforceability of an exclusion of liability clause in a contract for medical services),[83] could only have occurred once jurists recognize rights' radiating influence. Similarly, social rights could spur changes to directors' and officers' duties towards their corporation; they might be required to take special consideration of the interests of the business' vulnerable constituencies when making decisions on behalf of the company.

This kind of doctrinal reform can have a powerful, indirect effect on economic outcomes and distributions.[84] They extend rights' influence beyond satisfying specific needs in discrete cases, and would work instead toward reshaping the terrain on which market activity takes place. Without fulfilling rights in an immediate way, these developments might work to create an economic environment more conducive to social rights' fulfillment. For this same reason, jurists should not worry that "indirect application" will always collapse into direct, horizontal application. These rights can do a lot of work beyond imposing specific obligations onto specific plaintiffs.

Second, treating rights as values, or as a source of normative influence, does not necessarily diminish their moral weight. If anything, admitting that social rights should guide law's development might *augment* their standing by casting them as central to the private law project, and capable of countering private law's historic insistence on formal equality and

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[81] On the idea that legal discourse and its admitted values can shape downstream doctrinal outcomes, see eg "Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship" (1982) 95:7 Harv L Rev 1669 at 1678–1679.
[82] *Beadica*, *supra* note 61.
[83] *Barkhuizen v Napier*, [2007] ZACC 5 [*Barkhuizen*].
[84] Kennedy, *supra* note 48 at 328–329.

individual autonomy. It might shift prevailing cultures of justification by requiring developments and outcomes to further – or at least be respectful of – the constitution's socio-economic aspirations.

Third, an indirect approach better respects private law's integrity. It incorporates the project of gradually fulfilling rights into the process by which private law is incrementally developed. An attempt might be made to nest new social duties within theories of relationships that shape private law. By contrast, an exclusive reliance on direct horizontal application encourages jurists to discard private law the moment that body of norms is judged to be incapable of fulfilling constitutional rights. This is indeed the state of the law in Colombia, where judges are asked to first apply the country's civil law and to only proceed towards applying constitutional duties of solidarity when the former offers inadequate protection.[85]

Fourth, proceeding by way of general private law reform might also bolster the law's legitimacy, and make redistributive outcomes more palatable for the losing party. There is a risk that direct horizontal constitutional duties present as charity: a vulnerable person claims access to a vital good or service, and the wealthier entity is required to be generous for that reason alone. The fact that such a claim is framed as an entitlement may not be enough to shake the impression that this is some species of legally-mandated donation.[86] Resistance to these orders might ensue. By contrast, integrating social rights within the private law can root these economic aspirations in existing legal doctrines and within theories of interpersonal relationships. After all, explaining why a particular defendant owes something to a particular plaintiff – its construction of

[85] See eg *Decision T-463/17*, (CC) at section 2.1; *Decision T-520/03*, (CC) at section 3.3.1.
[86] A variation of this argument was developped to prefer private law redistribution over tax-and-spend programs: Daphna Lewinsohn-Zamir, "In Defense of Redistribution Through Private Law" (2006) 91 Minn L Rev 326.

"frameworks of respectful interaction" – goes to the core of private law's justificatory practice.[87] It might also enhance the recipient's perceived value of that which is received.

Fifth, direct horizontal obligations may be less amenable to subsequent legislative amendment, limiting the role that legislatures might play in a dialogue with courts. By contrast, judicial elaboration of the general common law can usually be displaced by subsequent statute.[88] This species of common law dialogue is especially valuable here. Not only may there be standard-fare disagreements over what the substance and limits of these rights should be, there are also countless ways any particular right – including housing, healthcare, food or water – can be fulfilled through a mix of private duties, regulation and public programs. The political branches should therefore have some latitude to revise the work of courts. Conceivably, if courts know they do not possess the last say, they might also be more comfortable issuing decisions which are bolder or more courageous.

Lastly, integrating social rights does not necessarily produce more commercial uncertainty than its alternative. Direct horizontal duties may produce a difficult balancing exercise weighing competing, context-sensitive interests each time a positive duty is alleged. Persistent, lingering uncertainty is sure to be the result. Social rights' radiating influence might reshape aspects of contract, property or corporate law doctrine, but once that difficult work is accomplished the law might settle back into a state of relative stability. In places like South Africa, legal doctrine evolves naturally, if incrementally, over time. Introducing new social values and aspirations to guide its development may create some fresh uncertainty, but it does not fundamentally alter the work of gradually elaborating general rules through litigation.

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[87] See eg Dagan & Dorfman, *supra* note 46 at 1410–1412 (describing private law's valuable distinctiveness as a "relational form of legal ordering").
[88] For more on this kind of "common law dialogue" in regards to social rights, see Tushnet, *supra* note 30.

V. Reframing the relationship between rights and the judicial contribution

The twin shifts this Chapter has defended – one towards institutional support, the other towards normative integration – help reframe the contribution judges make to the rights project. Courts evidently remain limited in what they can accomplish. Properly contextualizing their role can help manage the public's expectations, and shape where rights' advocates invest their efforts.

In this section, I stress the need to reframe the relationship between rights and the judicial contribution – more specifically, to free rights from the potentially narrow confines of what courts order. One promising way to do so is to uncouple right from remedy. Distinguishing the two can help nourish an understanding of rights that is broader than what courts are willing to order. It creates a more generous space for social rights' imaginative and evocative potential to be harnessed by lawyers and activists as they deploy rights rhetoric in political debates beyond the courtroom.

a) The right-remedy relationship

Uncoupling right from remedy is important as a matter of conceptual clarity. There is a traditional view – deeply rooted, but dangerous when applied to social rights – which holds that rights and remedies should reflect one another. The intuition is that where there is a right, there must be a corresponding remedy.[89] The position has an obvious rule of law logic. Rights might be seen as lacking integrity if they cannot be enforced or guaranteed by courts. At the same time, the legitimacy of judicial intervention often depends on courts being presented as a guarantor of constitutional norms. This view thus holds that remedies should mirror, as closely as possible, the constitutional right in question. As a corollary, remedies are understood to be revelatory, in

[89] Karl Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School*, 11th ed (Oxford: Oxford University Press, 2008) at 83–84.

the sense that they provide lawyers with a view of a right's true content. As Daryl Levinson puts it, the "only way" to see the constitutional right "is to look at remedies".[90]

Rights and remedies are better thought of as reflecting separate spheres of activity. This position is informed, in the province of public law, by scholars including Lawrence Sager,[91] and, on the side of private law, by scholars like Stephen Smith.[92] Fundamentally, rights and remedies reflect different relationships. Rights involve what an individual can claim from others (including from the government), while remedies involve what kind of assistance individuals can claim from courts.[93] A host of institutional limitations can limit what courts can sensibly order. Courts may wish to be deferential to state actors, judges may fear political backlash, they may be sensitive to the limits of their knowledge (and the risk of unanticipated consequences), and there may even be limits to the kinds of issues that can be framed through litigation. These limitations may sensibly guide judicial interventions, but they should not circumscribe the content of the underlying right. To put this point in the language of social rights, if a court declines to order specific relief for an individual experiencing homelessness because it unduly impinges on the executive or legislature's prerogative, that conclusion says something about the court's relationship to the political branches and to its sense of institutional role, but it says little about the nature or the content of the right to housing.

These arguments are especially forceful in the domain of social rights. These rights often involve attaining a desired economic outcome. These objectives can usually be advanced in

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[90] Daryl Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99 Colum L Rev 857 at 880.
[91] Lawrence Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1978) 91:6 1212.
[92] Stephen Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford: Oxford University Press, 2019).
[93] See eg *ibid* at 8; Stephen Smith, "Rights and Remedies: A Complex Relationship" in Hon Robert Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2009) 33.

different ways, and social rights will often be agnostic to the policy means by which the outcomes are achieved. Remedies, by contrast, can sometimes require specific courses of action. In this, they are (at most) only one possible manifestation of the underlying right.

Moreover, social rights can go unenforced (or underenforced) without compromising a legal system's commitment to the rule of law. These are rights that are commonly recognized as possessing an aspirational or programmatic dimension, subject to gradual realization. A court may decline to give this aspirational dimension immediate effect via judicial command without jeopardizing the ideal of a government of laws. Rights capture the full meaning of constitutional values and aspirations. Remedies merely attempt to realize those values and aspirations while incorporating a host of practical, procedural and institutional considerations external to the rights themselves.[94]

Furthermore, the view that a right's "cash value" hinges on the kind of remedy a court is willing to issue is unduly court-centric. This argument assumes that the only place that constitutional rights have value is within litigation. This position thus neglects the rich life that rights can have in extra-judicial social movements, in public debate, and in the halls of power. It likewise neglects the independent responsibility of all state actors to respect, protect and fulfill constitutional rights. I return to this claim below.

There is a more nuanced, alternative, view – though still ultimately unpersuasive – that holds that rights and remedies are inevitably interdependent, intertwined, and interrelated, since rights are "shaped by, and incorporate, remedial concerns".[95] But there is little that is inevitable about this process. If, as a matter of law, a particular remedy must be issued upon the breach of a right – for instance, the right landowners have traditionally had at common law to an injunction

[94] Owen Fiss, "Foreword: The Forms of Justice" (1979) 93:1 Harv L Rev 1 at 50–52.
[95] Levinson, *supra* note 90 at 885.

in the event of trespass – then courts might be tempted to shift the boundaries of the right to avoid unreasonable remedial outcomes. However, the situation is different if the starting assumption is that rights and remedies reflect distinct logics and relationships. Maintaining that conceptual boundary opens up space for more discretion in the choice of appropriate relief, and more transparently institutionalist reasoning at the remedial stage. In such a case, judges will generally be less tempted to shape the right in light of anticipated remedial outcomes, because the remedial outcomes can be discussed on their own terms. Beginning from the premise that rights and remedies are distinct allows courts to take the posture that a particular right may have been breached, or neglected, but robust judicial enforcement would be inappropriate. This is common practice in some areas of the law. And, indeed, such a posture is not different in kind from moments where judges decline to answer questions on the basis that they are non-justiciable. In such cases, judges concede that a constitutional right may well be in play, but its nature is not amenable to judicial enforcement.[96]

Even in cases where the definition of the right incorporates a remedy – which is far from universal practice – it is sensible to parse out the distinct relationships a claimant may have. An individual might be owed something from the state, or from another individual (the rights question). But if that right is violated, the individual may have a separate right to petition a court for relief (the remedies question). It is for this reason that Stephen Smith has suggested, playfully, that private law remedies may better be thought of as a branch of public law, given that they govern the relationship between courts and individuals whose rights have been infringed.[97]

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[96] See eg *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 (majority declines to opine on the presence of positive social right to housing under the Canadian Charter on the basis that, even if such a right existed, the claim framed generally was not justiciable).
[97] Smith, *supra* note 92 at 13.

b) The scope of rights and political constitutionalism

Separating right and remedy is not only a matter of conceptual rigour. The distinction also helps advance the rights project. There are risks in failing to distinguish right and remedy. Those risks are on display in Lauren Birchfield and Jessica Corsi's important survey of the Indian Supreme Court's interim orders in *PUCL*, the right to food case. Birchfield and Corsi adopt the common methodological posture that remedies reveal the true content of the right to food. They write that "the Supreme Court has, through its series of interim orders, gradually defined the right to food in terms of what policies are required of the state and central governments in order for them to adequately fulfill their constitutional obligations".[98] But this reading unduly constrains the right to food's meaning. That right can have varying degrees of ambition (exactly how much and what kind of food should be made available, and to whom), and can also be realized in a great number of ways (for instance, direct distribution of public reserves, a food stamp program, or even simply policies to decrease unemployment or to increase wages). The right can also evolve over time, as the country changes and the government's resources increase. The Indian Supreme Court's specific orders simply cannot be read as the definitive statement on what the right to food includes.

Instead, the Supreme Court's approach in *PUCL* was heavily influenced by institutional constraints, as I suggested in Chapter 3. On my reading, many of its orders reveal aspects of judicial constraints and strategy, instead of the true meaning of the right to food. The view that remedies are the "only way to see the constitutional right" can thus encourage members of the public to adopt an unduly restricted interpretation of the rights in issue.

[98] Lauren Birchfield & Jessica Corsi, "Between Starvation and Globalization: Realizing the Right to Food in India" (2010) 31:4 Mich J Int'l L 691 at 700.

The result, then, is that rights' potential value in social movements and in political processes is undercut. Rights discourse can be fruitfully mobilized in a dynamic process by vulnerable communities, non-governmental organizations, social movement leaders, politicians, bureaucrats and other state officials.[99] Rights discourse can have a special potency and legitimacy. It is a "deeply rooted and attractive moral discourse" that integrates core values including human dignity, welfare, and freedom.[100] Rights also rest on solemn constitutional commitments, and have also been recognized in international treaties that have achieved widespread agreement among governments worldwide.[101] They can re-cast vulnerable individuals as dignified members of a political community, whose interests deserve to be treated as a matter of imperative – as opposed to individuals who possess mere interests, or, worse, who are undeserving of assistance or who are an active nuisance.[102]

Equating rights and remedies stifles this dynamic process. Court orders often represent a sharply narrowed vision of what rights fully mean. At most, they might represent one potential way of instantiating a social right at a given moment in time. More commonly, remedies are shaped by a variety of institutional and strategic concerns that are external to the rights themselves. The acute risk is that such a limited rights imagination may give state officials (and others) a sharp defense against novel rights claims; they can simply claim that the constitutional right has already been fulfilled once a specific court order has been complied with.[103]

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[99] See eg Mark Tushnet, "The Relation Between Political Constitutionalism and Weak-Form Judicial Review" (2013) 14:12 German LJ 2249.
[100] Gráinne de Burca, *Reframing Human Rights in a Turbulent Era* (Oxford: Oxford University Press, 2021) at 3–4.
[101] *Ibid*.
[102] Annette Christmas, "The Modderklip Case: The State's Obligation in Evictions Instituted by Private Landowners" (2005) 6:2 ESR Review 6 at 9.
[103] On this risk, see Natalia Angel-Cabo & Domingo Lovera Parmo, "Latin America Social Constitutionalism: Courts and Popular Participation" in Helena Alviar Garcia, Karl Klare & Lucy

Equating remedies and rights can also repress those dimensions of social rights that are thought to be "evocative", "critical" or "aspirational".[104] Social rights form part of the wider project of transformative constitutionalism, a movement which is more than a series of reforms, and is instead often imagined as an outlook, a mindset, or as an enduring space for change and contestation.[105] They help form that imagined "bridge" connecting a country's dark past to some brighter, more equal future.[106] Rights can help ground a basic critical posture that can target a challenge a wide range of institutions, laws, and policies than would otherwise be the case.

This potential is worth underscoring. There are many institutions, rules, and programs that play an important role in shaping a community's economic life – as well as individuals' potential to live healthy, free and dignified lives. This might be said of competition or labour law, or of the way power and rights are allocated within a corporation, or more obviously still to basic matters of monetary and fiscal policy. It is hard to imagine any of these areas being the subject of social rights litigation, let alone a judicial remedy. But these matters could conceivably be frontiers for rights-invoking civil leaders, political groups and social movements. In these contexts, social rights might not be invoked to make specific claims for specific individuals or entities. Instead, they might be invoked as an important set of moral and constitutional values, as a space for challenging and reimagining the status quo, or as a lodestar of government policy. This wider potential for social rights is at risk of being cut off by those who insist that the meaning of constitutional norms must be limited to that which is specifically ordered in the

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Williams, eds, *Social & Economic Rights in Theory and Practice: Critical Inquiries* (New York: Routledge, 2014).

[104] See eg Jens Theilen, "The Inflation of Human Rights: A Deconstruction" (2021) 34:1 Leiden J Int'l L 1.

[105] Pius Langa, "Transformative Constitutionalism" (2006) 17:3 Stellenbosch L Rev 351 at 354.

[106] See eg *Du Plessis v De Klerk*, [1996] 3 SA 850 (CC) at para 157; *S v Makwanyane*, [1995] (3) SA 391, 1995 (6) BCLR 665 at para 262; *Soobramoney v Minister of Health (Kwazulu-Natal)*, [1997] (1) SA 765 (CC) at para 8.

context of litigation. Skeptics claim that human rights have little to say on structural economic issues, the kind that can entrench precarity and deepen inequality.[107] Confining the meaning of rights to court orders would do much to strengthen their claim.

What would a judicial delineation of right and remedy look like? It would begin with the clear recognition that rights and remedies reflect separate issues and indeed separate relationships, as I have suggested above. Rights could then be articulated in more general and aspirational terms, while acknowledging that some constitutional objectives are likely beyond judicial remedy. Far from monopolizing rights enforcement, judges should welcome the participation of a wider set of actors within the rights project. It would also mean leaving questions about the appropriateness of the method of judicial intervention to the remedial stage, or at least delineating categories of cases in which judges will intervene. Judges should also make clear that concerns over judicial capacity and legitimacy often speak more to what can be ordered than to what the rights themselves mean. Admittedly, this may mean multiplying the instances where judges identify a right that has gone unfulfilled, but for which there is no readily-available judicial remedy. This delineation between right and remedy differs from Madhav Khosla and Mark Tushnet's preliminary work on how judges can contribute to building state capacity, which stresses how this work ought to shape rights doctrine, *as well as* courts' remedial practice.[108]

These basic acknowledgments would result in a rewrite of South African rights doctrine, to take just one example. Traditional concerns over judicial capacity and legitimacy led the Constitutional Court to cast social rights doctrine in a procedural mold, a process I first described in Chapter 2. The Court has thus held out the possibility that it might demand that government

[107] See notably Moyn, *supra* note 80; Wills & Warwick, *supra* note 80.
[108] Khosla & Tushnet, *supra* note 2.

formulate a policy if one does not already exist, to gather essential data when that has not been done, or to engage respectfully with vulnerable rights-holders when their interests are threatened by state action. I have defended such a procedural turn. What I object to now is not necessarily the Court's enforcement posture, but rather its framing. The Court's "procedural" turn has unduly shaped rights doctrine – its articulation of constitutional meaning – as opposed to being limited to the analysis of the appropriate remedy.

VI. Dimensions of transformation

a) Pessimism and chequered success

The twin shifts this Chapter has defended also help contextualize the judicial role and the challenges courts face. There has emerged a pervasive sense of pessimism over the prospects of social rights and the transformative project. Critics and sceptics argue that these rights focus on extreme need and neglect the more important goal of promoting substantive equality.[109] As rights that can be demanded from the state, they are also thought to ignore the difficult, foundational work of economic and institutional reform.[110] These rights' principal enforcers – judges – are said to be constrained from accomplishing much of note.[111] Experience has shown that judicial activity can also backfire. Legal proceedings are often inaccessible to the most vulnerable.[112] Instead they can serve as a tool to shift scarce public resources away the poor, and towards the

[109] Moyn, *supra* note 80 at 3–5 and 218; Rosalind Dixon & Julie Suk, "Liberal Constitutionalism and Economic Inequality" (2018) 85:2 U Chicago L Rev 369 at 386–388.
[110] Gargarella, *supra* note 80 at 246–249; Roberto Gargarella, "Equality" in Rosalind Dixon & Tom Ginsburg, eds, *Comparative Constitutional Law in Latin America* (Cheltenham: Edward Elgar, 2017) 176 at 176, 183 and 188–194.
[111] Dixon & Suk, *supra* note 109 at 395–397; Moyn, *supra* note 80 at 199–201.
[112] David Landau, "The Reality of Social Rights Enforcement" (2012) 53:1 Harv Intl LJ 189.

affluent litigants who have less difficulty accessing constitutional justice.[113] Recent scholars worry these rights can even be "anti-transformative".[114]

This project has offered a qualified response to the sceptics. Institutional support underscores how complex court orders and individualized relief can play a valuable role in confronting a lack of state capacity. Normative integration stresses how social rights can catalyze shifts across the law governing private relationships and commercial activity.

One the problems marking contemporary scholarship is that the idealized "transformation" is often poorly defined. The dismantling of extreme inequality and the promotion of dignity and democracy are commonly identified as the project's guiding constellation, but not much else is elucidated. Some authors assume that "transformation" occurs whenever a meaningful number of vulnerable individuals are impacted by a judicial proceeding.[115]

The reality is that transformation occurs across a number of dimensions, and rarely all at once. These dimensions include sites of change, timing and effects, and political visions. By "sites", I refer to the choices judges make in deciding what exactly should be addressed to realize

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[113] See notably Octavio Luiz Motta Ferraz, *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (Cambridge: Cambridge University Press, 2021); Octavio Luiz Motta Ferraz, "Harming the Poor through Social Rights Litigation: Lessons from Brazil" (2011) 89:7 Tex L Rev 1643; Pedro Felipe de Oliveira Santos, "Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socio-economic Rights" (2019) 18:3 Wash U Global Stud L Rev 493 at 504–512.

[114] David Landau & Rosalind Dixon, "Constitutional Non-Transformation?: Socioeconomic Rights beyond the Poor" in Katharine G Young, ed, *The Future of Economic and Social Rights*, 1st ed (Cambridge University Press, 2019) 110; see also Sanele Sibanda, "When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism" (2020) 24:1 Law, Democracy and Development 384; Sanele Sibanda, "Not Purpose-Made - Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty" (2011) 22:3 Stellenbosch L Rev 482; Laurie Nathan, "Mind the Gap! The Constitution as a Blueprint for security" in Kristina Bentley, Laurie Nathan & Richard Calland, eds, *Falls the Shadow: Between the Promise and the Reality of the South African Constitution* (Cape Town: UCT Press, 2013) 1.

[115] See eg Landau & Dixon, *supra* note 114.

rights. Perhaps judges might work to make certain state actors more efficient, or they may request the creation of new social programs, or they may reform background rules that structure private interactions. By "political visions", I do not mean the agenda of the ruling party that appointed the judges in question. I refer instead to the vision of the just society that can animate how rights are understood. Some judgments might call for greater protections for the vulnerable, some stress the value of more efficient markets, while other hide their politics. By "effects" (and the related point of "timing"), I refer to the varied consequences of court orders. These effects can range from the material (such as the delivery of grain) to the symbolic (recasting individuals experiencing homelessness as dignified rights-holders).

As I explain below, there can be tension between these dimensions of transformation. This insight reveals important trade-offs that judges must wrestle with as they contribute to the demands of constitutional change. It also casts the limitations on courts' work in a more sympathetic light.

b) The sites, effects, timing, and politics of change

To understand how these dimensions interact, I return briefly to the three species of judicial intervention considered in this work. In my discussion of structural remedies and institutional support, I argued that judges have targeted state capacity failures as a common (but not exclusive) site of intervention. These orders can help coordinate implementation of public programs, ease bureaucratic blockages, gather relevant data and other information, and create spaces for involving civil society and disseminating best practices. This focus on bolstering other institutions' rights performance can pay significant dividends. However, these kinds of orders also shy away from engaging with social rights' political dimensions. Many impactful orders simply facilitate the implementation of government programs. They often eschew serious

scrutiny or contestation of public policy. They likewise avoid challenging political structures. The kind of institutional support that judges lend other political actors represents a fairly neutral political vision. This is indeed one of its main attractions, and explains its broad appeal to judges who may well hold sharply different political views. But it also comes at a cost: judges risk curbing social rights' critical imagination.

Some of the individual remedies considered in Chapter 4 target the distribution of vital goods as their site of transformation. If timely and accessible procedural vehicles are made available to potential litigants, individualized relief can be a fast and effective way for ensuring that countless of individuals receive medical treatment. If proper guardrails are not applied, however, over time these orders can shift resources away from public programs benefiting the poor towards more affluent individuals, who benefit from greater relative access to courts.

The political vision implicit in these judgments can be difficult to tease out. On one interpretation, these orders represent a startling political proposition, one which many rights advocates have fought for – namely, that individuals can claim immediate access to healthcare or food or even housing as a legal imperative.[116] Social rights become a firm pledge by one's political community, a promise that courts can intervene to enforce. In reality, most of the time, the courts surveyed avoid standing by that kind of strident political vision. In some places, like Brazil, courts frame rights in rigid, mechanical terms. This framing allows judges to present their interventions as the straightforward application of constitutional text.[117]

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[116] See eg David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance" (2002) 117 S Afr LJ 484.

[117] See eg Florian Hoffmann & Fernando Bentes, "Accountability for Social and Economic Rights in Brazil" in Varun Gauri & Daniel Brinks, eds, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) 100.

An alternative move sees courts pivot to offering some variety of institutional support, as I discussed above. They might issue commands that compel the delivery of a good promised by state policy, or establish some procedure by which state actors engage respectfully with vulnerable rights claimant. These interventions also understandably hew closely to a neutral and relatively uncontroversial political vision. In a similar way to the complex remedies discussed above, they also appear designed to avoid engaging with the politics implicit in social rights.

Normative integration follows a different course. Sidestepping social programs and state actors, courts impose obligations on private actors, and shift their entitlements over property. Under the right conditions, social rights' influence can reach further. Constitutional commitments can potentially have a downstream influence on private law's orientation, its values, and its modes of argument. They can even provoke a top-down re-evaluation of private law.[118]

The immediate effects of these decisions are limited to the individual litigants. However, these interventions shape the general law and – through a formal doctrine of precedent or a stable commitment to consistent decision-making – their reach might extend quite a bit further still. Change is slow. In South Africa, lawyers recognize that doctrinal overhaul – if it happens – is a multi-generational endeavour.[119] Cases generally concern but one narrow area of law at a time. Few cases reach apex courts. Any effort to reshape legal culture can also face resistance. Most South African decisions in the fifteen years following constitutional reform continued to exhibit a confident traditionalism that has only subsided recently.[120] And all of this depends on the door to this kind of influence being opened. In India, a mix of a codified private law and procedural

[118] *Daniels*, *supra* note 61 (see reasons of Froneman J).
[119] *Gardener v Whitaker*, [1994] (5) BCLR 19 (E) R at 30G-32C (per Froneman J).
[120] See eg Davis & Klare, *supra* note 49.

incentives has thwarted the country's social rights jurisprudence from having much of an influence in private law. A different procedural matrix in Colombia has allowed a body of horizontally-applied human rights norms to flourish, while leaving the traditional bodies of private law largely intact and undisturbed.

However, where the conditions are ripe to encourage meaningful dialogue and interaction, as in South Africa, the politics of private law can undergo substantial change. The boundaries of "legitimate" legal discourse can itself shift, transforming what would have previously been mere "opinion" or "policy" into legal argument.[121] Thus one of the recent fault lines to emerge in South African private law jurisprudence concerns whether legal change should be oriented towards economic efficiency and growth or redistribution and confronting the country's economic inequalities. Decisions surface a history of inequality and private domination.[122] The public/private divide can also become eroded, with various markets and the "private sphere" being repositioned as vital sites of necessary transformation.[123] In the process, private law litigation becomes an important site of constitutional political dialogue and even conflict. This dynamic can slow the pace of change further still, as opposing political visions clash over how to best realize the constitution's socio-economic objectives.

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[121] This observation starts from the assumption that legal discourse itself is something that is socially constructed, rather than being logically ordained, see eg Gary Peller, "The Metaphysics of American Law" (1985) 73:4 Calif L Rev 1151 at 1154–1155.

[122] See eg *Du Plessis v De Klerk*, *supra* note 106 at para 163 (referring to the problem of "oppressive and undemocratic practices at all levels" of a "racist society"); *Molusi and Others v Voges NO and Others*, [2016] ZACC 6, [2016] (3) SA 370 (CC) at para 39 [*Molusi*] (referring to the habit of the "old law" to entrench "unfair patterns of social domination and marginalisation of vulnerable groups"); *AB and Another v Pridwin Preparatory School and Others*, [2020] ZACC 12 at paras 129-131 [*Pridwin*] (seizing on the importance of education contracts as a site for "perpetuat[ing] inequality" and therefore ripe for the "transformation of private relations").

[123] See eg *Pridwin*, *supra* note 122 at paras 129-131.

These trend lines gesture towards tensions and trade-offs in the project of transformative constitutionalism. Orders that bolster institutional performance trade a critical political vision for a fairly palatable mode of rights enforcement that succeeds, at least occasionally, in securing meaningful rights victories. The rigid and mechanical enforcement of rights through strong-form individual orders can stubbornly hide their politics but, in doing so, this method of enforcement allowed social rights litigation to become quickly normalized. A constitutionalized private law, meanwhile, has the potential to offer a more critical and transformative vision, but change can be hampered by deep political disagreements and a slow pace of change. Understood in this light, the diverging modes of judicial intervention represent different ways of balancing the competing dimensions of the transformative project.

VII. Conclusion

This Chapter has developed several key prescriptions for moving the social rights project forward. In public law litigation, I defended a general orientation under which courts attempt to build governments' rights-respecting capacities. As for private law, I argued in favour of an ambitious integrative approach, one which goes beyond simply imposing positive duties on individuals and entities.

Such a twin approach also requires the public to better situate and contextualize the judicial contribution. This move might be accomplished by uncoupling right from remedy. Doing so can also help preserve these rights' true transformative potential, and encourage the dynamic process by which these rights are invoked outside the courtroom. It also means acknowledging a more textured understanding of the process of transformation. Judicial interventions might participate in transformation across different dimensions – politics, sites, effects – and these can

occasionally conflict with one another. Harnessing these trade-offs is vital if courts are to position themselves as meaningful contributors to the rights project.

Chapter 7:
Conclusion

To conclude, I recapitulate some of this project's findings and gesture towards future directions. At the outset of this work, I noted the pervasive sense of dissatisfaction which marks much of the contemporary scholarship on social rights. The account I have provided is one of qualified optimism. I underscored how complex, structural court orders can play a valuable role in bolstering state capacity. At the most basic level, court orders can help ease coordination and implementation problems, the kind that have serious implications for members of vulnerable communities. Ambitious courts may go further. They may compel state actors to collect data and other information, consult civil society groups, and disseminate proposals for reform. These orders do not appear to reflect a specifically-articulated right – at least, not in any immediate or obvious way. Instead, they help push government actors towards some ideal of the humane, well-functioning state, one where policy-makers are dynamic, responsive, and treat the urgent needs of the vulnerable as a top-of-mind concern; one where information-gathering, consultation and debate are disciplined priorities; and one where government agencies are coordinated and effective. I have suggested that courts can engage in this work without running into the traditional range of capacity and legitimacy issues that come with enforcing entitlements to complex social goods such as healthcare, housing, education, food or water. These interventions may also invite less backlash, since there is more likely to be agreement on matters of process and state performance, as opposed to the detailed substance of socio-economic policy.

I have also defended individualized relief from its critics. I argued that there are individual court orders capable of avoiding the harmful, regressive impacts observed in the empirical literature on Brazil, Costa Rica, and Colombia. Specifically, there are forms of individualized relief which have the function – intended or not – of providing the kind of

institutional support I described above. For instance, orders may compel the delivery of goods already promised by state policy. Such curial commands do not warp the state's intended distribution; rather they are a tool for realizing it. Thus, individual healthcare orders in Colombia have helped compensate for the absence of regulatory oversight of the country's insurance companies, and have helped guarantee the delivery of drugs and treatments guaranteed under the country's national plan. Individual orders can also be deployed to compel state actors to engage more respectfully with vulnerable communities. As South Africa's eviction jurisprudence has shown, these orders can occasionally temper the harshness of government action, and occasionally lead state actors to identify creative solutions. Individualized relief can also catalyze wider reform, particularly when the cost of complying with a slew of such orders is greater than resolving the underlying cause producing the rights deprivation.

Later still, I underscored the ways in which social rights can lead to important change – and even deep ideological shifts – in private law. Colombia has seen a fairly sustained effort to impose social duties horizontally onto private actors. Even more ambitiously, judges in South Africa have begun the difficult work of reimagining the foundations of private law in light of the country's constitutionalized economic aspirations. Scholars have occasionally undervalued social rights because they have failed to to perceive private law as a site for nurturing social rights' critical economic and political vision.

In the last Chapter, I defended an approach to social rights enforcement where the underlying judicial philosophy would vary meaningfully from public to private law. In public law, I suggested that courts should focus on lending institutional support. This process-oriented approach to enforcement bolsters the state's rights-respecting capacities, and would include a range of both structural and individual remedies. More substantively, beyond public law, I

argued in favour of an approach which would draw on constitutional aspirations to critically challenge – and to potentially re-orient – some of the market-facing areas of law, including contract, property, and even corporate law.

These enforcement philosophies may require lawyers to rethink the nature and shape of the judicial contribution to the rights project. One vehicle for doing so is to revisit the right-remedy relationship. Uncoupling right and remedy – and recognizing that each represents distinct spheres of activity, and indeed different relationships – can be fruitful. Notably, this framing can save rights from unduly narrow constructions that limit their evocative and critical potential.

What is more, parsing out these diverging enforcement philosophies can also underscore the different dimensions of transformation, and how they might be in tension with one another. More process-oriented approaches generally succeed at generating faster, practical results, but do so at the cost of clipping rights' critical and evocative potential, and their ability to challenge the rules and institutions which can have important (if indirect) impacts on a community's economic life. In a sense, this tension casts the limitations on courts' work in a more sympathetic light. The more ambitious ideological work is understandably slower, while the structural remedies which can spur fast change can often do so because they may largely dodge political controversy. This tension also gestures towards the importance of pairing both process-oriented approaches and more substantive and ideological ones. On my reading, institutional support represents a sensible focus for public law remedies, while normative integration preserves a space for nurturing social rights' critical, socio-economic vision.

There have been several limits to this project's scope. Some of them point the way towards future study. When I took up market-facing areas of law, I focused on the basic norms

governing property and contract. This work deserves to be broadened to capture other important areas, including corporate law, competition law, and insolvency law, to name but a few. Corporate governance stands out as an area ripe for this kind of analysis. An integrative approach would ask how the rules allocating power and decision-making authority could be better designed to promote social rights awareness within corporate decision-making, and to align corporate activity with the constitution's economic aspirations. Intriguingly, the kind of work underway in South Africa to rethink rules of contract and property has not yet made its way to the law governing the corporation in a similarly ambitious way. "Constitutionalized contract law" and "constitutionalized property law" are now commonly understood as fields of study and practice in South Africa; the area of "constitutionalized corporate law" has not yet emerged in earnest. It would also be valuable to have a better account for why certain market-facing areas are more vulnerable than others to being catalyzed by the presence of social rights.

Next, I have argued in favour of normative integration of social rights into private law, but I have not delved into exhaustive detail over how this kind of work should be carried out. As I have stressed, the integrative project does not churn out predetermined results. Instead, it lays the groundwork for debate. In recent South African decisions, fundamental disagreements have emerged over whether to prioritize economic growth or redistributive justice. The position announced in *Beadica* pushes South African law towards a pro-growth, market-friendly posture. Future work is needed to rehabilitate a more redistributive private law, one that more readily assists individuals experiencing poverty.

Turning to litigation against the state, more work is needed to parse out the different considerations judges attend to when they decide which *kind* of institutional support to offer – if they are so inclined. At a basic level, there remains an important choice between providing

institutional support through remedies which are structural, orders which are individualized, or to pursue both in a "two-track" response. In recent years, apex courts have also shied away from embarking on ambitious structural remedies. This hesitancy might reflect the risks and degree of investment that such proceedings require. Future work might point the way towards strategies that can mitigate these challenges, and that encourage judges to undertake ambitious structural responses once again.

I have also gestured towards the importance of mobilizing social rights in political discourse. I have argued that the way judges articulate rights can even have an impact on the way this political work is carried out. But more work is needed to understand the relationship between judicial interventions and their impacts on political processes regarding social rights – and, more generally, regarding how social rights discourse can be successfully mobilized outside the courtroom.

Next, this project has been concerned with judicial interventions in times which were, for the most part, experienced as "normal". Future work could consider to what extent collective emergencies – experienced as exceptional – could shift the enforcement landscape. The Covid-19 pandemic unleashed widespread rights deprivations, including to rights to health and to food security. In intriguing ways, the sense of the pandemic as a collective threat fostered a sense of solidarity that could – and in some places, *did* – result in temporarily improved social programs and outcomes. It would be worth investigating whether this period of exception shifted judicial enforcement efforts in meaningful ways.

Lastly, I have focussed on South Africa, Colombia, and India, three prominent jurisdictions in the social rights canon. Future work could compare some of the approaches charted in this project to developments in less well-studied countries. There would also be value

in bringing some of these insights to bear on jurisdictions – like Canada – which have not constitutionalized the standard set of social rights. There remains healthy opposition to judicial enforcement of social rights in many countries in the Euro-Atlantic world. Arguments commonly revive the concerns that were at the core of the old justiciability debate. Further study might challenge these lawyers' apprehensiveness by surfacing some of the developments considered in this project. Such efforts would contribute to repositioning jurisdictions from the "Global South" as valuable sources of legal knowledge and inspiration.

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