COMPLEX REMEDIES IN SOCIAL RIGHTS LITIGATION

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Abstract

Socioeconomic rights disputes pose a unique set of challenges for the judiciary. Claims arising from social rights are complex, polycentric, and involve parties who may not usually be before the court. They also implicate resource allocation, and questions persist about the judiciary's institutional fit to decide these issues relative to the representative branches of government. How do judges get around these concerns, ensure their decisions are seen as legitimate, and avoid executive backlash? In an age of democratic backsliding, how can courts safeguard their institutional capital while delivering effective social rights remedies? The central way that judges get around these concerns is by using *complex remedies.* Complex remedies involve a range of stakeholders beyond the litigants to respond to some of these concerns – by incorporating civil society, government authorities, and other affected parties within the judicial process. These actors help frame the legal issues, suggest remedies, and oversee implementation. Remedies of this kind disrupt our traditional understanding of litigation and are undertheorized in the comparative constitutional law literature. This dissertation fills this gap by advancing normative constitutional theory through a study of judicial doctrine and identifies the kinds of complex remedies seen in India, South Africa, and Kenya, while also setting out the factors that can and should guide judicial decision-making and civil society strategy.

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All errors are mine.

Table of Contents

Introduction

In January 2015, a division bench of the High Court of Karnataka instituted a *suo motu* proceeding[1] after a newspaper article uncovered the high number of out-of-school children in the state. The report alleged that their numbers had grown steadily over the past two years. It posed a direct challenge to the state and federal government's narrative on the upward trajectory of school enrolment and learning outcomes. Over the next few months, the Court's division bench met regularly, each time seeking information from the state government departments and members of civil society on the best way forward. At the time, I was working at the Azim Premji University as a research associate. The university and the Azim Premji Foundation, a sister organization working in school education, were repeat players in strategic litigation on the right to education. It was, therefore, of little surprise when the Foundation and the university sought to intervene in the out-of-school children matter. The Court, by that time had set up a high-powered committee and Azim Premji University was part of it. The committee met between March and September 2015 at four-week intervals and comprised representatives from the state government, its education ministry, civil society, and local government. Each time the committee met, it drew up a list of action plans that was evaluated at the following meeting. Over a year-long period, the number of out-of-school children in Karnataka had dropped by a staggering 75%. This was a remarkable success in a country terminally beset by well-intentioned government interventions that often failed. Something had clicked, and various stakeholders had come together to dialogue and solve a pressing social problem.

[1] Indian High courts are permitted to institute proceedings for fundamental rights violations without a case being filed as part of its powers under its *suo motu* jurisdiction under Article 226 of the Constitution of India, 1949.

This dissertation is about judicial remediation of this kind. A range of difficulties has beset social rights since their inception. The framers of the earliest constitutions that included social rights did so for a range of reasons. Still, chief among them was the impulse to restructure the relationship between labour and capital, to reassert state dominance over the Church in schooling and welfare provision, and to build greater legitimacy for the state.[2] The early twentieth century is the first time that social rights figure in national constitutions of states like Mexico and the Weimar Republic. However, they looked little like the social rights we have in constitutions today.[3] They were meant to be aimed at the representative branches and were statements of intent, rather than justiciable guarantees which citizens could cash out. The next wave of constitution-making, of which this dissertation considers India and Ireland the emblematic cases, was defined by greater acceptance of social rights as worthy of inclusion in their founding documents.[4] Yet, a range of ideological and logistical disagreements between the framers meant that their inclusion would only be through judicially unenforceable directive principles of state policy. Yet, in the years ahead, the judiciaries of both these countries would try to find ways to interpret existing rights in light of directive principles[5], or create social rights through their linkages to existing civil-political rights. The following decades witnessed the twin forces of decolonization and the rise of international human rights agreements that influenced the design of social rights provisions, notably in the newly independent African nations.

In the post-1989 period, judicial review came to be entrenched as the institutional form to enforce social rights, with increasingly complex forms of remedies being envisaged by

[2] See generally, Steven L. B. Jensen & Charles Walton, SOCIAL RIGHTS AND THE POLITICS OF OBLIGATION IN HISTORY (Cambridge University Press, 2022).
[3] See Chapter 3 for an expanded overview of this argument.
[4] Thomas Murray, CONTESTING ECONOMIC AND SOCIAL RIGHTS IN IRELAND CONSTITUTION, STATE AND SOCIETY, 1848–2016 (Cambridge University Press, 2016).
[5] See Sinott v. Minister of Education [2000] 3 IR 62; Aoife Nolan, *Ireland: The Separation of Powers Doctrine vs. Socio-Economic Rights* in Malcolm Langford (ed.), SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW 295 (Cambridge University Press).

constitutions.[6] Structural remedies were not unknown to constitutional practice. They had been used in US constitutional litigation since the 1960s, often to desegregate schools, improve prison conditions, and make school financing more equitable[7]. Structural remedies often involved retaining jurisdiction over a particular case until a systemic change in the situation could be demonstrated. These kinds of remedies laid the groundwork for the complex remedies under study here. However, the use of structural remedies in the jurisdictions under study commenced at different stages in their constitutional development.

The jurisdictions under study here – India, South Africa, and Kenya – have several notable similarities and divergences in their legal, social, and political trajectories. A colonial past, high absolute and relative levels of poverty, and a commitment to constitutional supremacy unite them. Access to social goods like education, healthcare, and housing are stratified, and while the governments in the countries remain their guarantor under ordinary circumstances, there is increasing encroachment of the private sphere into these realms. The three countries also have a well-organized civil society and a judiciary that is often receptive to legal claims based on social rights. Consequently, these jurisdictions provide fertile ground to study the phenomenon of complex remedies, their various manifestations, and the conditions under which they are granted.

[6] David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism* 99(5) California Law Review1163, 1198 (2011).
[7] Abram Chayes, *The Role of the Judge in Public Law Litigation* 89 Harvard Law Review 1289 (1976).

Institutional Pathologies, Dispute Polycentricity, and Structural Constitutional Concerns

The central preoccupation of the first wave of SER scholarship was their place in constitutions.[8] Once SER found greater acceptance among the drafters of constitutions, and began to be used in constitutional practice, the second wave of scholarship sought to respond to concerns about establishing accountability for the violations of SER. Around this time, there was academic consensus on the expansion of judicial power[9] coupled with the totalizing force of global constitutionalism.[10] The second wave of scholarship, produced in temporal parallel with the wave of constitution-making following the fall of the Soviet Union and the democratization of many countries in Latin America and parts of Africa, was concerned with the scope of the judicial role in enforcing social rights.[11]

However, on some accounts, courts can be institutionally unsuited to decide social rights claims that implicate allocative justice and require expertise, democratic accountability, and information.[12] Courts that interfere with budgetary allocations or push back against the decisions of the representative branches can invite legislative reprisals.[13] They are therefore often in a position where limited institutional capital needs to be preserved to ensure its longevity and legitimacy with the broader public.[14] This combination of a lack of democratic

[8] See for example, Cass R. Sunstein, *Against Positive Rights* 2 East European Constitutional Review 35 (1993).
[9] Doreen Lustig & Joseph H.H. Weiler, *Judicial Review in the Contemporary World: Retrospective and Prospective*, 16 Int'l J. Const. L. 315 (2018).
[10] Mattias Kumm, *On the History and Theory of Global Constitutionalism*, in GLOBAL CONSTITUTIONALISM FROM EUROPEAN AND EAST ASIAN PERSPECTIVES (Takao Suami, Anne Peters, Dimitri Vanoverbeke & Mattias Kumm eds., 2018).
[11] Etienne Mureinek, *A Bridge to Where - Introducing the Interim Bill of Rights*, 10 South African Journal on Human Rights 31, 32 (1994).
[12] See for example, the kinds of arguments presented in Jeremy Waldron, *The Core of the Case against Judicial Review* 115(6) Yale Law Journal 1346 (2006).
[13] Rosalind Dixon, RESPONSIVE JUDICIAL REVIEW: DEMOCRACY AND DYSFUNCTION IN THE MODERN AGE 9 (Oxford University Press, 2023).
[14] See James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 American Political Science Review 343 (1998) contra, James Gibson & GA Caldeira, *Defenders of democracy? Legitimacy, popular acceptance, and*

legitimacy and institutional fit to decide social rights disputes can be called *structural constitutional concerns*.

Social rights disputes arise out of a social reality that is messy and complex. Cases before courts affect, and are affected by, the actions of stakeholders that may not be represented in the courtroom. This feature is called polycentricity[15], and is characteristic of all disputes, but is more pronounced in social rights cases.[16] Polycentricity makes the task of remediation harder and sometimes less effective. The success of social rights remedies is also dependent upon sustained judicial attention because of the systemic nature of social rights violations. Some scholars argue that a rights advocacy support structure is a necessary precondition for sustained judicial attention to a rights issue in addition to formal rights.[17] Support structures comprise of a web of actors including lawyers, individual activists, civil society organizations, and members of the political elite.[18] Therefore, the need for social rights remedies to account for stakeholders beyond those before it and its reliance on support structures is part of what I call *dispute polycentricity*.

Judicial remedies for social rights violations also have an effectiveness problem. Judicial remedies for social rights serve three functions.[19] The first is to place the applicant in, as far as possible, the same position as they were before the occurrence of the alleged rights violation. The second is to ensure ongoing compliance with the rights obligations of duty bearers. The

the South African Constitutional Court 70 Journal of Politics 1 (2003) (on the South African Constitutional Court having little institutional legitimacy in survey experiments).

[15] Lon Fuller, *The Forms and Limits of Adjudication* 92 Harvard Law Review 353 (1978).

[16] Jeff King, JUDGING SOCIAL RIGHTS, ch. 4 (Cambridge University Press, 2012).

[17] Charles R. Epp, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); See also empirical confirmation of this in Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?* 60(3) American Journal of Political Science 575, 579 (2016).

[18] Charles R. Epp, T*he Support Structure as a Necessary Condition for Sustained Judicial Attention to Rights: A Response* 73(2) The Journal of Politics 406–409 (2011).

[19] Kent Roach, REMEDIES FOR HUMAN RIGHTS VIOLATIONS: A TWO-TRACK APPROACH TO SUPRA-NATIONAL AND NATIONAL LAW 2-5 (Cambridge University Press, 2021) (Hereinafter Roach, Remedies).

third is to try and ensure that future violations of the right in question do not occur through a) deterrence, and b) an attempt at addressing the feature of a legal system that caused the violation in the first place. Individual social remedies often fail to prevent future violations or remedy the feature of the legal system that caused the violation; systemic remedies often leave individual claimants without a remedy and do not address the intangible harms that rights holders have suffered.[20] The tendency of courts to grant individual or systemic decisions that often do not meet the three functional desiderata of remedies can broadly be called *remedial pathologies*.

Complex Remedies as a Response to Structural Constitutional Concerns, Dispute Polycentricity, and Remedial Pathologies

Complex remedies are judicial orders that involve more than one step, which may be interim or final, that join stakeholders who are not before the court to join in the judicial proceeding to help arrive at the interim order or final judgment (*multi-stakeholder* feature), provide information to the court, or to oversee implementation of an interim order or final judgment (*dialogic* feature), as part of a series of steps that help address the issue before the court (*multi-step* feature). The dialogic, multi-stakeholder, and multi-step features of complex remedies help them respond to remedial pathologies, the polycentric nature of social rights disputes, and various structural constitutional concerns. Unpacking how they do so is a key task of this dissertation.

[20] Roach, REMEDIES, at 14-15.

Research Question

My doctoral dissertation answers the research question: "under what conditions do courts in India, South Africa, and Kenya grant complex remedies in social rights litigation?" and "what are the kinds of complex remedies seen in the three jurisdictions under study?"

The genesis of this dissertation was the involvement in the Karnataka school dropout litigation, which led to an interest in court-centered processes of social problem solving due to my involvement in litigation which used the right to education to engage the problem of school dropouts in the Indian state of Karnataka.[21] The success of this process, identified by Sandra Fredman as an example of 'bounded deliberative democracy' being facilitated by courts in the literature[22], lead to an interest in observing the varieties of these remedies and determining the conditions under which they were being granted in courts across the world.

There was no clear answer which could be found in either doctrine or normative theories from scholars, even if much of their observations were grounded in a close reading of judgments from courts.[23] My thesis aims to develop these conditions so courts can act in more predictable, principled ways, and do so while engaging seriously with their institutional incapacity, lack of expertise, and democratic legitimacy and not impinge too seriously on the principle of the separation of powers.

[21] Jayna Kothari & Gaurav Mukherjee, *The Out of School Children Case: A Model for Court-Facilitated Dialogue?*, Oxford Human Rights Hub Blog, 18 September 2015 < https://ohrh.law.ox.ac.uk/the-out-of-school-children-case-a-model-for-court-facilitated-dialogue/>

[22] See, for example, Sandra Fredman, COMPARATIVE HUMAN RIGHTS LAW 99-100 (2018): "*Kothari and Mukherjee comment that the deliberation facilitated by the Court in this case presented some strategic advantages due to the involvement of stakeholders in the formulation and implementation of the policy. However, they note that it also highlighted the limitations of working with State authorities, in this case manifested as a reluctance to monitor its welfare schemes*".; Sandra Fredman, Adjudication as Accountability: A Deliberative Approach, in Nicholas Bamforth & Peter Leyland (eds.), ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION 105, 107 (Oxford University Press, 2013).

[23] Sandra Liebenberg, *Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law* 32:4 Nordic Journal of Human Rights 312 (2014).

Methodology

Comparative Method

My choice of a comparative method is due to epistemic reasons. The choice of India, South Africa, and Kenya is driven by the fact that they represent three different ways of conceptualizing the judicial role and codifying social rights in their constitutional texts: a) judicially unenforceable, b) strongly enforceable, c) strongly enforceable, but with qualifiers, respectively. In Chapter 2 of this dissertation, I term the three countries as emblematic of the different waves of social constitution-making in the 20th and 21st centuries. These cases are 'prototypical' of the waves of constitution-making and approaches to issues of judicial power. Therefore, they exhibit key characteristics of the waves of constitution-making I have described that can be seen in many cases. Therefore, these prototypical cases "serve as exemplars of other cases with similar characteristics."[24]

Constitutions adopted in later waves of 20th-century codification, such as the Constitution of Ireland, 1937 and the Constitution of India, relegated social directives to the aspirational, judicially unenforceable parts of their constitutions, and their (limited) incorporation as justiciable rights only occurred through subsequent judicial decisions. Constitutional design choices of such nature in the 20th century reflect an institutional proclivity for the representative branches and a set of disagreements among the community of constitution-makers regarding the appropriateness and practicality of including a set of justiciable rights. Contrast such an approach with the place of social rights in the wave of constitutions that were drafted in the late 20th century, such as those in Colombia (1991), South Africa (1996), and Kenya (2010). While the first two conceived of a strong judicial role in their enforcement, in South Africa,

[24] Ran Hirschl, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 256 (Oxford University Press, 2014).

there were internal qualifiers to the set of social rights that made their 'progressive realization' dependent on 'reasonable legislative measures' subject to 'available resources'.[25] The drafters of the 2010 Kenyan Constitution were aware of the risks of permitting courts to wrest control over the resource allocation agenda of a government, an expression of which is found in Article 20(5) of its 2010 Constitution.[26] The provision explicitly states that "the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion."[27] The provision addresses the issue of resources by stating that the State has the responsibility to show that resources to implement the right in question are not available. Such a formulation puts the burden on the state to prove that its failure to enforce the right has been reasonable.[28] Internal qualifiers and explicit textual preclusion of *judicial primacy* in reordering resource allocations represent a stab at how the tensions between judicial review in social rights cases and thin understandings of democracy are resolved, or at least engaged with.

Doctrinal Method

This doctoral dissertation considers judicial decisions to be a central unit of analysis. We can analyze court decisions along several dimensions, including a doctrinal one (involving analysis of court judgments) and an institutional one (concerning its networks of relationships with a range of other actors in the social and political system, which would implicate questions about

[25] See section 26 of the South Africa Constitution:
"26. Housing: 1. *Everyone has the right to have access to adequate housing.*
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."
[26] Jill Cottrell Ghai and Yash Ghai, *The Contribution of the South African Constitution to Kenya's Constitution*, in Rosalind Dixon & Theunis Roux (eds.), CONSTITUTIONAL TRIUMPHS, CONSTITUTIONAL DISAPPOINTMENTS: A CRITICAL ASSESSMENT OF THE 1996 SOUTH AFRICAN CONSTITUTION'S LOCAL AND INTERNATIONAL INFLUENCE 252, 264 (Cambridge University Press, 2018).
[27] Article 20(5), Kenyan Constitution 2010.
[28] See also *Republic of Kenya v Cabinet Secretary-Ministry of Education Science and Technology ex parte Musau Ndunda* [2016] eKLR.

who comes to court, how courts' dockets are determined, access to justice, as well as courts' positioning vis-à-vis the other branches of government). The doctrinal method analyzes systematically the rules governing a particular legal category, with a focus on the relationship between such rules, and explaining areas of difficulty and future developments.[29] This method also recognizes that judicial decisions are influenced by the form and substance of the constitutional text, which is why the dissertation devotes careful attention to the changes in the way social rights are constitutionalized.

Consequently, my project takes the idea of doctrinal coherence seriously. Constitutional texts are open-textured and often do not provide clear responses to difficult questions of the conditions under which juridical intervention in cases is permissible and legitimate, as well as how such intervention should be done.[30] Despite the judiciary being granted a privileged textual role in the constitutional dispensations discussed in this article, we do not have a clear sense of the reasons why courts in India[31], South Africa[32], and Kenya[33] intervene in the ways that they do in some cases and not others. While the enterprise of adjudication has at its heart the idea of reasoned, transparent decision-making, judges often do not follow this, leading to the instability and incoherence of judicial doctrine. Therefore, this project considers the

[29] Terry Hutchinson, *Doctrinal research: Researching the* jury, in Dawn Watkins and Mandy Burton (eds.), RESEARCH METHODS IN LAW 8 (Routledge, 2017).
[30] For instance, the Bill of Rights enforcement provisions under the South Africa Constitution, 1996:
38. Enforcement of rights: "*Anyone 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, including a declaration of rights*…"; See also, Article 32 & 226, Constitution of India, 1949 (setting out the jurisdictions of the High Courts and Supreme Court of India to enforce fundamental rights), and Article 241, Constitution of Colombia, 1991 (setting out the jurisdiction of the Colombian Constitutional Court).
[31] Gaurav Mukherjee, *The Supreme Court of India and the Inter-Institutional Dynamics of Legislated Social Rights* 53(4) Verfassung und Recht in Übersee 411 (2021).
[32] Theunis Roux & Rosalind Dixon, *Marking Constitutional Transitions: The Problem of Transformation in Constitutional Design*, in Tom Ginsburg & Aziz Z. Huq (eds.), FROM PARCHMENT TO PRACTICE IMPLEMENTING NEW CONSTITUTIONS (Cambridge University Press, 2020)
[33] Yash Ghai, *Constitutions and constitutionalism* in Nic Cheeseman, Karuti Kanyinga, and Gabrielle Lynch (eds.), THE OXFORD HANDBOOK OF KENYAN POLITICS (Oxford University Press, 2020).

coherence and stability of judicial doctrine as central to the maintenance of internal consistency that aids the rational development of future case law that can build on previous ones.[34]

Socio-legal Method & Law-in-context approaches

This dissertation uses a mix of sociolegal methods and law-in-context approaches to the study of the three jurisdictions in a comparative way. Philip Selznick explains that the phrase 'law in context' points to the many ways legal norms and institutions are conditioned by culture and social organization.[35] Using this approach, we can see how "*legal rules and concepts, such as those affecting property, contract, and conceptions of justice, are animated and transformed by intellectual history; how much the authority and self-confidence of legal institutions depend on underlying realities of class and power; how legal rules fit into broader contexts of custom and morality*."[36]Take for example how court interventions were always seen as a good thing when it came to enforcing social rights, in the face of what can be best described as middle-class apathy toward social mobilization and political processes (at least in India). We would have very little idea about the ways in which courts can (at best) make little difference to things on the ground[37], end up perpetuating the social status quo by favouring middle-class litigants acting in their self-interest[38], and in some cases (at its worst), actually make life a lot worse for vulnerable constituencies.[39]

A central way in which this dissertation uses socio-legal methods is to use a dispute processing framework to displace the dominant paradigm that exists around existing research into social

[34] Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine*, 100 Northwestern University Law Review 517 (2006).
[35] Philip Selznick, *'Law in Context' Revisited* 30(2) Journal of Law and Society 177, 178 (2003).
[36] Id.
[37] Gerald Rosenberg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Chicago: University of Chicago Press, 1991).
[38] David Landau, *The Reality of Social Rights Enforcement* 53 Harvard International Law Journal 225 (2012).
[39] Anuj Bhuwania, *Courting the people: The rise of Public Interest Litigation in post-emergency India* (2014) 34(2) Comparative Studies of South Asia, Africa and the Middle East 314.

rights cases, which looks primarily at case law. Polycentric social rights cases are done a disservice by the traditionally understood life cycle of a judicial dispute as being one that begins and ends in court. Menkel Meadow describes dispute processing in the tradition of socio-legal studies as seeking to "study disputants, their representatives, the context and content of their disputes, and the varieties of processes chosen to 'process' (not necessarily to resolve or manage) their disputes, in order to uncover what social processes and relationships, in addition to, or other than, 'law,' influence what actually happens to disputes."[40] Dispute processing frameworks try to ensure that three distinct phases are captured in the life cycle of a case: a social or political conflict and its transformation or mobilization into a legal form, the actual decision-making in court, and the implementation of judicial decisions which may or may not result in a resolution of the underlying problem. [41] Why is this important and useful? This is because of the idiosyncratic nature of the kinds of problems which lie at the heart of claims which are grounded in socio-economic rights (SER) and how they diverge from civil-political rights in form and adjudication.

To recap, this dissertation aims to understand better the phenomenon of complex, multi-step and multi-stakeholder remedies granted in social rights litigation and identify the conditions which influence their grant or denial. A dispute processing framework permits this dissertation to examine the complete life cycle of a case that can be understood using a range of non-doctrinal and doctrinal materials, in order to build a fuller picture of the case and helps me identify the range of factors which influenced the grant of a remedy by using a combination of doctrinal reconstructive and law-in-context methods.

[40] Carrie Menkel-Meadow, *Dispute Resolution: Raising the Bar and Enlarging the Canon* 54 J. Legal Educ. 5 (2004).
[41] Ralf Rogowski and Thomas Gawron, *Constitutional Litigation as Dispute Processing Comparing the U.S. Supreme Court and the German Federal Constitutional Court*, in Ralf Rogowski and Thomas Gawron, CONSTITUTIONAL COURTS IN COMPARISON. THE US SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT 3 (Berghann Books, 2016).

Limitations of the Dissertation

The comparative account of complex remedies that this dissertation aims to provide is incomplete in some ways and has a number of limitations. The first is that the project does not treat the effectiveness of complex remedies as a question that is to be answered in great depth. The effectiveness of social rights remedies is largely an empirical question, one that is measured by social scientists using a range of methods, including, but not limited to, ethnography, surveys, and interviews. There is also little consensus on which indicators to include while evaluating effectiveness.[42] While some of the sites of social rights litigation have received attention from social scientists, most notably in South Africa, this research is often not present for all the case studies in this dissertation. I have therefore included learnings from the social science discipline where possible. In its stead, the dissertation theorizes that complex remedial forms give rise to a set of conditions that make effectiveness likelier. A cognate question in the field of social rights is the debate around their effect on economic inequality, which this dissertation does not address.[43]

Second, the dissertation does not deal extensively with the differences between categories of social rights when it comes to the use of complex remedies. Complex remedies are used across the three jurisdictions for cases on social rights that appear to not be sensitive to the kind of social right in question. However, more research is necessary before a firm conclusion can be drawn. As a corollary, the dissertation is largely focused on social rights (education, housing,

[42] See for example, a key debate in the field of comparative constitutional studies on effectiveness and the methodological approaches to measure it, in Mila Versteeg & Adam Chilton, HOW CONSTITUTIONAL RIGHTS MATTER (Oxford University Press, 2020). For a criticism of its methods see, Madhav Khosla, *Is a Science of Comparative Constitutionalism Possible?* 135 Harv. L. Rev. 2110 (2022).

[43] See Samual Moyn, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (Harvard University Press, 2018); for a pushback against the central idea, see Gráinne de Búrca, *Book Review: Samuel Moyn. Not Enough: Human Rights in an Unequal World*, 16 International Journal of Constitutional Law 1347 (2018) and Mila Versteeg, *Can Rights Combat Economic Inequality?* 133 Harvard Law Review 2017 (2020).

healthcare, nutrition, and social security) except for discussions on employment guarantee rights in India.

Third, the dissertation does not address in extensive detail, the question of whether courts should adjudicate social rights claims. The choice of jurisdictions with strong judiciaries enforcing constitutional or legislated social rights largely negates a detailed discussion of this nature. Relatedly, the dissertation does not deal with the enforcement of social rights through fourth branch institutions.[44]

Fourth, the focus of the dissertation is on domestic social rights as found in constitutions and statutes, as adjudicated by domestic courts. As a result, the dissertation does not look to discuss international human rights instruments like the International Covenant on Economic, Social, and Cultural Rights, or decisions from international, supranational, or regional human rights courts or quasi-judicial bodies.

Structure of the Dissertation

This dissertation is divided into seven chapters. Chapter 1 titled 'What are complex remedies' unpacks and defines complex remedies, outlining the kinds of problems these kinds of remedies look to engage with, and what the benefits and drawbacks of complex remedies are. Chapter 2 is titled 'The Law and Politics of Constitutionalizing Social Rights', and covers the four waves of constitutionalizing social rights, of which India, South Africa, and Kenya are prominent examples of the last three. This chapter draws on cognate disciplines to comparative constitutional studies such as history and political science to chart the evolution of how social

[44] See the newly developing literature on this, Tarunabh Khaitan, *Guarantor Institutions* 16 Asian Journal of Comparative Law 40 (2021).

rights provisions are drafted and why they are included in constitutions. Chapter 3 is titled 'Why Complex Remedies?' and engages with the structural concerns around the expended judicial role seen in complex remedies, as well as the form and substance of constitutional social rights provisions, and the nature of social rights disputes.

The next three chapters track complex remedies at work in the three jurisdictions. The chapters identify four models of complex remedies in the jurisdictions: a) report back to court model, b) consensual remedial formulation[45], c) expert remedial design, d) expert remedial oversight. Where relevant, the chapters indicate where and why some forms are seen in greater or lesser frequency in the three jurisdictions. Chapter 4 is titled 'Complex Remedies in India', and provides an overview of the emergence, entrenchment, and challenges to the continued use of these remedial forms in India with a close analysis of the legal, social, and political context of judicial decisions. Chapter 5 is titled 'Complex Remedies in South Africa', and provides an overview of the emergence, entrenchment, and challenges to the continued use of complex remedial forms in South Africa with a close analysis of the legal, social, and political context of judicial decisions. Chapter 6 is titled 'Complex Remedies in Kenya, and provides an overview of the emergence, entrenchment, and challenges to the continued use of complex remedial forms in Kenya with a close analysis of the legal, social, and political context of judicial decisions.

Chapter 7 is titled 'The Prospects of Complex Remedies: Comparative Reflections". This chapter provides an overview of the kinds of complex remedies we see across the three jurisdictions, the factors that condition their grant, and how these remedies comport with structural constitutional principles like the separation of powers. The chapter recaps the salient

[45] This form of the complex remedy is seen only in 'meaningful engagement' orders in South Africa, and not replicated in the other jurisdictions under study.

factors for courts while granting complex remedies. The dissertation ends with a conclusion that sets out an overview of the project.

1. What are Complex Remedies?

1.1. Three Vignettes: Delhi, Johannesburg, and Nairobi

On June 21, 2001, the Supreme Court of India released an interim order in PUCL v Union of India. This public interest litigation case sought to direct judicial attention to scores of starvation deaths in the arid Western region of the country.[46] The country's public distribution system for foodgrains was creaking, and a series of poor rainfall seasons put even greater pressure on it.

The interim order had four notable components:

A) It declared the right to food to be a constitutionally recognized and judicially defensible right[47]

B) it converted a number of existing discretionary (as opposed to right-based) government food security schemes into justiciable rights[48],

C) it required the litigants, a prominent civil society organization, to engage in dialogue with a range of government departments that had the responsibility to administer these food security schemes;

[46] Manish K. Jha, *Hunger and Starvation Deaths: Call for Public Action* 37(52) Economic and Political Weekly 5159, 5160 (2002).

[47] The Indian Constitution did not contain a set of judicially enforceable socioeconomic rights, with its framers opting to codify a set of directives in the fields of education, healthcare, and food security in its judicially unenforceable Directive Principles of State Policy. See Tarunabh Khaitan, *Constitutional Directives: Morally-Committed Political Constitutionalism* 82(4) Modern LR 603 (2019) (outlining a set of reasons for the choices made in respect of social entitlements at the Constituent Assembly) For the constitutional theory implications of these, see Lael K Weis, *Constitutional Directive Principles* 37(4) Oxford Journal of Legal Studies 916 (2017).

[48] PUCL v Union of India, Order dated 16 January 2002.

D) it set up an institutional structure, comprising commissioners and staffed with their deputies, that would be housed within the Supreme Court premises, overseeing the implementation of its directives and suggesting further ways to ensure the fulfilment of the right to food.[49]

This interim order would form the basis for revising many of the basic assumptions of existing constitutional theory and practice. Why was this revolutionary? After all, was the Supreme Court of India not already an established player in global constitutional studies discourse, lauded for its doctrinal innovations and its careful attention to crafting a progressive jurisprudence?50 While that may certainly have been true, the Court's attention to issues of implementation of its judgements (and therefore, to the enforceability of the remedies it granted) was less visible in its outputs. Therefore, this kind of remedial order on an issue around which there was significant public attention [51] and political mobilization [52], and social movement energy[53], was unprecedented. The *PUCL* interim order represented what I will call a complex remedial order, for the first time in the history of India's apex court's judgments on social entitlements, as formulated in terms of justiciable rights.

Let's now look at another example, this time from South Africa. The country transitioned from a formal apartheid regime in 1994 to a constitutional democracy. South African constitutional democracy was founded on a number of principles, including those of non-racialism, the rule of law, and a robust and independent judiciary. If apartheid was built on a web of laws that created, entrenched, and sustained an exclusionary social order, undoing this web and its

[49] See Section 16, Land Act, 1991.
[50] SP Sathe, *Judicial Activism: The Indian Experience,* 6 Washington University Journal of Law & Policy 29 (2001); Oliver Mendelsohn, *The Supreme Court as the most trusted public institution in India*, 23 South Asia: Journal of South Asian Studies 103 (2000)
[51] Jean Drèze, *Democracy and Right to Food* 39(17) Economic and Political 1723 (2004).
[52] See James Chiriyankandath, Diego Maiorano, James Manor, Louise Tillin, THE POLITICS OF POVERTY REDUCTION IN INDIA: THE UPA GOVERNMENT, 2004 TO 2014 (Orient BlackSwan, Hyderabad 2020).
[53] Shereen Hertel, *Hungry for Justice: Social Mobilization on the Right to Food in India*, 46 Development and Change 72 (2015).

afterlife would require sustained and coordinated effort from social, political, and legal actors. A key area for reform was the question of land, land that had been dispossessed from the native, primarily black residents of the country.[54] The dispossession of land was accompanied by two corollary moves by the apartheid state that would seal the place of land reform as an issue of central importance to socioeconomic rights. The first was the relocation of the black population to the peripheries of cities and to satellite townships and 'bantustans through laws like the Black (Urban Areas) Consolidation Act 25 of 1945. The second was the pass system that limited the number of black people who could access the cities and the times at which they could be in the city. [55] As a result, urban and rural land is still held disproportionately in private hands, most often white. A majority of eviction and resettlement cases based on the right to housing provision of the South African Constitution are therefore triggered by 'irregular occupiers' being on urban private and public land.[56]

One of the key planks for land reform is the restoration of native title to lands on which persons had resided for an extended period, a formal process for which was set up by the Land Act, 1994. The process was sclerotic: in over 20 years since it was set up, the Department had over 10,000 unprocessed applications for converting land tenure. They had processed less than twenty percent of this number when the last data was available from 2018. The Department's failure to process these claims was challenged in *Mwelase*[57] at an individual and systemic level, and the Land Claims Court held that the Department's failure constituted a violation of a number of constitutional rights, most notably the entitlement to secure land tenure that had

[54] See generally, Tembeka Ngcukaitobi, LAND MATTERS: SOUTH AFRICA'S FAILED LAND REFORMS AND THE ROAD AHEAD (Penguin Randomhouse 2021).
[55] Ruth Hall, *A Political Economy of Land Reform in South Africa* 31-100 Review of African Political Economy 213, 215-217 (2004).
[56] Margot Strauss & Sandra Liebenberg, *Contested spaces: Housing rights and evictions law in post-apartheid South Africa* 13(4) Planning Theory 428, 430 (2014)
[57] Bhekindlela Mwelase v Director-General for the Department of Rural Development and Land Reform [2019] ZACC 30 (Mwelase).

been rendered legally insecure as a result past racially discriminatory laws or practices.[58] The Land Claims Court appointed a Special Master, an official who would take over the Department of Land Reform's division that processed tenure conversion claims. On appeal, the Constitutional Court left intact the Land Claims Court's order, citing the need for urgent land reform to undo the legacies of apartheid and the need to respect the specialist expertise of the court.[59] The judgment was extraordinary in the breadth of the powers it granted to an official that it appointed to oversee the executive and the depth of its mistrust of the national government. However, what was extraordinary was how this judgment arrived on the back of a series of decisions that cast serious doubts on the ability of governmental agencies - and the departments that oversaw them – to perform their duties.[60] This lack of constitutional faith from the judiciary toward the coordinate branches was a key reason for awarding fairly extensive, complex, and structural remedies in some of the cases under discussion.

In Kenya, the third jurisdiction under study here, compliance with judicial orders has been and continues to be a thorny issue, despite the enactment of the 2010 Constitution that granted more expansive remedial powers to courts than previously available.[61] Courts struggle with non-compliance by government actors – usually couched in terms of state incapacity[62] or economic constraints.[63] Following Kenyan independence and its transition to democracy in 1963, courts

[58] See Section 25(6), South Africa Constitution.
[59] Mwelase at para 41.
[60] See the cases on social security, *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) (where the CCt set up an expert panel to oversee remedial implementation); *Linkside v Minister for Basic Education* [2015] ZAECGHC 36 (setting up a panel for the oversight of a remedy that involved upgradation of school infrastructure) see also Helen Taylor, *Forcing the court's remedial hand : non-compliance as a catalyst for remedial innovation* 9(1) Constitutional Court Review 248, 253 (2019).
[61] Walter Khobe Ochieng, *Judicial–Executive Relations in Kenya Post-2010 The Emergence of Judicial Supremacy?*, in Charles M. Fombad (ed.), SEPARATION OF POWERS IN AFRICAN CONSTITUTIONALISM (Oxford University Press, 2016).
[62] Mai Hassan, *The local politics of resource distribution*, in Nic Cheeseman (ed.) et al., THE OXFORD HANDBOOK OF KENYAN POLITICS 67 (Oxford University Press, 2020).
[63] But see for example Kenya Constitution, 2010, section 20. **Application of Bill of Rights:**
"*In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles*
a. it is the responsibility of the State to show that the resources are not available;

were not immune from the gravitational pull of its state apparatuses' authoritarian, strong-man proclivities. Courts could do little as they stood by without much resistance, especially where the interests of strong political actors were involved.

Following the passage of the 2010 Constitution, a particularly intractable problem has been forced evictions, and its links to the political economy of urban land dispossession.[64] The unstoppable force of urban renewal has necessitated the displacement of the urban landless from several plots of private and public land that they had occupied[65], a practice that went unabated even during the pandemic.[66] Judicial protection against evictions from public and private land has been a source of litigation under the 2010 Constitution, with the principles settling key principles in the 2021.[67] The use of structural remedies, that have several features in common with the complex remedies under study in this dissertation, has been a contentious issue in Kenya, with the High Court, the Court of Appeal, and the Supreme Court being locked in a battle over their use in remedial orders.[68]

One of the early cases to deploy a complex remedy was litigation regarding evictions from the Ngara Open Market in central Nairobi. In this case, a group of hawkers and other residents who had resided in or operated businesses in the area (for which they paid daily amounts of money

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b. in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

c. *the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion*."

[64] Ambreena Manji, THE STRUGGLE FOR LAND AND JUSTICE IN KENYA (James Currey / Boydell & Brewer, 2020).

[65] Wangui Kimari & Constant Cap, *Nairobi's incendiary displacements*, Africa is a Country https://africasacountry.com/2022/03/nairobis-incendiary-displacements.

[66] Ella S. Duncan, *Justifying and Resisting Evictions in Kenya: The Discourse of Demolition during a Pandemic*, World Peace Foundation, September 21, 2020, available at https://sites.tufts.edu/reinventingpeace/2020/09/21/justifying-and-resisting-evictions-in-kenya-the-discourse-of-demolition-during-a-pandemic/; see also Juliana Nnoko-Mewanu, Nairobi Evicts 8,000 People Amidst a Pandemic and Curfew, https://www.hrw.org/news/2020/06/10/nairobi-evicts-8000-people-amidst-pandemic-and-curfew (highlighting the significance of public / private ownership and stalled land reform).

[67] Mitu Bell Welfare Society v. Kenya Airport Authority PETITION NO. 3 OF 2018, available at https://katibainstitute.org/wp-content/uploads/2021/01/Petition-3.2018-MituBell.pdf.

[68] William Kiema, *A Case for Structural Interdicts in Enforcing Socio-Economic Rights in Kenya* 7(1) Kenya Law Review 136, 141 (2019); Martha Chinyavu Muzungu, *Structural interdicts in Kenyan constitutional law* 1 Kabarak Law Review 147 (2022).

to the Nairobi county government) for 30 years, were served eviction notices requiring the vacating of their residences within a very short time.[69] The petitioners argued that the evictions did not provide alternate accommodations for the affected residents and therefore violated the constitutional and policy obligations that the state was under.

The High Court halted the eviction due to its non-compliance with the rudimentary Resettlement Action Plan that looked to rehabilitate and resettle Nairobi residents who were affected by the plan to build the "Accra Road Extension (Ngara market- Kirinyaga Road)".[70] While halting the eviction, the Court, over several sittings, was able to gain information expertise on the proposed plan for rehabilitation and resettlement from various government agencies, enable dialogue between members of civil society who had not been adequately consulted in the process, and foster conversations between the affected communities and the government. The final judgment in the dispute records a permission for the eviction process to be completed, a little over a year and a half since the original notice had been served by the authorities.[71] However, the four requirements set out in the judgment are important: a) observer access to ensure compliance with human rights principles, mandatory presence of government and security officials, c) eviction to occur in compliance with rights to dignity, life, and security of the evictees, and d) no subjection to indiscriminate attacks. The decision also stipulated that members of the Kenyan Human Rights Commission would oversee the eviction[72]

[69] Republic v Cabinet Secretary Ministry of Transport and Infrastructure & 3 others ex parte Francis N. Kiboro & 198 Others [2015] eKLR (Kiboro).
[70] Id. at para 5.
[71] Kiboro at para 58.: "*The Respondents in undertaking the evictions in question will have to take into account the following factors:*
i) that at the time of eviction, neutral observers should be allowed access to the suit properties to ensure compliance with international human rights principles.
ii) that there must be a mandatory presence of Governmental officials and security officers.
iii) that there must be compliance with the right to human dignity, life and security of the evictees.
iv) That the evictions must not take at night, in bad weather, during festivals or holidays, prior to any election, during or just prior to school exams and in fact preferably at the end of the school term or during school holidays.
v) that no one is subjected to indiscriminate attacks."
[72] Kiboro, at para. 59.

Even if the eviction could not be fully halted, as the respondents had sought, the judicial process served to buy the evictees time, deepened their engagement with a largely opaque bureaucratic structure, and enabled the Kenyan Human Rights Commission to oversee the eventual eviction complied with dignitarian norms. A judicial process and outcome of this kind – one that promoted the values of human dignity and the rights enshrined in the 2010 Constitution, was facilitated by its design. The Court rooted its holdings in not just Article 21(2)[73] and Article 43 (on the right to housing) but also the values of public participation in government decision-making and good governance that are spelt out in Article 10.[74] But the Ngara Open Market was one of the first times that a complex, multi-step, multi-stakeholder remedy was used in Kenya, and marked a confident judiciary that was not afraid of challenging the government. The use of these complex remedial forms proliferated following the passage of the 2010 Constitution, likely boosted by knowledge and training networks for judges.[75] However, their use came under challenge in subsequent cases in Kenya. In 2021, the *Mitu-Bell* case in the Supreme Court laid down principles to be applied when deciding on a remedial grant of the complex kind.[76]

[73] Kenya Constitution, article 21(2): **Implementation of rights and fundamental freedoms**
(2). The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.
[74] Kenya Constitution, article 10: **National values and principles of governance**
1. The national values and principles of governance in this Article bind all State
organs, State officers, public officers and all persons whenever any of thema. applies or interprets this Constitution;
b. enacts, applies or interprets any law; or
c. makes or implements public policy decisions.
2. The national values and principles of governance includes patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
c. good governance, integrity, transparency and accountability; and
d. sustainable development."
[75] Elizabeth A. O' Loughlin, *International Law And Constitutional Reform: A Case Study Of The 2010 Constitution Of Kenya* (unpublished PhD dissertation, University of Manchester), available at https://pure.manchester.ac.uk/ws/portalfiles/portal/184636019/FULL_TEXT.PDF.
[76] Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021).

These are paradigmatic examples of complex multi-step, multi-stakeholder remedies in the jurisdictions under study at various stages in their political development and at different times in the evolution of the judiciary. In this introductory chapter that sets the stage for what is to follow, I outline in Part I what I mean by a complex remedy. Part I considers the discontents that surround remedies in social rights litigation. Part II outlines what is and isn't a complex remedy and how they differ from its close cousin, the structural remedy. Part III outlines how complex remedies respond to some of the discontents identified in Part I. Part III outlines in brief the trade-offs with complex remedies.

1.2. Remedies & Their Discontents

In the comparative literature on remedies in social rights cases, the term remedy refers to both a substantive and procedural concept.[77] Procedurally, it refers to a process or series of processes by which courts, quasi-judicial bodies, administrative agencies, and/or other competent bodies hear social rights violation claims.[78] Substantively, it refers to the outcome of the judicial deliberation following a hearing of the case and the relief granted to the claimant. Notice that this process usually involves three parties: the claimant, the respondent, and the court. This makes the process triadic, and one of the features of complex remedies is the disruption of this triadic formulation of the judicial process. The complex remedies in social rights that this dissertation will discuss encompass both the process of arriving at a remedy in cases where the remedy is not clear, as well as the outcome.

Social rights remedies should also be effective. An *effective* remedy for a social rights violation serves three functions.[79] The first is to place the applicant in, as far as possible, in the same

[77] Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 4 (3rd ed. 2015, Oxford University Press) (hereinafter Shelton, REMEDIES).
[78] Id., at 7.
[79] Kent Roach, REMEDIES FOR HUMAN RIGHTS VIOLATIONS: A TWO-TRACK APPROACH TO SUPRA-NATIONAL AND NATIONAL LAW 2-5 (Cambridge University Press, 2021) (Hereinafter Roach, Remedies).

position as they were before the occurrence of the alleged rights violation (the *restitution* function). The second is to ensure ongoing compliance with the rights obligations of duty bearers (the *equilibration* function). The third is to try and ensure that future violations of the right in question do not occur through a) deterrence, and b) an attempt at addressing the feature of a legal system that caused the violation in the first place (*non-repetition* function). Social rights remedies are often unable to ensure the fulfilment of these desiderata and therefore some courts use complex remedies to engage with the problems.

Judicial remedies in social rights cases have deficiencies – ones that result from their design and practice in the everyday of constitutional litigation. I list below the primary ones.

a. Democratic Legitimacy: Decisions on social rights cases are ones that implicate socially important things – where roads are built, how money is allocated to education, and a range of other allocative justice decisions. Democracy theorists argue that judicial remedies short-circuit this process in social rights cases by enabling democratically unaccountable judges to decide on these questions.[80] Judges are considered, in these accounts, to be part of an institution (the judiciary) that possesses lowers levels of democratic connection and accountability relative to the representative branches, to decide on such matters that people should have a say on. The 2010 Kenyan Constitution explicitly recognizes these concerns and places limits on the extent to which judges can interfere with budgetary allocations arrived at by the government.[81]

[80] Jeremy Waldron, *The Core of the Case against Judicial Review* 115(6) Yale Law Journal 1346 (2006).
[81] See Kenya Constitution 2010, article 20(5): **Application of Bill of Rights:**
"In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles:..
c. the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion."

b. Polycentricity: Judicial remedies on social rights often falter on the adequate consideration of the polycentricity of their claims. Polycentricity is a feature of legal problems that have "interacting points of influence" that "involve many affected parties and a somewhat fluid state of affairs".[82] Fuller's notion of polycentricity applies to the process of adjudication in that the triadic form of the judicial process often does not include parties who might be affected by a ruling but are not before the court. A modified version of the polycentric critique of social rights remedies involves the individuation of systemic issues and offering piecemeal solutions to broader social problems. These individual solutions affect a range of stakeholders who have little or no say in the judicial process, despite being affected by it. However, the polycentricity is not in and of itself not a special feature of SER litigation and is part of most kinds of legal disputes[83]. Concerns around polycentricity can be engaged with through greater stakeholder involvement that leverages the comparative institutional advantages of the coordinate institutions like the legislature and executive[84].

c. Diffused Power & Responsibility: Responsibility for the fulfilment of social rights is primarily vested with government authorities. This allocation occurs both at the vertical and horizontal levels. Vertically, power is shared between the federal and sub-national governments (usually through divvying up spheres of legislative and rule-making competence); horizontally, between the executive, legislative, judicial and fourth branches (usually through functional competence). Of the countries under study in this dissertation,

[82] Lon Fuller, *The Forms and Limits of Adjudication* (1978) 92 Harvard Law Review 353.
[83] Jeff King, *The Pervasiveness of Polycentricity* [2008] Public Law 101.
[84] Kent Roach, *Polycentricity and queue jumping in public law remedies: A two-track response*. , 66(1) University of Toronto Law Journal 3 (2016).

two are normatively unitary (South Africa & Kenya) but contain elements of devolution of responsibility to provincial units of government[85]; while India is normatively federal, but descriptively also has elements of unitaristic design. Coordination among levels of government is necessary for fulfilling social rights and redressal of their violations requires the identification of the entity responsible and coordinating between spheres and levels of government.[86]

d. Expertise: Complex remedies allow courts to draw on the expertise of not just the parties to the dispute, but also of CSOs and other parties. Courts are said to be institutionally unsuited for certain kinds of expertise-heavy deliberation[87] and can often get the contested (or evolving)[88] science behind social rights claims wrong. Take for example the approach of the South African Constitutional Court in *Mazibuko*[89] which was heavily criticized[90] by academics and human rights practitioners for its approach to the question of the amount of daily household water allocation that was to be granted to residents in the satellite area of Soweto in Johannesburg. The City's prayer was that the Court accept a considerably lower daily allocation than the ones pressed for the lawyers for the opposing side. The Constitutional Court agreed with the city, citing subsidiarity, the separation of powers, and the government's expertise as the motivating concerns driving the decision. However, that does not thoroughly solve the problem of normative epistemology of courts relative to legislatures and the

[85] Especially in the realm of provision of social services like housing, healthcare, and education.
[86] Gaurav Mukherjee & Juha Tuovinen, *Designing Remedies for a Recalcitrant Administration* 37 South African Journal on Human Rights 61 (2021).
[87] Malcolm Langford, *Why Judicial Review*, 2 Oslo Law Review 36 (2015).
[88] See for example how the Constitutional Court of South Africa in the Treatment Action case had to deal with the evolving scientific understanding of the transmission of HIV-AIDS in the face of the government's AIDS denialist stance. Jonathan Berger & Nathan Geffen, *MTCT programmes in South Africa: nevirapine and the minister*, i-Base, 6 September 2004, https://i-base.info/htb/9007.
[89] Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28.
[90] Ed Couzens, *Avoiding Mazibuko: Water security and constitutional rights in Southern African case law* 18(4) Potchefstroom Electronic Law Journal 1162 (2015).

executive as the primary drivers of decision-making of this kind. This is because the institutional competence of courts relative to other branches to weigh evidence is contested[91]. Yet, complex remedies can get us closer to a place where a range of different opinions are considered and parties are brought together (beyond the bi-polar nature of ordinary litigation) to deliberate on what the best way forward in a remedial situation will be.

1.3. Complex Remedies: A Definition

Complex remedies are judicial orders that involve more than one step, whichmay be interim or final in nature, that join stakeholders who are not before the court to join in the judicial proceeding to help arrive at the interim order or final judgment (*multi-stakeholder* feature), provide information to the court, or to oversee implementation of an interim order or final judgment (*dialogic* feature), as part of a series of steps that help address the issue before the court (*multi-step* feature).

The complexity of the remedy arises out of one or a combination of the following features:

a) the nature of the dialogic process involving multiple stakeholders to arrive at the interim or final order. As discussed earlier, the triadic judicial process does not ordinarily permit the involvement of non-parties in judicial proceedings, a feature that exerts pressure on the polycentric nature of social rights disputes. Complex remedies involve stakeholders in the form of experts, government departments, and civil society, who contribute to the eventual resolution of the dispute by devising the remedy or overseeing its implementation.

[91] Jeremy Waldron, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS ch. 8 (2016)

b) stakeholders engage in dialogue and bargain with one another, often more than is seen in, or required by, the ordinary judicial process.

c) the nature of the interim order or final judgment that involves multiple steps. Ordinary judicial processes often involve multiple steps, with parties returning to court multiple times. What sets a complex remedial process apart in this respect is that the reporting back to court for multiple steps is done to report progress on the steps formulated in the last court hearing.

Complex remedies disrupt the triadic[92], one-off nature of judicial decisions, and involve stakeholders that are beyond the parties to the dispute. Remedial complexity is independent of the nature of the claim, i.e., it does not arise more or less in litigation involving a certain social right. In the sections that follow, complex remedies arise from cases where parties are joined to the dispute during the judicial process prior to delivering of the final judgment. In such cases, these remedies perform an informational or epistemic function and assist the court in filling gaps in knowledge or expertise and often are asked what the nature of the remedy should be.

When they are joined to the dispute after the delivery of the judgment, the parties serve to monitor the implementation of the judgment and/or compliance with the terms set out by the court. In such cases, they perform an oversight function that courts cannot by virtue of their design as institutions whose mandate (usually) ends with the disposition of the case. Complex remedies involve private and public stakeholders beyond the parties to the case, but who can contribute to judicial engagement with the broader dispute. Public entities include the following:

[92] Owen M. Fiss, *The Social and Political Foundations of Adjudication* 6(2) Law and Human Behavior 121, 124 (1982), Alec Stone Sweet, *Judicialization and the Construction of Governance* 32(2) Comparative Political Studies 182 (1999).

- government departments and authorities who may not be directly involved with the case itself and who were not impleaded into the original case as a result;

- fourth branch institutions like national or sub-national human rights commissions that are tasked with remedial design or judgment monitoring;

- sub-national governments and authorities who may not have been part of the case at the outset, but are later added to the case.

Private entities include the following:

- civil society organizations and non-governmental organizations

- individuals who are appointed by court as experts or as amicus curiae who are tasked with remedial design or judgment implementation oversight.

1.4. Complex Remedies & Structural Remedies: Convergences & Differences

Judicial remedies for social rights violations are of three kinds. The first is an individual remedy, where a court grants a judicial order that serves restitution, equilibration, and non-repetitionary functions to the litigant before it. The orders in cases where individual remedies are granted do not extend to the structural issue that caused the injury to the litigant. Since the nature of the judicial process is triadic, the majority of decisions are individual in nature. However, individual remedies are especially incapable of remedying social rights violations, especially in jurisdictions like South Africa, and can result in a range of previously identified functional desiderata not being met. The second is a structural remedy, where the judicial order responds to a claim from a litigant by engaging with, and ordering a resolution of, the structural problem that caused the injury. The third is a composite individual-systemic remedy, which grants relief to the litigant while also requiring engagement with the structural factors that cause

the injury. Individual remedies may fail to prevent future violations or remedy the feature of the legal system that caused the violation; systemic remedies may leave individual claimants without a remedy and also not address the intangible harms that rights holders have suffered.[93]

The three categories of judicial remedies listed above do not capture the process of arriving at the remedy and what courts can do to ensure compliance. In the jurisdictions and complex social problems addressed by social rights that are under study, problems with state capacity, executive and legislative recalcitrance, and informational and expertise deficits abound. Courts often also struggle to ensure compliance with their orders in the face of executive intransigence. This presents a difficult problem for courts: under the doctrine of *functus officio*[94], they cannot reopen cases they have decided and must relinquish jurisdiction. Yet, some complex remedial forms necessitate the retention of jurisdiction while courts decide on a final remedy, or where they monitor compliance in partnership with fourth branch institutions or members of civil society. The Supreme Court of Kenya, in *Mitu-Bell*[95], highlighted this tension when it had to decide the validity of using structural interdicts in Kenyan constitutional litigation, which the Court of Appeal had struck down as violating functus officio. It held that while systemic, but one-off remedies were permitted within the Kenyan constitutional order, the use of structural orders (which had a reporting component) should be limited due to courts' limited institutional capacity and the "validity, even vitality, in the majority of cases", of the doctrine of functus officio. However, it also held that in certain situations, the doctrine "ought to give way, albeit on a case-by-case basis." [96] Structural remedies usually are issued one-off, and may not have a dialogic component where a range of stakeholders deliberate nor a reporting obligation.

[93] Roach, Remedies, at 14-15.
[94] Anna Wong, *Doctrine of Functus Officio: The Changing Face of Finality's Old Guard* 98 Canadian Bar Review 543 (2020).
[95] Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021).
[96] Id, at

Consequently, complex remedies, which draw on expertise and support structures to create and ensure compliance with remedies, can address the issues of state capacity to comply and institutional fit to design remedies. Therefore, individual, systemic, and hybrid remedies may be arrived at in a complex manner and may be implemented with elements of the judicial process that lead to complexity.

1.5. Advantages of Complex Remedies

Why have some jurisdictions embraced complex remedies and why do some tend to shun them? Complex remedies offer a range of benefits over other kinds of judicial remedies that I capture in this section.

a) **Lower Coordination Costs**: One of the key advantages of complex multi-step remedies is that they can lower coordination costs. Coordination costs refer to the difficulty and expense of bringing together all of the necessary stakeholders to design and implement judicial remedies. For social rights litigation, coordination costs can be particularly high, as remedies often involve multiple parties, including government agencies, NGOs, and affected communities. Complex multi-step remedies can lower coordination costs by breaking the implementation process into smaller, more manageable steps. For example, in the *Mud School* case[97], a case that involved the development of basic physical school infrastructure and the supply of school materials, one of the central challenges for the Eastern Cape High Court was the levels of coordination needed to design and implement the remedy. By including the government authorities and civil society in the judicial process, the court was able to operate within the limits of feasibility and state capacity while ensuring that the remedy adhered to certain normative standards. The social right remedies in the cases involved a series of steps, including

[97] Centre for Child Law and Others v Minister of Basic Education and Others (2840/2017) [2019] ZAECGHC 126

the provision of textbooks, the construction of new schools, and the training of teachers. Each of these steps was undertaken separately, with different parties responsible for different aspects of the remedy. The complex nature of the remedy and the dialogue that parties engaged in during the judicial process ensured its ultimate success and helped reduce the overall complexity of the implementation process and make it easier for stakeholders to coordinate their efforts.[98]

b) <u>Creation & Maintenance of Support Structures for Systemic and Sustainable Change:</u>

The realization of social rights through litigation is one of many strategies, along with social and political mobilization. The greater fulfilment of social rights is also crucially dependent on a network of support structures comprising civil society and members of the political elite who can coalesce around the cause and ensure greater public attention, resources, and judicial energy are diverted to these causes. [99] Complex remedies can help create and sustain these support structures through the involvement of a range of stakeholders who engage with the government, private parties, and civil society in the process of formulating the remedy or overseeing its implementation.

c) **<u>Ease of Replicability</u>**: Another key advantage of complex multi-step remedies is that they can be easily replicated in other contexts. This is particularly important for social rights litigation, which often involves similar issues in different contexts. The kinds of doctrinal approaches and institutional innovations used in cases with complex remedies can travel to other contexts, for example, a remedy designed to address the lack of access to clean water in one community, which was the case in the Walker[100], might be replicated in another community facing the

[98] Ann Skelton, *Leveraging funds for school infrastructure: The South African 'mud schools' case* study 39 International Journal of Educational Development 59, 61 (2014)
[99] Charles Epp, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).
[100] City Council of Pretoria v Walker (CCT8/97) [1998] ZACC 1.

same issue. The ruling of the SA Constitutional Court in the case and its approach using a non-discrimination framework that sought inputs from the affected communities and civil society has been used elsewhere as well.[101] Complex multi-step remedies can be easily replicated because they are designed to be flexible and adaptable to different contexts. This can make it easier for different stakeholders to adapt the remedy to their specific circumstances.

d) **Deliberative Equality**: Deliberative equality refers to the principle that all stakeholders should have an equal say in the decision-making process.[102] In the context of social rights litigation, this means that affected communities, NGOs, and government agencies should all have an equal voice in the design and implementation of remedies. Complex multi-step remedies can incorporate deliberative equality by providing opportunities for all stakeholders to participate in the decision-making process. For example, a remedy might involve the creation of a committee or working group made up of representatives from all relevant stakeholders. This group could be responsible for overseeing the implementation of the remedy and ensuring that all stakeholders have an equal say in the decision-making process.

e) **State Capacity**: State capacity refers to the ability of the state to implement policies and programs effectively. In the context of social rights litigation, state capacity is particularly important, as remedies often require significant resources and institutional capacity to implement. Complex multi-step remedies can incorporate state capacity by taking into account the capacity of different state actors. For example, a remedy might involve the provision of training and resources to government agencies to help them implement the remedy effectively. Alternatively, the remedy might involve the creation of a new institution or program specifically designed to address the issue at hand.

[101] S v Jordan 2002 6 SA 642 (CC).
[102] Susan Sturm, *A Normative Theory of Public Law Remedies* 79 Georgetown Law Journal 1355 (1991).

f) **Multiplier Effects**: Multiplier effects refer to the ability of a remedy to have a positive impact beyond the immediate issue at hand. In the context of social rights litigation, multiplier effects can be particularly important, as remedies can have a wide-ranging impact on social and economic development. Complex remedies can help affected communities work with local governments and civil society to divert resources to these communities, draw public attention to issues, and to also ensure lasting, sustainable change.

1.5. Trade-offs with Complex Remedies

While complex remedies offer a range of benefits, they can also come with some disadvantages.

a. **Normative Disunity & the Situatedness of remedy**: Complex remedies often challenge a traditional, triadic understanding of the judicial process and the involvement of actors other than the ones before the court. In common law systems such as those under study in this dissertation, judicial decisions provide a roadmap for deciding future cases. Judicial review benefits from decisional specificity, as it applies a series of broadly worded constitutional or statutory provisions to well-defined facts. In this process, they illuminate our understanding of a certain right at hand concerning future cases, providing directions to various governmental actors along the way. However, with complex remedies that are heavily context-dependent, the normative influence of a decision in providing an action plan for future cases (whether they're litigated or not) comes under scrutiny.

b. **Expertise Privilege**: The judicial process in complex remedies relies often on the views of experts in guiding the determination of the dispute and the design of the remedy. However, in such cases, there can be a tendency to privilege certain kinds of expertise over others. An expert comes to a dispute with their biases and in many cases on social rights the expertise, as well the policy consequences that follow, is highly contested. Where there is a conflict of existing rights, expertise may also side with, and grant precedence to, one right over another – which

may have normatively undesirable consequences. The Indian Supreme Court and its jurisprudence on human displacement and environmental law is instructive in this respect.[103] The Court in a series of cases from the 2010s on conflicts between irregular occupiers of private and public lands, and the government (who claimed that these settlements were detrimental to the environment conservation efforts being undertaken), repeatedly decided cases on the basis of evidence presented by amicus curiae who had not weighed fully the evidence from the opposing side. This evidence included the findings presented by intervenors to the case of the loss of livelihood due to displacement and the rights acquired by the irregular communities after uninterrupted habitation for several decades in the neighbourhood.

c. **Deliberative Inequality:** Complex remedies that arise from social rights claims generally involve a private entity launching a legal action against the state. This situation often means that the state, equipped with more extensive financial resources, time, and organizational abilities, stands against private individuals who frequently live in circumstances of material scarcity and temporal limitations like for example, how often they can appear in court. Litigations are resource-intensive and time-consuming undertakings, often assisted by the types of strategic litigation actors prevalent in socio-economic rights cases. Hence, it's crucial that complex remedial procedures don't reproduce the existing deliberative imbalances seen in conventional adversarial litigation.

d. Judicial Overreliance & Executive & legislative Atrophy: In the jurisdictions under study, SER litigation is used both as a *sword* against retrogression and violations of social rights, as well as to force the state to justify its choices when it comes to the design of its policies on social rights. However, there is a risk of judicial strategies becoming the primary driver of action of social rights instead of the representative branches. In other cases, the executive may

[103] Gautam Bhan, *"This is no longer the city I once knew". Evictions, the urban poor and the right to the city in millennial Delhi* 21(1) Environment and Urbanization 127(2009).

not act on social rights claims, allocate funds toward the realization of rights, unless judicial action precedes it. A focus on judicial strategies and on complex remedial forms also risks de-politicizing resource allocation questions.[104]

1.6. Conclusion

This chapter has defined complex remedies and outlined how these kinds of remedies respond to a range of pathologies that beset traditional social rights remedies. While complex remedies present many advantages that are covered in brief in this chapter, they also have a number of drawbacks that are presented here. In the next chapter, the dissertation considers how key features of complex remedies engage with a range of structural constitutional concerns, the nature of social rights law, as well as the nature of social rights disputes.

[104] Nancy Fraser, *Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies* 99(2) Ethics 291(1989).

2. Why Complex Remedies?

Complex remedies are judicial orders in social rights cases that involve more than one step, that may be interim or final in nature, that join stakeholders who are not before the court to join in the judicial proceeding to help arrive at the interim order or final judgment (*multi-stakeholder* feature), provide information to the court, or to oversee implementation of an interim order or final judgment (*dialogic* feature), as part of a series of steps that help address the issue before the court (*multi-step* feature). This definition identifies three features of complex remedies that make them attractive for the jurisdictions under study. In this chapter, I place these three features in conversation with concerns around the judicial role and social rights in the broader literature and show how complex remedies can engage with them.

2.1. Complex Remedies & the Open Texture of Social Rights Provisions

Social rights provisions are often worded in broad language and without identifying the precise duty bearers within government or private parties or the exact nature of their duties. Social rights are also often 'new' rights in constitutional texts, and judges may not have extensive experience in adjudicating them.[105] Complex remedies can help engage with these features of social rights provisions by bringing a range of different stakeholders in dialogue with one another to spell out the range of duties that these rights impose, upon whom they are imposed, the substantive content of these rights, as well as the logistics of enforcement.

[105] James Fowkes, *Normal Rights, Just New: Understanding the Judicial Enforcement of Socioeconomic Rights* 20 American Journal of Comparative Law 1.

Let's take the right to education provision of the Indian Constitution, which was the first judicially enforceable social right to be constitutionalized in 2002. Article 21a of the Indian Constitution states that "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine." Notice how the provision is silent on the nature (or quality) of free and compulsory education that children between the ages of six to fourteen will receive, or how they are to enforce the right in case of a violation.

In litigation involving the Right to Education Act, 2009 (the legislation that operationalized Article 21(a)), key questions emerged for judges and advocates to flesh out in oral argument and judicial decision-making.[106] They included the nature and extent of state and federal government duties and the identification of the rights-holder, especially in the absence of a clear executive policy to spell these out. However, the wording of the right to education provision in the Indian Constitution is by no means an outlier. Dixon and Ginsburg find that these kinds of "by law" clauses are widespread and found in most constitutional orders around the world.[107] Moreover, constitutional rights provisions vary broadly regarding how much guidance a legislature gives when empowered or required to regulate a topic. Despite all this variance, it is clear that "by law" clauses are ubiquitous and may be positively related to the growth of constitutional rights. As rights become more numerous, and particularly as they become more complex, it is increasingly difficult for constitutional designers to adopt rights without legislative implementation. A key avenue for the enunciation of a range of questions

[106] For example, in Society for Unaided Private Schools of Rajasthan v. Union of India AIR 2012 SC 3445.
[107] Rosalind Dixon & Tom Ginsburg *Deciding Not to Decide: Deferral in Constitutional Design* 3 International Journal of Constitutional Law 636 (2011).

that arise from the broad wording of social rights provisions is through the dialogue that can inhere in multi-stakeholder litigation processes and remedial formulation.

It is also essential to signal that social rights provisions have become less indeterminate and more specific over time. In the first wave of social rights constitutionalization that occurred in the early parts of the 20th century, constitutional socioeconomic directives[108], were drafted as mission statements for the representative branches of government using much broader language than we see in constitutions today. For example, the Weimar Constitution of 1919 stated that "large families may claim social welfare"; "motherhood is placed under state protection and welfare.[109] This provision does not clarify how social welfare may be claimed, the exact nature of the obligations under the provision, or whether it is justiciable. The next wave of constitutionalizing social rights occurred in the mid-twentieth century when jurisdictions like India and Ireland chose to wall off justiciable and non-justiciable provisions on education, housing, and healthcare, opting to codify the latter as directive principles of state policy. While the textual provisions in this wave of constitutionalization were less abstract[110] than the preceding one, they still deferred decisions on precise elements, likely reflecting a lack of consensus among drafters.[111] Directive principles in Ireland and India influenced policy in weak ways and were occasionally used to aid the interpretation of justiciable fundamental rights. The third wave of social constitutional making in the post-1989 period drew inspiration from international instruments like the ICESCR[112] and was characterized by greater specificity in the constitutional design of SER provisions. Take, for example section 26 of the Constitution

[108] See Chapter 4 for an explanation of this term.
[109] Article 119, Constitution of the German Empire of August 11, 1919.
[110] See for example, the provision on education (now amended): Article 45: "*The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years*"
[111] Tarunabh Khaitan, *Directive Principles and the Expressive Accommodation of Ideological Dissenters* 16(2) International Journal of Constitutional Law 389 (2018).
[112] See Anna Saunders, *Constitution-Making as a Technique of International Law: Reconsidering the Post-War Inheritance* 117(2) American Journal of International Law 251 (2023).

of South Africa, 1996, concerned with housing.[113] All three provisions of section 26 lay out a set of concrete obligations (right to have access to adequate housing, progressive realization within available resources, as well the requirements for evicting someone). Yet, concerns abound, to this day, on the reluctance of courts to engage with the substance of social rights obligations.

Sandra Fredman, following the work of Robert Alexy, suggests that we understand SER provisions as "norm(s) which must be realized to the greatest extent possible given the legal and factual possibilities", which do not lose their moral and legal salience when they are outweighed in particular circumstances by other principles.[114] According to Fredman, when understood as principles, these norms retain their normative force even when they are not immediately fulfilled, as long as parameters of "effectiveness, participation, accountability, and equality" are considered by a particular authority. All of these parameters form a crucial part of the design and practice of complex remedies.

Fredman expanded on existing ideas by incorporating insights from deliberative democracy into her work. She has developed a theory of adjudication called "bounded deliberative democracy" which she believes holds courts, legislatures, and executives accountable for human rights.[115] Deliberative democrats argue that political cooperation should not solely rely on interest bargaining, where outcomes are determined by relative economic, material, political, or numerical power. Jürgen Habermas distinguishes between two types of

[113] Section 26, South Africa Constitution, 1996: "**26. Housing:**
(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions"
[114] Sandra Fredman, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 66 (Oxford University Press, 2008)
[115] Sandra Fredman, COMPARATIVE HUMAN RIGHTS LAW, ch.4 (Oxford University Press, 2018).

coordination: "interest governed and "value-oriented". Interest bargaining involves communication aimed at compelling or persuading opponents to accept one's claims. Success in interest bargaining depends on factual power rather than the strength of the argument. It assumes that each individual or group has fixed and unchangeable interests, and the solutions usually involve victory, surrender, or compromise.

In contrast, value-oriented coordination is based on presenting reasons that can convince all parties involved. The parties enter the process intending to justify their positions through reasons everyone can accept, while also being open to persuasion from other participants' arguments. Instead of focusing on defeating or winning, this form of coordination aims to achieve consensus driven by rational motivations.[116] While interest-based bargaining is a natural and sometimes necessary aspect of democracy, she highlights the significance of deliberation as an alternative to overcome bargaining power imbalances. Importantly, human rights should not be subject to interest-based bargaining, as it would risk prioritizing the rights of the powerful, who possess superior numerical, political, or financial resources, over the rights of the marginalized and vulnerable. This approach can be used to develop the normative content in difficult cases and where courts are called upon to balance competing rights and ensure their accordance with broader constitutional structural principles, which often occurs in practice. The Indian Supreme Court, in a series of cases on the non-availability of oxygen cylinders and its impact on the right to health during the pandemic, explicitly grounded its intervention on this theoretical account.[117] The Court balanced the federalism interests of states against the national government, with the need for timely, rights-based remedies.

[116] Jurgen Habermas, BETWEEN FACTS AND NORMS 139–40, 165 (Polity Press, 1997).
[117] In Re: Distribution of Essential Supplies And Services During Pandemic, Suo Motu Writ Petition (Civil) No.3 of 2021, para 5 (per Chandrachud CJ).

The dialogic nature of complex remedies that facilitates interaction with a range of stakeholders is compatible with a view of social rights provisions as channels of communicative action, rather than a basis for *only* strong form judicial review[118]. On this view, social rights provisions and their enforcement through complex dialogic remedies, can "structure communication among the potential duty bearers."[119] According to this approach, when interpreting SER provisions, courts can engage with duty indeterminacy with a focus on establishing new institutional arrangements, as well as assessing "a variety of background relationships that affect whether individuals have secure access to a crucial good or service."[120] Such an approach is manifested in the approaches of many courts in the jurisdictions under study,[121] and, most recently in the Covid-19 cases in India (discussed in Chapter 5).

Indeterminacy in the text can also open up a discursive space where a range of arguments during the process of dialogue between stakeholders that is seen in complex remedies. Bobbit's typology of constitutional argumentation, developed in the context of American constitutional litigation, is instructive even when transposed in a global context.[122] Dialogue and deliberation of the sort envisaged in this dissertation allows for the use of precedent, but also arguments based on the history of the drafting of the constitution, international law or foreign case law, and canons of constitutional interpretation. In the context of South Africa, De Vos notes that less traditional factors, such as "the surrounding circumstances of the case, the social context

[118] Mark Tushnet, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 231 (Princeton University Press, 2008) : "…*sets up a dichotomy between judicial enforcement and no enforcement at all.*"
[119] See Varun Gauri and Daniel Brinks, *Human Rights and Communicative Action* 20 The Journal of Political Philosophy 1, 16 (2012) (drawing on the work of Jurgen Habermas).
[120] Id., at 13.
[121] See for example, courts looking at, in India whether the right to health would give rise to a claim for damages for substandard care (Indian Medical Association v. VP Shantha AIR (1995) 6 SC 651), whether prosecution under criminal law of negligence would be appropriate for a medical service provider (Juggankhan v State of MP AIR 1965 SC 831), in South Africa, limiting price gouging for medication (New Clicks South Africa (Pty) Limited v Dr Manto Tshabalala-Msimang NO and Another (2004).
[122] Philip Bobbitt, CONSTITUTIONAL FATE. THEORY OF THE CONSTITUTION 5-6 (Oxford University Press, 1981) (His typology comprised historical, textual, structural, prudential doctrinal, and ethical arguments).

of the case, or the general history of the country", while also being sympathetic to its role as an institution which was meant to mediate a break from its apartheid past.[123]

Arguments originating in international law can clarify the precise nature and extent of duties accruing to various actors, albeit to varying degrees across the three jurisdictions. Fredman suggests that at a minimum, human rights on SER are ordinarily framed in what can be understood through a tripartite lens of duties to protect, respect and fulfil.[124] While this classification is derived from international law[125], courts in India, South Africa and Kenya have developed ways in which the domestic obligations accruing to different branches of government arising under binding international commitments, primarily under the ICESCR, are judicially clarified through recourse to the treaties where these obligations are contained. This is influenced by the status of international law in each of these jurisdictions' respective legal systems, with South Africa[126] and India[127] being formally dualist countries, unlike Kenya[128]. In South Africa, case law evolved over time using the tripartite duty as a shield against retrogression or at least as a barrier against impairment of access[129]; in Kenya, it is used

[123] Pierre de Vos, *A Bridge Too Far? History as Context in the Interpretation of the South African Constitution* 17(1) South African Journal on Human Rights 1, 25 (2001).
[124] Sandra Fredman, HUMAN RIGHTS TRANSFORMED 70-74 (Oxford University Press, 2008).
[125] See Committee on Economic, Social and Cultural Rights, *General comment No. 16 (2005) The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)* (11 August 2005), available at https://www.refworld.org/docid/43f3067ae.html. ("*The equal right of men and women to the enjoyment of economic, social and cultural rights, like all human rights, imposes three levels of obligations on States parties - the obligation to* ***respect, to protect and to fulfil****. The obligation to fulfil further contains duties to provide, promote and facilitate.11 Article 3 sets a non-derogable standard for compliance with the obligations of States parties as set out in articles 6 through 15 of ICESCR.*")
[126] See section 231, South Africa Constitution: **International agreements**
"*Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliamen*t."; section 38 Interpretation of Bill of Rights: "(1) *When interpreting the Bill of Rights, a court, tribunal or forum—*
…(b) *must consider international law*".
[127] Aparna Chandra, *India and international law: formal dualism, functional monism* 57 (1-2) Indian Journal of International Law 25 (2017).
[128] See section 2, Kenya Constitution: "*Supremacy of this Constitution (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution*."
[129] Government of the Republic of South Africa v Grootboom ZACC 19, 2001 (1) SA 46 (CC) para 24, Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others (CCT 29/10) [2011] ZACC 13, para

to clarify the nature and extent of duties incumbent upon the government[130] in SER cases. In India, too, where international treaties do not automatically become part of domestic law, the Supreme Court has used international law in a way that has not always been uniform. More often than not, the deployment of provisions from the ICESCR, to which India is a signatory, has been rhetorical at worst, and at best, has been used to buttress the finding of an obligation upon respondent governments to undertake action (usually in the area of the right to food or shelter[131]). Its use, at least in the field of SER, is never determinative of the outcome. Courts have always sought to maintain such treaties are not a source of obligations independent of parliamentary enactment.

Therefore, textual indeterminacy need not necessarily be fatal to realizing social rights, and key features of complex remedies can engage with the identified problems. Complex remedies open avenues for greater dialogue among a range of stakeholders over a series of steps, and permit the use of international law to flesh out rights and obligations, while also allowing a range of extra-textual factors to be considered while remedying a violation of social rights. Complex remedial forms, where judges bring together a range of stakeholders to speak to one another to arrive at a solution, present an instance where judges can use the open texture of the text in service of a remedial goal that advances social justice.

58. See also Manisuli Ssenyonjo, *The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa* 64(2) Netherlands International Law Review 259, 277 (2017).

[130] John Kabui Mwai & 3 Others v. Kenya National Examination Council & 2 Others, Petition No. 15 of 2011, [2011] eKLR (High Court of Kenya at Nairobi, 16 September 2011), http://kenyalaw.org/Downloads_FreeCases/83548.pdf, paras. 6,7; Patricia Asero Ochieng and 2 Others v. The Attorney General & AIDS Law Project, Petition No. 409 of 2009 (High Court of Kenya at Nairobi, 20 April 2012), paras. 57–64.

[131] P.G. Gupta v. State of Gujarat (1995) Supp. 2 SCC 182.

2.2. Complex Remedies & The Separation of Powers

Complex remedies can alleviate many of the concerns typically raised around courts deciding social rights cases and its effects on the separation of powers. In the decades following the entrenchment of social rights, recurrent arguments are made that stress that the judiciary exercises deference and restraint in deciding claims grounded in them.

Conceived historically as an organizing principle for allocating powers and functions across branches of government, the separation of powers implicates questions of both institutional competence to decide and the legitimacy of those decisions[132]. The separation of powers in its original form was aimed at devising ways of divesting the concentration of power within one branch of government[133], while also permitting functional isolation[134].

Social rights cases are sensitive to information and expertise and implicate resource allocation. In arguments against judicial involvement in social rights disputes, it is thought that the coordinate branches of government are better placed to decide due to their democratic responsiveness and proximity to the ground.[135] Yet, these accounts are often based on a caricatured account of how everyday law and policymaking works. In reality, the power to create and enforce policy relating to social rights is dispersed across multiple centres and

[132] David Bilchitz, *Towards a defensible relationship between the content of socio- economic rights and the separation of powers: conflation or separation?*, in David Bilchitz and David Landau, THE EVOLUTION OF THE SEPARATION OF POWERS BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH 57, 60 (Edward Elgar, 2018) (hereinafter, Bilchitz, *Towards a defensible relationship between the content of socio- economic rights and the separation of powers*).
[133] James Madison, Federalist No. 51, https://avalon.law.yale.edu/18th_century/fed51.asp.
[134] Charles Montesquieu, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone trans., 1989): "*Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor*".
[135] Bilchitz, *Towards a defensible relationship between the content of socio- economic rights and the separation of powers* 61.

departments of government.[136] This dispersed nature of policymaking makes identifying duty bearers harder and is often overlooked by traditional separation of powers critiques of judicial involvement. Legislatures also suffer from blockages and deadlocks, which delay decisive action on issues of social importance, and courts can help catalyze action in such contexts. Courts acting in social rights cases, especially while using complex remedies and their multi-stakeholder, dialogic nature, can alleviate many of these concerns by enforcing accountability and justification for the actions of the coordinate branches while bringing them in conversation with members of civil society.

Complex remedies can also engage with many concerns around the effects of court judgments on resource allocation. One way to view this is on normative terms, through the lens of positive and negative rights. Most civil-political rights are formulated as negative injunctions against the state, being 'absolute' and 'immediate'. In contrast, social rights involve programmatic positive duties and thus are the subject of gradual or incremental realization.[137] Additionally, courts generally adjudicate claims relating to negative rights, which makes the task of deciding social rights cases more difficult. Still, these are concerns that can be alleviated over time and through judicial training.

However, we now know that courts enforcing positive rights is commonplace, and many of the premises on which judicial intervention was thought to impinge on the separation of powers have fallen away. There is now recognition that civil political rights also implicate positive obligations and government action. Additionally, social rights in most jurisdictions involve

[136] Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 Boston College Law Review 433, 461 (2013).
[137] Asbjorn Eide, *Economic, social and cultural rights as human right*s, in Asbjorn Eide, et. al. (eds.) ECONOMIC SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 9, 23 (Dordrecht: Martinus Nijhoff, 2001)

particular three-pronged obligations: 'respect', 'protect' and 'fulfil' [138]. It is the task of courts, especially through devices like complex remedies, to better flesh out these and develop sophisticated jurisprudence that distinguishes the obligations emanating from this tripartite conception.[139] Therefore, courts acting to enforce existing obligations, especially dialogically through the involvement of several stakeholders, does little to offend the separation of powers principle. Of course, unelected judges in courts interfering with a democratically accountable legislature's decisions on how to spend limited state resources is a cause for concern. Yet, there is also a growing body of literature[140] which distinguishes between cases where courts examine the adequacy of government spending or resource allocation and where courts order government spending. [141] It is important to recognize that most commentators who argue against court-ordered resource allocation have a problem with judicial capacity, legitimacy and expertise, and that these should not be conflated with legitimate concerns about court decisions' distributive impacts.[142]

The constitutional text has also sought to address this issue in different ways across the waves of constitutionalization. It has found express mention in the third wave, wherein the most emblematic jurisdiction, South Africa, the drafters of the constitution addressed concerns about court-ordered reallocation in two ways. First, by deviating from international practice and enumerating access rights instead of direct rights to social goods like housing and education, the constitution reorients allocative decisions toward the benefit of the community rather than

[138] Walter Kaguongo, *Resource Allocation Towards Socioeconomic Rights: Lessons from Domestic Courts* 13(1) Human Rights Review 85, 87 (2011).
[139] See for example, Section 7, South African Constitution 1996: **7. Rights** "…
(2) *The state must respect, protect, promote and fulfil the rights in the Bill of Rights*."
[140] Jeff A. King, *The Justiciability of Resource Allocation* 70(2) Modern Law Review 197, 223 (2007).
[141] This is similar to Khosla's proposal on making social rights conditional. See Madhav Khosla, *Making social rights conditional: Lessons from India*, (2010) 8(4) International Journal of Constitutional Law 739.
[142] Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11(2) Health and Human Rights 33, 34 (2009); David Landau, *The Reality of Social Rights Enforcement* 53(1) Harvard International Law Journal 192 (2012).

the individual. Second, the internal qualifiers on each of the SER provisions on the taking of reasonable measures to achieve progressive realization within available resources made sure that courts would have devise standards to evaluate government action, as well as weigh up their institutional capital in case of finding a violation of such a right. Concerns relating to the allocation of resources were addressed in the *Certification* judgment of the Constitutional Court of South Africa[143], where the Constitutional stated:

> "*…inclusion of these rights in the NT is inconsistent with the separation of powers required by CP VI because the judiciary would have to encroach upon the proper terrain of the legislature and executive. In particular the objectors argued it would result in the courts dictating to the government how the budget should be allocated. It is true that the inclusion of socioeconomic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socioeconomic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers…"*[144]

The drafters of the Kenyan Constitution, which represent the fourth wave of SER constitutionalization, drew extensively from the South African constitutional experience[145], and were aware of the risks of permitting constitutional courts to wrest control over the resource allocation agenda of a government, an expression of which is found in Article 20(5). The provision explicitly states that "*the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion*."[146]The provision addresses the issue of resources by stating that the State has the responsibility to show that resources to implement

[143] [1996] ZACC 26
[144] Ibid., at para.77.
[145] Jill Cottrell Ghai & Yash Ghai, *The Contribution of the South African Constitution to Kenya's Constitution*, in Rosalind Dixon & Theunis Roux (eds.), CONSTITUTIONAL TRIUMPHS, CONSTITUTIONAL DISAPPOINTMENTS: A CRITICAL ASSESSMENT OF THE 1996 SOUTH AFRICAN CONSTITUTION'S LOCAL AND INTERNATIONAL INFLUENCE (Cambridge University Press, 2018).
[146] Article 20(5), Kenyan Constitution.

the right in question are not available. Such a formulation burdens the state to prove that its failure to implement the right has been reasonable.[147]

Therefore, we see that constitutional text engages with the judicial role in social rights enforcement in different ways, permitting it to expand and contract with changing circumstances. Complex remedies can help engage with the modern era of law and policymaking by bringing a range of stakeholders under a judicial umbrella and ensuring accountability for violating social rights.

2.3. Complex Remedies & Democratic Legitimacy

An expanded judicial role is often objected to because it is bereft of democratic legitimacy. A standard form of this objection can be articulated as: "economic and social rights are matters which are best left to the representative branches". On an idealized account, the representative branches are meant to be more democratically accountable than unelected judges to take decisions on social rights disputes which have an allocative justice to them. What are the possible responses to these concerns and how do complex remedies alleviate, or engage with them? Three responses are possible. They are: a) that democratic legitimacy concerns originate from an idealized view of the legislative process, b) that these concerns trade on a 'thin' conception of democracy, c) dialogic forms of the judicial process that lead to complex remedies can under some circumstances be more democratically responsive than the ordinary political process.

[147] See also Republic of Kenya v Cabinet Secretary-Ministry of Education Science and Technology & 2 others ex parte Musau Ndunda & 2 others [2016] eKLR.

These responses are, of course, in addition to a more banal one: that it is written into the constitutional text. Jurisdictions like South Africa and Kenya constitutionalize an expanded role for the judiciary in the process of social transformation in their constitutions. In South Africa, which had previously possessed a legal order where courts were "not concerned with the propriety of the legislation or policy of the Legislature"[148], the Supremacy Clause of the Final Constitution[149] changed the way in which the role of courts as guardians of constitutional supremacy would look like. Therefore, in certain constitutions, courts have an explicit role to exercise their power of review over matters like SER, which may not be properly addressed in the representative branches.[150]

This brings us to the idealized nature of the legislative process, which often lies at the core of political constitutionalists who object to judicial involvement in social rights disputes. The legislative process is often opaque, and the characterization of legislatures as an institution that aggregates voters' preferences is often misleading. The legislative agenda is non-transparent, and voters often find that their elected officials do not enact their policy choices. Legislatures are often gridlocked due to political partisanship and fragmentation, and suffer from burdens of inertia, blockages, and blind spots. [151] Certain forms of judicial review and the remedies that emerge from them (complex remedies being one such example) can help overcome these institutional pathologies and often catalyze them into action while dialing down the heat of political conflict.[152]

[148] Collins v. Minister of the Interior 1957 1 SA 552 (A) (per Centlivres CJ).
[149] Section 2, Constitution of South Africa, 1996: "*This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*."
[150] See David Robertson, *The counter-majoritarian thesis*, in Gary Jacobsohn and Miguel Schor (eds.), COMPARATIVE CONSTITUTIONAL THEORY (Edward Elgar, 2018) ('In such conditions it would be rather pointless crying 'Counter-majoritarian!' at the courts given the record of pre-transformation histories, and the fact that the constitutions often very directly tell the courts to join the struggle to overcome past attitudes')
[151] Rosalind Dixon, *The Core Case For Weak-Form Judicial Review* 38 Cardozo Law Review 2192, 2208 (2019).
[152] Katharine Young, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (especially chapter 6) (providing examples of courts functioning in a catalytic manner in South Africa, India, and Colombia) (Oxford University Press, 2012).

Objections to judicial review often follow from its 'counter-majoritarian' character. However, this characterization is dependent on aggregative and pluralist models of democracy. These begin to fall away when we consider the necessity of courts to protect channels of political access, which may be blocked since indigence caused by poverty may be a factor which actively prevents persons from gaining access to or gaining power within a political process.[153] Therefore, it becomes important to address the values which animate the direction that a certain set of arguments appear to take. This may then be classified into those based on the notion of *political equality*, which the legislatures use as legitimating device, and those relating to *relative institutional competence* (i.e., the argument that legislatures simply make better choices when it comes to SER provisions). Jeff King shows how both of these arguments begin to fall away under two conditions: when judicial review can be used to divert attention to an issue which has not received adequate legislative focus and when it is used to 'extend protection to groups that are particularly vulnerable to majoritarian bias or neglect.'[154] These two conditions manifested themselves in the TAC Case in South Africa, where policy focus had been absent, despite mounting scientific evidence that the availability of nevirapine could greatly alleviate the risks of mother-to-child transmission of AIDS. The evidence also showed that individuals from low-income households would be the primary beneficiaries of a change in government policy on making nevirapine more widely available across government healthcare centers.

Popular constitutionalists like Waldron mount potent critiques of the enterprise of judicial review (his argument pertains to the judicial review of legislation, not executive action), but in

[153] Tarunabh Khaitan, *Political insurance for the (relative) poor: How liberal constitutionalism could resist plutocracy* Global Constitutionalism 536 (2019).
[154] Jeff King, JUDGING SOCIAL RIGHTS 153 (Cambridge University Press, 2012).

different veins, and with divergent sets of background conditions in which their arguments might find salience. Waldron's key argument against judicial review is that in certain kinds of societies[155] legislatures are better placed to mediate arguments about different values than the judiciary. A related stream of argument then becomes whether "human rights litigation is increasingly a second forum for law-making (or law-unmaking) proposals that have failed a legislative vote, and failed for reasons other than the majority's contempt or disregard for any person or group."[156] Waldron's argument on the relative institutional advantages of legislatures rests not only on a set of stylized empirical assumptions about the societies they are nested in, but also on the manner in which legislatures serve as aggregators of preference and translators of policy choice for the general public.

2.4. Complex Remedies & the Idiosyncratic Nature of Social Rights Disputes

Complex remedies can also help engage with the systemic nature of social rights cases and the lives that disputes have outside of the courtroom Standard literature on SER often focuses on the question of interpretation of constitutional or statutory provisions, and has often not taken into account the idiosyncratic nature of the kinds of problems which lie at the heart of claims which are grounded in SER.

These idiosyncrasies can usually be classified into five facets, and I outline how each of these can be best engaged with through complex remedial formulations. First, the involvement of a wide range of actors who may or may not be parties to the dispute, which is indicative of its

[155] See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale Law Journal 1346, 1361(2006) (societies with well-functioning judicial institutions, with a commitment to rights, and with democratic institutions which channel and mediate disagreement about rights.)
[156] Bradley Miller, *Majoritarianism and Pathologies of Judicial Review*, in Grégoire Webber, et.al, LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION 181, 186 (Cambridge University Press, 2019).

multi-stakeholder nature. This can be to be the claimants (usually an umbrella organization[157]), the judiciary, or the government (represented by members of the executive[158]). Added to this is the possibility of courts appointing amicus curiae or intervenors, at their own instance, or when asked to do so by the claimant, leading to the complex feature of the remedy discussed in this dissertation. Complex remedies can bring these otherwise dispersed stakeholders into dialogue with one another.

Second, the social rights disputes implicate the undertheorized relationship between the nature of strategies adopted by social movements (usually classified into contention, collaboration and subversion[159]) and those adopted by lawyers attached to these social movements. The implication of this is two-fold – first, that that are many forms of strategic behavior that social movements engage in which are not captured by the legal dispute which ends up in court, and second, that the very act of translating a social problem into a legal claim by providing a vocabulary drawing on, "legal discourses to 'name' and to challenge existing social wrongs or injustices"[160] is an act which tends to influence outcomes.[161] Certain forms of complex remedies can imbue these with a degree of transparency while ensuring that social movement groups can coordinate with one another while engaging in dialogue with each other, and with government representatives who may often be difficult to access.

[157] There is an added layer of complexity to this when there are a plurality of organizations which represent
[158] This becomes further complicated in jurisdictions in which allocates responsibilities between various levels of government through devolution, decentralization or federal arrangements.
[159] Sidney Tarrow, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS (Cambridge Unversity Press, 1998).
[160] Michael McCann, *Law and Social Movements*, in Austin Sarat, ed., THE BLACKWELL COMPANION TO LAW AND SOCIETY 506 (London: Blackwell Publishing, 2004).
[161] Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To , Social Movements: An Introduction* in Austin Sarat & Stuart Scheingold (eds.) CAUSE LAWYERS AND SOCIAL MOVEMENTS 4 (Stanford University Press, 2006).

Third is the *structural* nature of a number of SER claims. Social rights disputes are usually structural in nature and often arise from the unequal distribution of resources, power, and opportunities among different groups in society. They often expose the fault lines of systemic injustices, such as economic inequality, discrimination, and marginalization, and the ways in which the law can alleviate, but not fully fix them. Complex remedies acknowledge that remedies may fail due to a range of extra-legal reasons, and that remedies often require iteration to see what worked and what did not. This is closely linked to how social rights disputes distort our idea of the time involved in social rights cases. The legal subject of these kinds of adjudication is most often vulnerable, and time is vital to them. For example, a claimant in an eviction case will likely be rendered homeless while awaiting the final resolution of their dispute. While temporary orders, injunctions and freezes can be valuable, a renewed focus on how delays by government institutions frame and constrain adjudication is necessary. In the Mwelase case, for example, which involved the non-timely processing of land tenant applications by the Department of Rural Affairs and Land Reform, the named claimant died without having seen any hope of title to the land on which they had spent generations but had been denied any rights to – partially on account of apartheid land policies. A focus on time is echoed in social sciences scholarship that encourages the study of 'dispute processing' in which legal anthropologists urge to 'move the focus away from legally constructed 'cases' to the broader notion of culturally and contextually embedded "disputes" having existences, before, during, and after formal legal disputes'.[162] This has several dimensions, including the fact that cases usually take a long time to be processed by court registries, the fact that lower courts may or may not grant stays or injunctions on, for example, an order of eviction, pending final

[162] Carrie Menkel-Meadow, *Dispute Resolution: Raising the Bar and Enlarging the Canon* 54 Journal of Legal Education 5 (2004).

disposal by an appellate or apex court, as well as the 'devaluation of some people's political time, which constitutes a widely overlooked form of injustice'.[163]

The fourth facet is the *limited nature of the judicial impact* upon the redressal of the kinds of problems which underlies the SER claim. This claim is grounded in at least three characteristics – a) the dependence of remedy implementation upon branches of government which are independent of the court, b) courts' inability to ensure implementation of its judgments, except through supervisory orders[164], c) the absence of an enforcement division in most courts[165]. Complex remedial forms can better account for these institutional limitations by seeking input from a range of stakeholders while also getting assistance from civil society to ensure the implementation of remedies.

SER disputes often have their origins in state failure, which is usually of a much deeper nature than we encounter in other categories of civil political disputes. As a result, responses to this are usually formulated at three levels: the social, the judicial, and the political. It is beyond the scope of this chapter and indeed, this thesis to try and capture the range of social and political processes which are at play in order to address problems which result in SER claims. Still, there is a body of literature that emphasizes how little is captured by the doctrinal study of judgments born out of disputes that have emerged from a series of complex sociological processes. This line of scholarship encourages the study of "dispute processing" which is often led by legal anthropologists to 'move the focus away from legally constructed "cases" to the broader notion

[163] For a fascinating discussion on the importance of time in political and legal processes, see Elizabeth F. Cohen THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE (Cambridge University Press, 2018).
[164] Christopher Mbazira *Non-implementation of court orders in socioeconomic rights litigation in South Africa. Is the cancer here to stay?* 9 ESR Review 2 (2008).
[165] A notable outlier was the Right to Food litigation in India, which did end up with the establishment of a separate enforcement commissionerate within the premises of the Supreme Court of India. See Steven Friedman & Diego Maiorano, *The limits of prescription: courts and social policy in India and South Africa*, 55(3) Commonwealth & Comparative Politics 353 (2017).

of culturally and contextually embedded "disputes" having existences, before, during, and after formal legal disputes'.[166]

According to Menkel-Meadow, "*this rich line of both theorizing and empirical study of dispute processing in the tradition of sociolegal studies has sought to study disputants, their representatives, the context and content of their disputes, and the varieties of processes chosen to "process" (not necessarily to resolve or manage) their disputes, in order to uncover what social processes and relationships, in addition to, or other than, "law," influence what actually happens to disputes".*[167] More recent literature[168] on dispute processing frameworks tries to ensure that three distinct phases are captured: a social or political conflict and its transformation or mobilization into a legal form, the actual decision-making in court, and the implementation of judicial decisions which may or may not result in a resolution of the underlying problem. Complex remedies, therefore, can better account for the many particularities of social rights disputes and also acknowledge the lives that these disputes live outside of the courtroom.

2.5. Conclusion

This chapter has sought to show how complex remedies and their multi-step multi-stakeholder dimensions, combined with its focus on dialogic forms of interaction, can engage with traditional concerns around the separation of powers, democratic legitimacy, and the particular nature of social rights disputes. In the next chapter, our attention turns to the gradual

[166] Carrie Menkel-Meadow, *Dispute Resolution: Raising the Bar and Enlarging the Canon* 54 Journal of Legal Education 5 (2004).
[167] Id.
[168] Ralf Rogowski & Thomas Gawron, *Constitutional Litigation as Dispute Processing: Comparing the U.S. Supreme Court and the German Federal Constitutional Court*, in Ralf Rogowski and Thomas Gawron, CONSTITUTIONAL COURTS IN COMPARISON. THE US SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT 3 (Berghann Books, 2016).

constitutionalizing of social and economic rights during the 20th and 21st centuries through a close reading of the law, history, and politics that surrounded the process.

3. The Law and Politics of Constitutionalizing Social and Economic Rights: Histories, Concepts, and Institutions in Twentieth Century Social Constitutionalism

3.1. Introduction

What can the process of constitutionalization of social and economic rights in the 20th century tell us about the kinds of doctrinal, theoretical, and institutional difficulties that persist around these kinds of rights even today? This chapter provides an account of this trajectory to shed light on the nature of socioeconomic rights in constitutional theory and its many historical contingencies.

Social and economic rights find their place in many national constitutions. According to the Constitute Project[169], out of the 190 constitutions which are included in their database (as of September 2013, according to their website[170]), 134 make a mention of free education in some way or another[171], 72 contain a right to shelter[172], while 131 make mention of health rights[173]. A 2014 study[174] found that of 195 constitutions in force as on January 1, 2013, 158 mentioned at least one social and/or economic right.

[169] The Constitute Project aims to "*offer(s) access to the world's constitutions that users can systematically compare them across a broad set of topics*", see Constitute, *About*, available at https://www.constituteproject.org/content/about?lang=en.
[170] The Constitute Website mentions that it "continue(s) to update these texts as they are amended or replaced", making it difficult to precisely pinpoint the total number of constitutions in their database at any given point.
[171] Constitute, *Search Results*, available at https://www.constituteproject.org/search?lang=en&key=edfree.
[172] Constitute, *Search Results*, available at https://www.constituteproject.org/search?lang=en&key=shelter.
[173] Constitute, *Search Results*, available at https://www.constituteproject.org/search?lang=en&key=health.
[174] Courtney Jung, Ran Hirschl and Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 American Journal of Comparative Law 1043, 1048-1050 (2014).

This, however, was not always the case. Provisions which bear some resemblance to what are called socioeconomic rights (SER) today appeared in national constitutions in the early twentieth century. For the purpose of this chapter, I term these precursors to SER as *constitutional socioeconomic directives* (CSED). In the remainder of the chapter, CSED are further classified based on whether they were capable of judicial enforcement. I refrain from referring to CSED as SER since CSED preceded the terminology of modern rights language (whether individual or collective), was early versions of the form which SER would come to assume later and were mostly not intended to be capable of enforcement through the judicial branch.

CSED were all born out of the specific historical circumstances which surrounded the constituent moments for these nations; more often than not, they reflected the manner in which the people who had found themselves in a seat at the constituent table thought that certain social problems could be addressed.[175] Existing historical accounts of SER focus on ideational trajectories[176], their genesis in international law[177], or provide a summary account of their emergence in the early twentieth century[178]. While the existing literature is insightful, it does not reveal the full picture of how and under what circumstances these provisions came to be included in constitutions, nor how they relate to early and more recent theoretical concerns in the literature like the separation of powers or textual indeterminacy. A closer look at the

[175] For a nuanced exploration of the effects of historical factors on the constitution making process, see Claude Klein and András Sajó, *Constitution-Making: Process and Substance*, in Michel Rosenfeld, András Sajó and Claude Klein (eds.), THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 420 (2011) (hereinafter, Sajó and Klein, *Constitution-Making).*

[176] Jeff King, *Social rights in comparative constitutional theory*, in Gary Jacobsohn and Miguel Schor (eds.), COMPARATIVE CONSTITUTIONAL THEORY 145-148 (Edward Elgar, 2018); Samuel Moyn, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD ch. 1 (Harvard University Press, 2018) (hereinafter Moyn, Not Enough).

[177] See, generally, Samuel Moyn, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (Harvard University Press, 2012); Claire-Michelle Smyth, *Social and Economic Rights: The Struggle for Equivalent Protection*, in Jean Quataert and Lora Wildenthal (eds.), THE ROUTLEDGE HISTORY OF HUMAN RIGHTS (Routledge, 2019).

[178] Colm O' Cinneide, *The Constitutionalization of Social and Economic Rights*, in Helena Alviar Garcia, Karl Klare, and Lucy A. Williams (eds.) SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE CRITICAL INQUIRIES (Routledge, 2014)

drafting processes of these constitutions, the prevailing social and political circumstances at the time, as well as the provisions themselves, can be instructive. They are instructive because they not only tell us the motivations behind the inclusion of CSED in the constitutional texts, but also about the manner in which they were meant to be operationalized. My aim here is to build on calls for a closer study of "*what prompts countries to constitutionally entrench socio-economic rights, the place of such rights in a larger scheme of the welfare state, or the non-idealist, 'realpolitik' factors that explain the variance in judicial interpretation of socio-economic rights provisions or divergence in the actual distributive consequences of social rights regimes*."[179] This lays the groundwork for understanding the transition from CSED to SER in four waves, which are capable of being classified on the basis of the *addressee* of the provision and the nature and extent of *enforceability.*

The novel contribution of this chapter is the classification of SER constitutionalization into four waves which are foregrounded through a discussion of the law and politics surrounding the constituent moment. By doing so, the chapter argues that current debates which dominate SER are better understood as manifestations of contradictions and heterodoxies which were never fully resolved. The classification is unpacked in three modes: historical, conceptual and conceptual. It is *historical*, in as much as it is an account of the prevailing social and political circumstances that surrounded the constitutionalization of CSED or SER. I am going to look at this here and here so and so.

Second, the classification is *conceptual,* in tracking how twentieth-century constitutionalism (which itself was a nascent idea), responded to prevailing sociopolitical forces and enabled viewing constitutions as documents which could not only limit but also direct state power.

[179] Ran Hirschl and Evan Rosevear, *Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities*, in Tom Campbell, K.D. Ewing, and Adam Tomkins (eds.), THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS 207, 208 (Oxford University Press, 2011).

Formally, CSED sit in an interstitial *sui generis* category between directive principles and rights, but as I show here, are usually not inherently destabilizing nor mere pious wishes.[180] I do so by looking at how the role of CSED provisions in constitutions change in the first and second waves from being aspirational through four case studies

1) in the case of Mexico in 1917, to becoming political tasks,

2) in the case of the Weimar Republic in 1919; to morally salient expressive directive principles in Ireland,

3) 1937, and

4) India, 1949.

Thereafter, the historical narratives underlying the third wave support a shift in the understanding of the nature of the constitutional text as transformative in some jurisdictions like Latin American countries and South Africa, while also being alive to liberal constitutional dilemmas like the separation of powers in the 2010 Constitution of Kenya in the fourth wave.

Third, the classification of constitutionalization into four waves also tells an *institutional* story. The conceptual reconfigurations occurring across the waves required an institutional pre-commitment, either textually or through practice, and the narrative in this chapter is alive to changes in form and substance of inter-branch relationships. The *addressee* of SER or CSED provisions, as well as their *modes of enforcement* change across the four waves, with the political branches being the primary addressee of CSED and little prospects of enforcement in the first wave. Thereafter, tussles between radical and liberal framers in Ireland and India relegate socioeconomic provisions to unenforceable parts of their respective constitutions, with changes in judicial composition and outlook dictating their deployment in the discovery of unenumerated constitutional SER at divergent temporal frames. In the third and fourth waves,

[180] Jeff King, *Constitutions as Mission Statements*, in Dennis J. Galligan and Mila Versteeg (eds.), COMPARATIVE CONSTITUTIONAL LAW AND POLICY: SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 91-93 (Cambridge University Press, 2013).

there is greater consensus on the primacy of the judicial role, yet concerns persist about standards of review, inter-branch tensions and the separation of powers. These continue to remain deeply contested and will likely continue being the subject of fierce academic and political debate.

The chapter is structured as follows. Part I tells the story of the *first wave of constitutionalization*, by recounting the historical circumstances under which the Mexico Constitution, 1917 and the Weimar Constitution, 1919 were drafted, the final form the CSED provisions took, as well as how these provisions worked in practice. Part II concerns the *second wave of constitutionalizatio*n and shows how prevailing social circumstances in India and Ireland birthed a fairly indigenous radical political thought. These radical impulses were sought to be contained in their respective constituent assemblies by liberal constitutionalists through expressive accommodation in the constitutional text. Part III is about the *third wave of SER constitutionalization* which occurred with a range of democratic transitions and the forces of globalization occurring in the backdrop, told primarily through the experience of some countries in Latin America and South Africa. Part IV of the chapter tracks the *fourth wave of SER constitutionalization and shows* how constitution-makers in countries like Kenya learnt from the experience of countries with third-wave SER constitutions like South Africa. Parts I, II, III & IV have a discussion at the end on the *key conceptual and institutional configurations* from the wave of constitutionalization, and how they influenced the design and practice in the subsequent wave. Part V concludes by recounting the main themes across the four waves and how they relate to contemporary debates about SER.

3.2. First Wave of Constitutionalization: Social Directives and Containing Social Revolution

The events of the early twentieth century resulted in the rise of social constitutionalism, where the law sought to respond to social phenomena? as collectively experienced, such as the fallout of high unemployment, war and social revolutionary churns which were occurring around the globe.[181] The aim of this emergent constitutionalization was in some senses reactionary – an attempt at "class-abatement," in order to limit the appeal of revolutionary upheaval, particularly after the 1917 Russian Revolution[182], as well as preserving "*class-rule by means of limiting social polarization and ensuring social mobility*".[183] Some have also described it as being based on "socialisation of risk, through the expansion of the insurance technique, and not as fundamental rights of the same nature as traditional liberties."[184]

The Mexican Constitution of 1917, for example, was adopted following a period of intense social strife in the country[185] and is argued to be the first attempt at a 'transformative constitutionalism'[186] that included CSED. Across the Atlantic Ocean, and quite independent of

[181] Duncan Kennedy, 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 63 (2006). With respect to Germany, *see also* Michael Stolleis, HISTORY OF SOCIAL LAW IN GERMANY:
"*The endeavour to maintain social harmony by means of social policy was crisis management intended to prevent an internal political collapse*."
[182] Thomas Murray, *Contesting A World-Constitution? Anti-Systemic Movements and Constitutional Forms In Ireland, 1848-2008* 22(1) Journal of World Systems Research 78,83 (2016).
[183] Id.
[184] Paul O'Connell and George Katrougalos, Fundamental Social Rights, in Tushnet, Fleiner and Saunders (eds.) Routledge Handbook Of Constitutional Law, (Routledge, 2012); See also Atria, F. (2015). Social Rights, Social Contract, Socialism. Social & Legal Studies, 24(4), 598–613
[185] Fernando Yllanes Ramos, *The Social Rights Enshrined in the Mexican Constitution of 1917*, 96 International Labour Review 590, 593-594 (1967) (hereinafter Yllanes Ramos, *Social Rights in the Mexican Constitution)*; N. Andrew and N. Cleven, *Some Social Aspects of the Mexican Constitution of 1917* 4(3) The Hispanic American Historical Review 474-485 (1921).
[186] Rainer Grote, *The Mexican Constitution of 1917: an early example of radical transformative constitutionalism*, in Armin van Bogdandy, et. al. (eds.), TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE 616 (Oxford University Press, 2017); William H. Beezley & Colin M. Maclachlin, 2 EL GRAN PUEBLO: A HISTORY OF GREATER MEXICO 1911-THE PRESENT 245-47 (1994), quoted in Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Columbia* 16(1) Indiana Journal of Global Legal Studies 173,178 (2009).

this historical development, the Weimar Constitution of 1919 came to be drafted by a national assembly where a coalition led by the Social Democrats had a majority, and also contained a set of CSED.[187] Both of these constitutions were adopted in response to the articulation of a specific set of demands born out of historical circumstance – in Mexico, CSED primarily addressed issues of agrarian land reform, labor conditions, and sovereignty over natural resources; in Germany, the CSED was concerned with labor condition reform, health and social welfare.

3.2.1. Mexico, 1917: A constitution born out of revolution

3.2.3. Historical and Political Circumstances

The 1917 Constitution of Mexico was not the first to take root on Mexican soil. There is some academic consensus that the first was the Cadiz Constitution of 1812[188], which concerned itself primarily with modes of government, while also lacking enforcement powers.[189] The Mexican Constitution of 1917 was the culmination of a lengthy period of armed struggle against the rule of Porfirio Diaz which began in 1910. Diaz's rule had resulted in the concentration of the ownership of land in the hands of very few, while also promoting generous, often unfair concessions to foreign companies to exploit the natural resources within the Mexican territory.[190] These conditions gave rise to three parallel, but linked demands from the forces which precipitated the social revolution which was to follow: that of agrarian reform which would address the issue of ownership of land in the hands of very few, the push for improved

[187] Cindy Skach, BORROWING CONSTITUTIONAL DESIGNS. CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC 35 (Princeton University Press, 2005).
[188] Richard D. Baker, JUDICIAL REVIEW IN MEXICO. A STUDY OF THE AMPARO SUIT 4 (University of Texas Press, 1971).
[189] M. C. Mirow, *Pre-Constitutional Law and Constitutions: Spanish Colonial Law and the Constitution of Cadiz*, 12 Washington University Global Studies Law Review 313, 315 (2013). It also provided for the rights of the criminally accused and a right to property.
[190] José María Serna de la Garza, THE CONSTITUTION OF MEXICO. A CONTEXTUAL ANALYSIS 17 (Hart Publishing, 2013).

working conditions for labor forces which were employed in these landholdings and mines, as well as the demand for complete Mexican sovereignty over its natural resources.

The rebellion was begun by a wealthy landowner named Francisco Madero, who later came to power through elections held in 1911. Madero was forced to resign in 1913, leading to a power vacuum which saw the rise of the counter-revolutionary regime of Victoriano Huerta.[191] He remained in power until a coalition of localized revolutionary forces split broadly into the Constitutionalist faction led by Venustiano Carranza and the Revolutionary one forced them out. Thereafter was a period of lengthy civil war in which Carranza's faction emerged victorious. On December 1, 1916, Carranza presented his draft of the Constitution at the Constitutional Convention gathered at Queretaro. The convention focused on four primary issues: agrarian reform, ownership of subsoil deposits, military-civil relations, Church–state relations. The draft Carranza presented was not well received since it did not adequately address labor reform, and consolidated the position of the executive branch, with there being very little that had been changed from the 1857 constitution, the issues from which were subject of the kinds of violent upheavals. Following Carranza's address, radical representatives like Francisco Mugica began to push more aggressively for the kinds of social reforms which were not addressed in the first draft. However, Mugica's demands, especially for a more radical restructuring of labor-capital relations, did not find expression in the final version of the Constitution.

Broadly, the CSED of the Mexican Constitution of 1917 covered the areas of education, land redistribution, state ownership over lands and natural resources[192], as well as Title VI, which provided for a set of principles relating to labour and social security. In the area of education,

[191] Brian Hamnett, A CONCISE HISTORY OF MEXICO 209-221 (Cambridge University Press, 2005).
[192] Article 27, Constitution of Mexico, 1917 (original).

the CSED provided that "elementary education would be compulsory"[193], and "all education given by the State shall be free"[194], while also providing for the exclusion of religious denominations from imparting education[195]. The provisions relating to labour included work hour restrictions[196], wage parity[197], certain health and safety standards[198], and associational rights[199]. It is however also clear that while the ambit of some of the provisions, especially relating to social security[200] were spelt out, their operationalization was left to legislation.[201] In this way, it becomes clear that the object of constitutionalizing was to codify a set of aspirations which was directed mainly at the representative branches and were not meant for judicial enforcement. While there was no textual bar against judicial enforcement of the CSED provisions, both legal practice at the time and academic commentary go against it. This could

[193] Article 3 (1)(VI), Constitution of Mexico, 1917 (original).
[194] Article 3 (1)(VII), Constitution of Mexico, 1917 (original).
[195] Article 3 (1)(IV), Constitution of Mexico, 1917 (original).
[196] Article 123A.I. "The maximum duration of work for one day shall be eight hours."
[197] Article 123A.VII. "*Equal wages shall be paid for equal work, regardless of sex or nationality*"
[198] Article 123A. XV "*An employer shall be required to observe, in the installation of his establishments, the legal regulations on hygiene and health, and to adopt adequate measures for the prevention of accidents in the use of machines, instruments, and materials of labor, as well as to organize the same in such a way as to ensure the greatest possible guarantee for the health and safety of workers as is compatible with the nature of the work, under the penalties established by law in this respect*."
[199] Article 123A.XVI "*Both employers and workers shall have the right to organize for the defense of their respective interests, by forming unions, professional associations*"
[200] Article 123B.XI, Constitution of Mexico, 1917(original) provided:
"*Social security shall be organized on the following minimum bases:*
a. It shall cover work accidents and occupational diseases, non-occupational illness and maternity; and retirement, disability, old age, and death.
b. In case of accident or illness, the right to work shall be retained for the time specified by law.
c. Women shall be entitled to one month's leave prior to the approximate date indicated for childbirth and to two months' leave after such date. During the nursing period, they shall have two extra rest periods a day, of a half hour each, for nursing their children. In addition, they are entitled to medical and obstetrical attention' medicines, nursing aid, and infant care services.
d. Members of a worker's family shall be entitled to medical attention and medicines, in those cases and in the proportions specified by law.
e. Centers are to be established for vacations and convalescence, as well as economy stores for the benefit of workers and their families.
f. *Workers will be allotted low-cost housing for rent or sale, in accordance with previously approved programs*."
[201] Article 123A.XXIX, Constitution of Mexico, 1917(original) provided:
"*Enactment of a social security law shall be considered of public interest and it shall include insurance against disability, on life, against involuntary work stoppage, against sickness and accidents, and other forms for similar purposes*".

be attributed to choices in institutional design, the often-competing interests in regime stability and a robust rights-enforcement mechanism.[202]

Some argue that this may have occurred due to framers drawing on the experience of judicial resistance to labor welfare regulations passed by various states in the U.S. during the *Lochner* era[203], the framers of the Mexican Constitution precluded any possibility of constitutional judicial enforcement of any nature which did not pertain to individual guarantees which were not civil-political in nature, such as the writs in the nature of habeas corpus.[204] However, disputes which arose out of labor-capital relations under ordinary law such as that of contract would be decided outside of the ordinary judicial system.[205]

3.2.4. Conceptual and Institutional Dimensions

The Constitution of Mexico, 1917 marked a break from earlier versions of its constitutions which had primarily been aimed at the constraint of power. The *amparo*, which is considered a unique feature of Mexican and Latin American constitutionalism, was used primarily to judicially enforce fundamental rights guaranteed in the Constitution in individual cases. Although it had been part of the constitutional architecture since 1857, it was further refined to include a cause of action against all legal norms, including administrative, legislative and judicial actions in the 1917 Constitution. The functions of the *amparo* were five-fold: "protection of individual guarantees; testing allegedly unconstitutional laws; contesting judicial decisions; petitioning against official administrative acts and resolutions, and

[202] Steven Levitsky and Maria Victoria Murillo, *Variation in Institutional Strength*, 12 Annual Review of Political Science 115, 119 (2009).
[203] Miguel Schor, *Judicial Review and American Constitutional Exceptionalism* 46(3) Osgoode Hall Law Journal 535 (2008).
[204] Article 103, Constitution of Mexico, 1917(original) provided:
"…The federal courts shall decide all controversies that arise:
I. Out of law or acts of the authorities that violate individual guarantees…."
[205] Article 123B.XII "Individual, collective, and interunion disputes shall be submitted to a federal tribunal of conciliation and arbitration to be organized as provided in the regulatory law." See Constitution of Mexico, 1917

protection of the social rights of farmers subject to the agrarian reform laws."[206] However, while the *amparo* was available to enforce fundamental rights in individual cases, it was not used to enforce CSED in constitutional litigation practice.

One of the main achievements of the 1917 Constitution was its provision for a way for the state to "control matters of worship[207], establish rules for clerical officials[208], limit the Church's right to property and its involvement in political affairs, and exclude the Church from participating in the nation's educational system.[209] A central way in which this was sought to be done was through constitutional provisions relating to education. These granted the state a monopoly over the education system by setting up a dual system where state imparted education would be compulsory (at least at the elementary level) and free; while also granting it the power to certify and regulate any private providers.[210] In the sphere of labor-capital relations, the principles contained in Article 123 (regarding labor laws) "*helped to change the spirit and nature of employer-worker relations in Mexico because there has been a distinct shift of attitudes on both the employers' and the workers' sides.*"[211]

While these have been greatly augmented over the years, the original Mexican constitutional text sought to engage with the forces and concerns which animated the period of conflict out of which the Constitution was born. In its original form, the Mexican case is best understood as a set of CSED targeted primarily at constitutionally resolving the obstacles to land

[206] Zamido, Introduction to Amparo, at 55.
[207] See, for example, Article 24, Constitution of Mexico, 1917(original): "…*Every religious act of public worship must be performed strictly inside places of public worship, which shall at all times be under governmental supervision*."
[208] See, for example, Article 130, , Constitution of Mexico, 1917(original): "…*The law does not recognize any personality in religious groups called churches*….
..Ministers of denominations shall be considered as persons who practice a profession and shall be directly subject to the laws enacted on such matters."
[209] See Article 3 IV, , Constitution of Mexico, 1917(original) "…*Religious corporations, ministers of religion, stock companies which exclusively or predominantly engage in educational activities, and associations or companies devoted to propagation of any religious creed shall not in any way participate in institutions giving elementary, secondary and normal education and education for laborers or field workers*."
[210] See Article IV, , Constitution of Mexico, 1917(original).
[211] Yllanes Ramos, *Social Rights in the Mexican Constitution*, at 608.

redistribution, as well as guiding government action in the sphere of labor welfare. These were not rights in the sense as they are understood now, and at the time of their adoption, were not capable of judicial enforcement, neither through constitutional litigation practice or academic opinion at the time.

It is important to note, however, that this could not have been by accident. It is clear that since 1857, the *amparo* existed as a means for the enforcement of certain kinds of legal claims, mainly civil-political ones. However, the functions of the *amparo* to did not find explicit articulation and legal embodiment till 1963 when organic laws were enacted to that effect, and the use of *amparo* to enforce CSED has been considered a legal failure in the post-revolution period.[212] It is hence clear that *amparo* was not used to enforce claims related to CSED, leading one to the conclusion that the social provisions were most likely programmatic, instructional, and directed at the legislature for implementation rather than in the idiom of enforceable rights. Could it be that institutional problems besetting the Mexican constitutional setup had already doomed the radical premises of the 1917 revolution to failure? Kirkwood notes that "in contrast to the Russian Revolution of October 1917, an alliance of workers and peasants (led by a vanguard party) did not displace the predominant middle-sector leadership"[213], while Hamnett opined that while Article 123 "improved the workers' subservient condition within Mexican society but also protected the economic elites."[214]

[212] Mónica M. Salas Landa, *Enacting Agrarian Law: The Effects of Legal Failure in Post-revolutionary Mexico* 47(4) Journal of Latin American Studies 685 (2015).
[213] Article 3 II. "…*Private persons may engage in education of all kinds and grades. But as regards elementary, secondary, and normal education (and that of any kind or grade designed for laborers and farm workers) they must previously obtain, in every case, the express authorization of the public power. Such authorization may be refused or revoked by decisions against which there can be no judicial proceedings or recourse*…"
Article 3 III. "…*Private institutions devoted to education of the kinds and grades specified in the preceding section must be without exception in conformity with the provisions of sections I and II of the first paragraph of this article and must also be in harmony with official plans and programs*…"
[214] Burton Kirkwood THE HISTORY OF MEXICO 147 (MacMillan Press, 2004).

Buchenau makes the claim that there were additional reasons for the non-fulfilment of the 1917 Constitution's radical socioeconomic transformative potential.[215] First, he states that the state's conflict with the Church preoccupied much of its time, and it was unable to devote resources or legislative energy toward framing organic laws which would be necessary for operationalizing the social provisions.[216] Second, he states that much of the state's energy and time was occupied with its tussle for authority with the Church, leaving little to devote to other areas. Third, he states that at different periods, the political executive of the nation has been committed to what can be described as a neoliberal vision of the relationship between the forces of capital and the state – despite one of the principal aims of the armed struggle preceding the drafting of the 1917 Constitution was precisely a recalibration of this very relationship.[217]

The Mexican Constitution represented the first constitution to contain a set of CSED which were not meant for judicial enforcement but were a set of aspirations which responded to a set of demands produced by social and historical forces. In many ways, this trend continued even into mid-twentieth century constitutional thought, with countries like Ireland and India simply making it explicit that CSED, in the form of directive principles, would be directed at the representative branches of government and yet be incapable of judicial enforcement.

[215] Jürgen Buchenau, *Mexico's 1917 Constitution at Its Centennial New Approaches and Considerations* 54 Jahrbuch für Geschichte Lateinamerikas/ Anuario de Historia de América Latina 1 (2017) (Hereinafter Buchenau, Mexico's 1917 Constitution at Its Centennial).

[216] This has been echoed in the literature by Alberto Rojas Caballero, in Alberto Rojas Caballero, LAS GARANTIAS INDIVIDUALES EN MEXICO 582 (Porrúa S.A., 4th ed. 2012), quoted in Gutiérrez Rivas, *Judges and Social Rights in Mexico*: "…(*these) constitutional precepts require the expedition and enforcement of the secondary laws and specifically, of procedural pleas where to establish the violation to their contents*…"

[217] See Buchenau, Mexico's 1917 Constitution at Its Centennial at 3:

"*Historians have long emphasized the fact that a succession of governments, starting with Carranza's and the presidency of General Alvaro Obregón (1920-1924) all the way to the so-called Maximato (1928-1934), reputedly dominated by former president and General Plutarco Elías Calles, would not implement the social rights provisions. Not only did these governments hold fast to notions of capitalist development, but they also proved susceptible to pressure from foreign owned corporations and private investors, both Mexican and foreign born. In this prevailing view, the constitution enjoyed a brief heyday under President Lázaro Cárdenas (1934-1940), whose government applied Article 27 to parcel out 49 million hectares of privately owned land and to nationalize the British- and U.S.-owned oil industry — only to once again slip into oblivion during the developmentalist regimes of the PRI era after World War Two*"

3.2.2. Weimar, 1919: Containing Social Revolution

3.2.5. Historical and Political Circumstances

Social policy in the period prior to the First World War was focused primarily on the idea of social insurance in the Prussian empire.[218] This Bismarckian welfare state had failed in alleviating "the distress of the poor or to integrate the working class into the militarist-capitalist system".[219] There also existed a fragmented regime of loose labor laws, primarily being developed as a response to unbridled economic liberalism in the late 19th and early 20th century.[220] In the twilight days of the First World War in 1918, Germany witnessed a number of major uprisings across its major cities, which culminated in it being proclaimed as a socialist republic by Karl Liebknecht, a socialist leader who at the time belonged to a loose affiliation of left-aligned parties. This unilateral declaration is considered to be a 'de-constituent'[221] moment, marking an end to the previous regime and birthing the next. Liebknecht was soon to be sidelined from the Sozialdemokratische Partei Deutschlands (SPD), which had emerged as the strongest of the left-aligned parties, by more moderate elements and was eventually murdered while playing a part in the Spartacist uprising of 1919 in Berlin. The man who emerged on to the scene was Friedrich Ebert, who was a moderate within the SPD, and was struggling to keep his party together in the midst of centrifugal pulls.[222]

[218] See, generally, Michael Stolleis, HISTORY OF SOCIAL LAW IN GERMANY, Ch. 3 (Springer, 2006) (Stolleis, HISTORY OF SOCIAL LAW IN GERMANY)
[219] John A. Moses, *German Social Policy (Sozialpolitik) in the Weimar Republic 1919-1933* 42 Labour History 83 (1982) (Moses, *German Social Policy*).
[220] Stolleis, HISTORY OF SOCIAL LAW IN GERMAN 29-34.
[221] Sajó and Klein, *Constitution-Making,* at 429.
[222] Cindy Skach, BORROWING CONSTITUTIONAL DESIGNS. CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC 35 (Princeton University Press, 2005) (hereinafter Skach, BORROWING CONSTITUTIONAL DESIGNS).

The process of drafting the constitution was the task of the National Constituent Assembly, which met for the first time in January 1919. However, even prior to the process of deliberations, there was already a steady social and political mobilization by a "variegated youth welfare lobby comprising the SPD, trade unions, Centre Party, youth movement, professional specialists, social reformers and educationalists", who were able to "exert pressure on the government to make humanitarian considerations the main priority in policymaking."[223]

Their efforts were also instrumental in challenging the traditionally blinkered liberal approach to worker welfare which emphasized self-help and non-intervention by the state and was dominant in shaping state attitudes and policy in a direction which favored some form of social security which could address the unprecedented levels of unemployment in the wake of the First World War.[224] The chief architect of the constitutional text was Hugo Preuß, whom Friedrich Ebert saw not just as a "radical democrat and jurist, but also as a bridge to the liberal camp in Germany".[225]The drafting process was fraught with difficulty since there was an attempt to find a compromise between "competing visions for the country: the revolutionary, heterogeneous democratic and socialist factions that pushed for a strong, modern (socialist) democratic republic, on the one hand, and the monarchist, conservative factions that sought to preserve the status quo".[226]

The inclusion of CSED in the Weimar Constitution took the form of measures in three chapters in Part II of the Weimar Constitution concerning Basic Rights: Chapter 2 (Life within a community), Chapter 4 (Education and School), and Chapter 5 (The Economy). Article 119 in

[223] Peter Stachura, THE WEIMAR REPUBLIC AND THE YOUNGER PROLETARIAT. AN ECONOMIC AND SOCIAL ANALYSIS 4 (Palgrave Macmillan, 1989) (hereinafter, Stachura, THE WEIMAR REPUBLIC AND THE YOUNGER PROLETARIAT).
[224] Stachura, THE WEIMAR REPUBLIC AND THE YOUNGER PROLETARIAT, at 44-45.
[225] Peter Stirk, *Hugo Preuss, German Political Thought and the Weimar Constitution* 23(3) History of Political Thought 497 (2002).
[226] Astrid Wiik, *Weimar Constitution (1919)*, Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL], available at http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e44?rskey=pLJ31y&result=1&prd=MPECCOL.

Chapter 2 stated that "large families may claim social welfare"; "motherhood is placed under state protection and welfare. In Chapter 4 relating to education, the Weimar Constitution mentioned that "…the arts, science and instruction are free, and that the "…state provides protection and participates in its cultivation."[227] Further, under the Weimar Constitution, "education of the youth", which was obligatory[228] would be "provided by public institutions"[229] while adding that "schooling entirely is placed under state supervision."[230]

With respect to the economy in Chapter 5, there was also a commitment by the Reich to safeguard a minimum of social rights for the working class.[231] It also secured a commitment to improving the health and housing conditions of German families.[232] Moreover, there was a secure textual commitment that "labour stands under the special protection of the Reich".[233] Trade unions were granted recognition as representing the interests of workers[234], and codetermination rights were also given recognition[235].

3.2.6. Conceptual and Institutional Dimensions

The CSED in the Weimar Constitution were meant to direct state action and were in no way intended to be actionable rights. This is clear since Stolleis mentions that judicial review was

[227] Articles 142 Constitution of the German Empire of August 11, 1919.
[228] Articles 145 Constitution of the German Empire of August 11, 1919.
[229] Articles 143 Constitution of the German Empire of August 11, 1919.
[230] Articles 144 Constitution of the German Empire of August 11, 1919.
[231] Articles 162 Constitution of the German Empire of August 11, 1919:
"The Reich shall endeavor to secure international regulation of the legal status of workers to the end that the entire working class of the world may enjoy a universal minimum of social rights".
[232] Articles 161, Constitution of the German Empire of August 11, 1919.
[233] Articles 157, Constitution of the German Empire of August 11, 1919.
[234] Articles 159, Constitution of the German Empire of August 11, 1919: Article 159: "The right to form unions and to improve conditions at work as well as in the economy is guaranteed to every individual and to all occupations. All agreements and measures limiting or obstructing this right are illegal".
[235] Articles 165, Constitution of the German Empire of August 11, 1919: "Workers and employees are called upon to participate, on an equal footing and in cooperation with the employers, in the regulation of wages and working conditions as well as in the economic development of productive forces. The organizations formed by both sides and their mutual agreements are recognized".

in vogue in the days of the Weimar Republic[236], with there being an attempt by the conservative judiciary to serve as a bastion against a socialistic bent which the representative branches had taken.[237] Challenges to state action, both legislative and executive, were being brought, with "private property, equality, the institutions of civil service, marriage, and inheritance" being invoked.[238] The inclusions of these CSED are now regarded as an attempt to consolidate the working-class vote on the part of the SPD, which did not wish to be seen as having betrayed them. It is also important to appreciate that "immediate context of the lost war and the November Revolution, meaningful social reform was deemed necessary to dissipate what residual revolutionary animus remained among the workers".[239] Stolleis' overview of the changes brought about by the Weimar Constitution deserves reproduction in full:

"*The new constitution…gave the Reich the legislative authority for "welfare for the poor and migrants," population policy, welfare for mothers, infants, children, and youths," labor law, insurance and protection of workers and employees as well as certification of employment," and "welfare for servicemen and their dependents" (Art. 7 WRV). To the extent that there was a need for the enactment of uniform regulations, the Reich also had the legislative authority for the "welfare system" (Art. 9 WRV). Together with the basic principles of social policy (partly programmatic in nature, partly possessing the character of basic law) in the second main section of the Constitution (Articles 109, 119, 122, 151, 155, 161–163), these norms formed the constitutional basis for a wide-ranging social legislation with which the Republic,*

[236] Before the inception of the Weimar Republic, Möschel describes at least three kinds of diffuse constitutional review was in existence: "(i) the review by courts of imperial regulations against imperial statutes on the principle of hierarchical superiority of the latter; (ii) the review of state regulations against imperial statutes on the principle of 'federal' hierarchy; and (iii) a limited review of statutes and whether they had been adopted according to the prescribed procedures which could also be seen as a procedural constitutionality review" See Mathias Möschel, *Diffuse Constitutionality Review in Germany* (unpublished draft, on file with author).
[237] Stolleis, *Judicial Review in the Weimar Republic* 271-272.
[238] Stolleis, *Judicial Review in the Weimar Republic* 272-273.
[239] Stachura, THE WEIMAR REPUBLIC AND THE YOUNGER PROLETARIAT 36.

endangered from the very beginning, could set out to deal by means of social policy with the misery of the war, inflation, and depression"

However, in terms of the actionability of such claims, Stolleis makes clear, in line with the literature, that the Constitution "did not establish an actionable legal claim to general welfare" since all administrative decisions related to social provisions were discretionary in nature, and did not give rise to an actionable claim.[240] This is unlike the position in legal decisions from administrative courts after 1949, which had the capacity as enumerated in the Basic Law to judicially review decisions.[241]

In taking stock of the CSED contained in the Weimar Constitution of 1919, it is clear that constitutionalization led to greater government attention to social policies. In pursuance of Article 155[242], state-funded housing programs were successful in building hundreds of thousands of new homes between 1919 and 1923, while also introducing rent and tenancy regulations. In pursuance of its obligations under Article 161[243], there was a significant surge in outlays in health and social security.[244] Therefore Grimm is correct to note that social rights

[240] Stolleis, HISTORY OF SOCIAL LAW IN GERMANY:
"*… such legal claims certainly did exist with the "elevated social assistance," and beginning in 1926 it was also possible to challenge the denial of benefits and the determination of their kind and level. But the protection by the administrative court failed: one was dealing with a discretionary decision, and there was a consensus that it followed from the "historical development of public welfare measures, from poor relief, from the Residential Assistance Act, and the Reich Law on the Responsibility to Provide Social Welfare Assistance of February 13, 1924, that the person in need of assistance never has a legally actionable claim against those obligated." Where a material claim does not exist, the failure of public assistance does not constitute a violation of the individual's legal positions*."

[241] The German Basic Law of 1949, in Article 19(IV), states: "Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts". For a historical overview of the change in position on administrative justice between the Weimar Republic and post-war Germany see Hermann Pünder, *German administrative procedure in a comparative perspective: Observations on the path to a transnational ius commune proceduralis in administrative law* 11(4) International Journal of Constitutional Law 940, 942-943 (2013).

[242] **Article 155:** "The distribution and usage of real estate is supervised by the state in order to prevent abuse and in order to strive to secure healthy housing to all German families, especially those with many children." See Constitution of the German Empire of August 11, 1919.

[243] **Article 161**: "In order to maintain health and the ability to work, in order to protect motherhood and to prevent economic consequences of age, weaknesses and to protect against the vicissitudes of life the Reich establishes a comprehensive system of insurances, based on the critical contribution of the insured." See Constitution of the German Empire of August 11, 1919.

[244] Stachura, THE WEIMAR REPUBLIC AND THE YOUNGER PROLETARIAT, at 40.

were "denied any legal effect by claiming that they did not directly entitle citizens to certain benefits, but needed to be concretized by legislation."[245] While he states that "in spite of their inclusion in the constitutional text, social rights were only seen as political statements of intent without legal effect"[246], his assessment should be seen in light of the radical spurt in state spending in the period following constitutionalization.

3.2.7. Conceptual and Institutional Configurations in the First Wave of Constitutionalization

The first wave of constitutionalization was not of SER but CSED, provisions which were hitherto unseen, but inaugurated a new vocabulary of intent which was aimed at the political branches. Prior to this, constitutions had primarily been The CSED reflected the social and political circumstances which birthed these constitutions and reconfigured the relationship between groups and the state. In Mexico, it was the need to diminish the influence of the Church and extractive patterns of agrarian landholding and labour practices which led to the unrest that culminated in the drafting of the constitution. Weimar Germany faced challenges of a different sort and was struggling to contain the social forces which had arisen after the institutional failure of the social insurance system amidst high unemployment.

Institutionally, the CSED were aspirations which addressed to the representative branches and were not intended for judicial enforcement. This is despite the existence, albeit underdeveloped, of a culture of judicial review, in Mexico with certain kinds of civil-political rights through the *amparo*, and in Weimar Germany with certain kinds of administrative actions being capable of challenge on limited grounds. Case law was nearly absent until the

[245] Dieter Grimm, *The role of fundamental rights after sixty-five years of constitutional jurisprudence in Germany* 9(29) International Journal of Constitutional Law 9,12 (2015).
[246] Id.

1949 Basic Law[247] and judicial review of administrative acts occurred in a very limited way in the period between 1919-24, when "basic rights were still not regarded as "standard legislation," but were seen more as political declarations, as petitions to the lawmakers, without legal substance".[248] In the period that followed, basic rights, especially those of property equality began to be used as a means of "countering socialist or excessively reformist lawmakers", with a conservative judiciary which was bent against positivism and parliamentarism.[249] The non-enactment of enabling legislation in Mexico which indicates how political will beyond mere inclusion of constitutional provisions is necessary for the fulfilment of CSED.

3.3. Second Wave of SER Constitutionalization: Expressive Political Accommodation of Radical Social Thought and Subsequent Judicial Usurpation

The trend of constitutionalizing political aspirations as seen with CSED in the first wave continued with the 1946 French Constitution which, in its Preamble[250], sought to codify certain "political, economic and social principles". However, much like similar constitutional

[247] Christoph Möllers, DER VERMISSTE LEVIATHAN: STAATSTHEORIE IN DER BUNDESREPUBLIK 38, (Frankfurt am Main, 2008), quoted in Jeff King, *Social Rights: Constitutionalism and the Social State Principle* (2014), available at http://discovery.ucl.ac.uk/1472218/1/J%20King%2C%20Social%20Rights.pdf.
[248] Michael Stolleis, *Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic,* 16(2) Ratio Juris 266, 273(2003) (hereinafter Stolleis, *Judicial Review in the Weimar Republic).*
[249] Stolleis, *Judicial Review in the Weimar Republic* 273.
[250] See the following provisions § 5-11, 13 Preamble, 1946 Constitution of France:
"*Each person has the duty to work and the right to employment. No person may suffer prejudice in his work or employment by virtue of his origins, opinions or beliefs.*
All men may defend their rights and interests through union action and may belong to the union of their choice.
The right to strike shall be exercised within the framework of the laws governing it.
All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the workplace.
All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society.
The Nation shall provide the individual and the family with the conditions necessary to their development.
It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have to the right to receive suitable means of existence from society"
§ 13: "*The Nation guarantees equal access for children and adults to instruction, vocational training and culture. The provision of free, public and secular education at all levels is a duty of the State*"

provisions of this nature around the same time, they were characterized as "programmatic principles rather than legally binding rights". This is echoed in the academic assertion that these CSED were not "on the same juridical ground as the traditional liberties" did not correspond to genuine human rights, and "were established on the basis of the socialization of risk (through the expansion of insurance), not on the extension of classical rights."[251] The second wave of constitutionalization sought to change some of this with a renewed emphasis on social provisioning through expressive accommodation.

3.3.1. Ireland: Directive Principles as a means of constitutionalization

The divergence in approaches to constitutionalization between rights and directive principles appears for the first time in a concrete manner in the drafting and adoption of the constitutions of the Irish Free State in 1922, as well the Constitution of Ireland in 1937.[252] Murray traces the incorporation of the socio-economic provisions in the Constitution of the Irish Free State in 1922 as a "clash between popular, anti-systemic movements and governments' attempts to contain the ideals and practices of these movements."[253]It is clear that curbing social unrest, on the one hand, the unwillingness to displace the centrality of the Church in welfare provisioning, while also taking care of the interests of the landed classes, proved to be the kinds of forces which shaped the making of the 1922 Irish Free State Constitution.

3.3.3. Irish Free State Constitution, 1922

The Constitution of the Irish Free State concerned itself primarily with the task of independence from Great Britain but also sought to curb unrest resulting from labor strikes while attempting to ensure that the position of the Catholic Church in the social sphere remained undisturbed.

[251] George S. Katrougalos, *The Implementation of Social Rights in Europe*, 2 Columbia Journal of European Law 277 (1996).
[252] Thomas Murray, *Socio-Economic Rights Versus Social Revolution? Constitution Making in Germany, Mexico and Ireland, 1917–1923* 24(4) Social & Legal Studies 487 (2015).
[253] Id.

While there were many proposals afoot put forward by a number of political parties on both sides of the political spectrum, by the time the Constituent Assembly gathered, the promises of the Sinn Féin's 1919 Democratic Program[254] had been significantly watered down due to opposition from classic liberal representatives who sought to battle strands of Catholic social thought as well as state intervention advocates who had sought certain kinds of land reforms. The 1922 Irish Free State Constitution, in the end, contained only two programmatic declarations, relating to free elementary education[255], as well as that of state ownership over natural resources[256].

3.3.4. Irish Constitution 1937

The drafting of the Irish Constitution of 1937 occurred in the backdrop of low levels of commitment to welfare, sharply polarized living standards, and extremely stark contrasts in the levels of educational opportunities afforded to the rich and poor. The Great Depression had sharpened social cleavages, with many parts of the country witnessing "mass boycott of land annuities to Great Britain, agrarian agitation over land redistribution, campaigns against slum landlordism and major strikes in transport and building"[257] In the face of this, the Catholic Church filled the vacuum which had been left by the state, and had a dominant role to play,

[254] The program had sought "*all rights of private property (were) to be subordinated to the public welfare, (and) assured Irish citizens of "an adequate share of the produce of the Nation's labor*" in return for serving the public welfare, and further outlined commitments to welfare state." See Murray, Contesting a World Constitution at 88.

[255] **Article 10.**
"All citizens of the Irish Free State (Saorstát Eireann) have the right to free elementary education."

[256] **Article 11.**
"*All the lands and waters, mines and minerals, within the territory of the Irish Free State (Saorstát Eireann) hitherto vested in the State, or any department thereof, or held for the public use or benefit, and also all the natural resources of the same territory (including the air and all forms of potential energy), and also all royalties and franchises within that territory shall, from and after the date of the coming into operation of this Constitution, belong to the Irish Free State (Saorstát Eireann), subject to any trusts, grants, leases or concessions then existing in respect thereof, or any valid private interest therein, and shall be controlled and administered by the Oireachtas, in accordance with such regulations and provisions as shall be from time to time approved by legislation, but the same shall not, nor shall any part thereof, be alienated, but may in the public interest be from time to time granted by way of lease or licence to be worked or enjoyed under the authority and subject to the control of the Oireachtas: Provided that no such lease or licence may be made for a term exceeding ninety-nine years, beginning from the date thereof, and no such lease or licence may be renewable by the terms thereof*."

[257] Thomas Murray, CONTESTING ECONOMIC AND SOCIAL RIGHTS IN IRELAND CONSTITUTION, STATE AND SOCIETY, 1848–2016 113 (Cambridge University Press, 2016).

especially in education, healthcare and charity services. The desire for abatement of class conflict was, therefore, a very important backdrop in which the drafting process occurred. There was a divergence manner in which social unrest was to be addressed between the advisers of Eamon De Valera who represented the clergy and the bureaucracy. Clerical advisers advocated for the constitutionalizing of social provisions like land redistribution and credit reform in order to "to keep in check the activities of agitators who would sow disunion or discontent with the object of fermenting a destructive and unchristian class war"[258]. These proposals were rebutted by members of the bureaucracy who claimed that constitutionalizing a right to land or housing would be dangerous and could lead to violence if the state's ability to honor those rights was exhausted.[259]

The forms of suggestions for Catholic constitutional social provisions included the "creation of a property-owning, 'middle class', centered on the Catholic family and farm, as a form of social stability, provisions for a 'family wage' for agricultural and industrial employees, as well as a 'social credit' system and the usage of natural resources for the common good."[260] These were opposed by the bureaucracy, whose objections ranged from the claim that socioeconomic provisions were "not of a kind usually enshrined in a Constitution", "'mostly unnecessary", to how recent welfare measures were already giving "effect to the ideals underlying the provisions . . . and there was nothing to stop further legislative progress in the same direction".[261]

The objections of the bureaucracy eventually won out, and there was a distinction drawn between the personal rights provisions, and the ones relating to guiding principles. All provisions relating to social credit, land redistribution and other rights to welfare found themselves in Article 45, which contained "principles of social policy…intended for the

[258] Murray, SER and the Making of the 1937 Irish Constitution at 514.
[259] Id.
[260] Id.
[261] Id.

general guidance of the Oireachtas." Their application "in the making of laws" would "be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution." The Directive Principles included provisions on securing a livelihood ("…he citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs"[262]); credit control ("That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole"[263]); safeguarding of economic interests of the weak ("The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged"[264]); worker health ("The State shall endeavor to ensure that the strength and health of workers, men and women and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength."[265]).

This indicates that only provisions relating to "property[266], education[267] and child welfare provision" found their way into the rights-related provisions of the constitution, while those relating to health and adequate living standards were included as 'directive principles of social policy'.[268] Ultimately, those who desired a much stronger recognition of Catholic social thought won out, and the provisions on fundamental rights took a very distinctly Catholic social

[262] Article 45.2.i, Ireland Constitution 1937.
[263] Article 45.2.iv, Ireland Constitution 1937.
[264] Article 45.4.1, Ireland Constitution 1937.
[265] Article 45.4.2, Ireland Constitution 1937.
[266] Article 43.1.1, Ireland Constitution 1937.
"The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods."
Article 43.1.2, Ireland Constitution 1937:
"*The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property*"
[267] Article 42.4, Ireland Constitution 1937:
"*The State shall provide for free primary education…*"
[268] Thomas Murray, *Socio-Economic Rights and the Making of the 1937 Irish Constitution*, 31(4) Irish Political Studies 502-503 (2016) (Murray, SER and the Irish Constitution).

form. This was achieved by an explicit articulation of the "special position" of the Catholic Church[269]. The Church's position was also fortified by a recognition of the Church's interests in property, education and social policy. The fundamental rights provisions on private property also meant that the limited work of land redistribution was halted and that the Church's position in the matter of education, as well as its hold over the state's "wider welfare apparatus" was solidified.[270]

However, this may be on account of "*shared concern for Irish society's cohesion in the face of popular mobilisations and class conflicts*"[271], while also incorporating elements of Catholic social thought.[272] Therefore, the inclusion or not of socioeconomic entitlements in domestic constitutions is contingent on a number of historical and micro-political factors.[273] Murray notes that a there was resistance against state institutions usurping "the traditional relationship between the Church and the family, where responsibility for welfare was to remain", which resulted in "a preponderance of Church influence over schools, hospitals and other welfare agencies." [274] Recent scholarship on Indian directive principles also acknowledges their potential in "*expressive accommodation of ideological dissenters who would otherwise lose out in constitutional negotiations in deeply divided societies*."[275] The need for social cohesion was seen also seen as being paramount across both sides of the ideological divide in Ireland,

[269] article 44.1.2, Ireland Constitution 1937.
[270] Murray, SER and the Irish Constitution, at 516.
[271] Murray, SER and the Irish Constitution, at 519.
[272] Murray, SER and the Irish Constitution, at 515.
[273] Thomas P Murray, *The Curious Case of Socio-Economic Rights* (Preventing the Rational? Socio-Economic Rights and the Phenomenon of Blaming the Victim, Irish-Style), at 13, IBIS Working Paper No. 94 (2009), available at http://irserver.ucd.ie/bitstream/handle/10197/2396/94_murray.pdf?sequence=1 (hereinafter, Murray, *Blaming the Victim*).
[274] Murray, *Blaming the Victim*, at 9.
[275] Tarunabh Khaitan, *Directive principles and the expressive accommodation of ideological dissenters* 16(2) International Journal of Constitutional Law 389 (2018).

and it was this that led to the mere expressive gesturing toward some form of SER in terms of DPSP.[276]

3.3.2. India, 1949: Moving Beyond the Irish Model

a. Historical Background and Debates in the Constituent Assembly

The antecedents of social and economic rights in the Indian constitutional imagination began with the Motilal Nehru Report in 1928, which was born out of an all-party conference with the mandate of drafting an alternative to the Government of India Act, 1919. In addition to civil-political rights, the Report also proposed the right to education and the right to unionize for better labor conditions to be constitutionalized, while health, employment, and other measures of social security to be statutorily provided by Parliament.[277] Thereafter came a series of resolutions[278] drafted by the Indian National Congress (INC) - the political party at the forefront of the fight for Indian independence since its inception in the late nineteenth century, as well as a number of draft constitutions put forward into the Indian public sphere by various political parties. Some of the early drafts produced by the INC, which were cast in a liberal centrist, were criticized for being designed to "effect a government on the Russian model".[279] It is important to note that the judicial enforcement of these provisions was not in the imagination of Indian politicians at the time. Jayal notes that in the period leading up to Indian

[276] One of the more quoted statements about this is from Gerard Quinn, who stated that Eamon De Valera, the chief architect of the 1937 Irish Constitution, had '"cleverly genuflected before socio-economic rights but made sure to insert them into a part of the Constitution that is unenforceable by the courts' See Gerard Quinn, *Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order* in C. Costello (ed.), FUNDAMENTAL SOCIAL RIGHTS: CURRENT EUROPEAN LEGAL PROTECTION AND THE CHALLENGE OF THE EU CHARTER ON FUNDAMENTAL RIGHTS 35, 49 (Dublin: Trinity College, 2001).

[277] Niraja Gopal Jayal, CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY 138 (Harvard University Press, 2013) (hereinafter Jayal, CITIZENSHIP AND ITS DISCONTENTS).

[278] The most important of these was the Resolution on Fundamental Rights and Economic Changes, 1931, which, inter alia, put forth provisions calling for "an end to bonded labor, the elimination of child labor, the protection of women workers, the right of workers to form unions and, for industrial workers, "a living wage…limited hours of labour, healthy conditions of work, protection against the economic consequences of old age, sickness and unemployment"".
See Jayal, CITIZENSHIP AND ITS DISCONTENTS, at 140.

[279] Sumit. Sarkar, MODERN INDIA, 1885–1947 (Macmillan India,1983), quoted in Jayal, CITIZENSHIP AND ITS DISCONTENTS, at 141.

independence (1935-47), the question of social rights assumed a backseat to questions about communal violence.[280]

The debate surrounding whether or not to include a set of justiciable rights within the constitutional text, which had animated the drafting of the Irish Constitution's directive principles of state policy resonated in India when its Constituent Assembly commenced the drafting of its 1949 Constitution.[281] The importance of first wave SER constitutions the Weimar Constitution of 1919 and Eastern European socialist constitutions inspired the Indian framers.[282] The Constituent Assembly debates (CAD) in India[283], which occurred in the period between 9 December 1946 and 26 November 1949 provide an insight into the many voices which shaped the final version of the directive principles contained in Part IV of the Constitution of India.

The Sub-Committee on Fundamental Rights, which was tasked with drafting the provisions on fundamental rights, was the site of fierce contestation between those who believed that social provisions should not be enforceable, and those who considered that it would not be feasible or desirable to have it included in an enforceable form. KT Shah and Ambedkar, who were both prominent lawyers, sought to provide the Sub-Committee with guiding drafts which included economic and Social Rights, which Shah argued were indispensable in their absence, civil-political rights would be meaningless.[284] Ambedkar's submission to the Sub-Committee

[280] Jayal, CITIZENSHIP AND ITS DISCONTENTS, at 141
[281] See Granville Austin, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 76, 79 (Oxford, 1999):
"*The Irish- Congress relationship extended back to the late nineteenth century.... the authors of the Nehru Report spoke of Ireland as 'the only country where the conditions obtaining before the treaty were the nearest approach to those we have in India*." (p. 76)
"Thus, it is not surprising that the framers of the Indian Constitution so openly embraced the Irish Constitution as a model for the directive principles section of the Indian Constitution." (p.79).
See also, B.N. Rau, INDIA'S CONSTITUTION IN THE MAKING 273 (Allied Publishers, Bombay 1963).
[282] Jayal, CITIZENSHIP AND ITS DISCONTENTS 145.
[283] Constituent Assembly Debates (Proceedings) (9th December, 1946 to 24th January, 1950), available at http://parliamentofindia.nic.in/ls/debates/debates.htm.
[284] "The right to free elections without a full belly would be a mockery" See Shiva Rao, 2 FRAMING OF INDIA'S CONSTITUTION 46 (Universal Law Publishing, 6th Reprint, 2015).

titled Memorandum and Draft Articles on the Rights of States and Minorities contained extensive provisions on a vision of economic justice. He argued that the "*purpose of prescribing the economic structure of society was to protect the liberty of the individual from invasion by other individuals, which was surely also the object of fundamental rights*."[285]

There are three strands of arguments which came to define the final shape assumed by the socioeconomic provisions, as well as their diminution from 'rights' in the submissions made by KM Munshi and Ambedkar, to 'directive principles' in its final form. The first was the question of *appropriateness*: CAD deliberations indicate that the inclusion of provisions on socioeconomic welfare, such as state intervention in mediating worker-capital relations, resource redistribution indicated an ideological predisposition, and precluded the state from charting a course in accordance with the preferences of its constituents.[286]

The second was an argument regarding *practicality*. Subsumed within this argument was the question of whether there should be a distinction as drawn by Lauterpacht in his 1945 book 'International Bill of the Rights of Man' between "rights meant to be enforced by the ordinary courts and . . . rights incapable of or unsuitable for such enforcement". This exposed a prominent fault-line between CAD members who felt frustrated by "the House being "reduced to the status of children" by a "brick wall of lawyers"[287] Finally, however, the CAD came to accept their inclusion as non-justiciable principles. Ambedkar added that non-justiciability would not impair fulfilment, since ignoring them would cost political parties at the ballot box[288], thus giving an early flavor of the law-politics dichotomy that would come to be the mainstay of current debates on socioeconomic rights.

[285] Jayal, CITIZENSHIP AND ITS DISCONTENTS 145.
[286] Jayal, CITIZENSHIP AND ITS DISCONTENTS 147.
[287] Id., at 155.
[288] Ambedkar, in his speech to the Constituent Assembly stated:

Finally, the question of whether the Indian state could *afford* to have enforceable SER was a matter of debate. Some thought that "nothing in practice is practicable until it is tried", while others, discussing the right to education[289] questioned the "clumsy, half-hearted and hesitating manner" in which the drafters of the Constitution had addressed "the curse of ignorance that has rested upon us all these years".[290]Finally, it was Ambedkar, using rhetoric similar to his settlement of the previous question of impracticality, stated that in a parliamentary democracy, while the Constitution should contain a vision of economic democracy as displayed in other provisions of the DPSPs, it could not privilege one particular mechanism for accomplishing it.

In the evolution of the Indian Supreme Court's (ISC) jurisprudence since the promulgation of the Constitution, DPSPs have come to perform a variety of roles. In the early phase of ISC jurisprudence[291] (1950-1960), the Court came to reject arguments based upon DPSPs in cases where they conflicted with Fundamental Rights due to their textual commitment to non-enforcement. However, in the period that followed, the ISC began to regard DPSPs are subsidiary interpretive tools in interpreting Fundamental Rights provisions as well as establishing a framework of values which can guide judicial enquiry, an account of which I provide in section b below.

b. Final Text and Judicial Interpretation

"*Whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the electorate at election time."*
See Constituent Assembly Debates, Volume VII, at p.47.

[289] The right to education, prior to being constitutionalized in 2009, was a Directive Principle:
Article 45."The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years".

[290] Constituent Assembly Debates, Volume VII, at p.479.

[291] *State of Madras v Champakam Dorairajan* AIR 1951 SC 226; *Muir Mills v Suti Mills Mazdoor Union* AIR 1955 SC 170.

The result of the debates in the Constituent Assembly was Part IV of the Constitution. The introductory provision sets out that the "…(other) *provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws*."[292] Scholars usually categorize the directive principles as socialistic principles (for example, securing a social order for the welfare of the people (Art.38(1)) and securing adequate means of livelihood for all (Art. 39(a)), liberal intellectualist principles (uniform civil code (Art.44) and free and compulsory primary education (Art.45 (now replaced), and 3) Gandhian principles (prohibition of intoxicants (Art.47) and organizing agriculture on modern and scientific lines (Art.48)[293].

As noted previously, Ireland inspired Indian constitutional drafters regarding debates on judicial enforceability. There are, however, important differences, both textually, and those which have appeared over time due to judicial interpretation.[294] Article 45 of the Irish Constitution provides that directive principles "shall be the care of the Oireachtas *exclusively*" (emphasis mine), and "shall not be *cognisable* by any Court under any of the provisions of this Constitution" (emphasis mine). There has been judicial resistance against enforcement of even the right to education[295], and there has been persistent refusal to read unenumerated constitutional rights in the way that such rights have been gradually read into some provisions relating to procedural and substantive criminal law.[296] This can be contrasted with the

[292] Article 37, Constitution of India 1949.
[293] Jeffrey Usman, *Non-Justiciable Directive Principles: A Constitutional Design Defect* 15 Michigan State Journal of International Law 643-644 (2007).
[294] Joseph Minnatur, *The Unenforceable Directives in the Indian Constitution* 1 Supreme Court Cases (Journal Section) 17 (1975); *see* also Upendra Baxi, *Directive Principles and Sociology of Indian Law — A Reply to Dr. Jagat Narain* 11(3) Journal of the Indian Law Institute 245.
[295] The Sinnott v. Minister for Education [2001] 2 IR 545; TD v. Minister for Education [2001] 4 IR 259.
[296] Oran Doyle, THE CONSTITUTION OF IRELAND: A CONTEXTUAL ANALYSIS 166 (Oxford: Hart Publishing, 2018); Aoife Nolan, *Ireland: The Separation of Powers vs Socio-economic Rights*, in Malcolm Langford (ed.), SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW 295 (Cambridge: CUP, 2008).

formulation of DPSPs in the Indian Constitution as "provisions…(which) shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."[297] Therefore, it can *first* be argued that the Constituent Assembly, by not making DPSPs the sole province of the legislative branch and distinguishing 'non-cognizance' from 'non-enforceability', granted the judicial branch to be able to craft ways in which it has been able to form a position where the "DPSPs were constitutionally irrelevant to a point where they were constitutionally on par with the Bill of Rights"[298] *Second*, this textual difference also points to Irish directive principles being *addressed solely* to the legislative branches, thus indicating its programmatic nature, rather than being enforceable in a court of law like the provisions in Part IV of the Indian Constitution.

3.3.5. Conceptual and Institutional Configurations in the Second Wave of Constitutionalization

The constitution-making processes in both Ireland and India witnessed cleavages between radical and more liberal-egalitarian elements with differing reasons for incorporating SER as DPSP. In India, it was the affordability, practicality and appropriateness of their inclusion as enforceable rights which caused tensions; in Ireland, it was a combined influence of a liberal reading of what constitutions should contain, along with the need to incorporate the Catholic Church within provisioning in the socioeconomic domain that led to their being non-justiciable. However, what is clear is the moral salience of the task at hand for both Indian and Irish constitutional framers, who, while also agreeing on the socio-economic problems facing the countries, disagreed about the way forward from there.

[297] Art. 37, Constitution of India, 1949.
[298] Gautam Bhatia, *Directive Principles*, in Madhav Khosla, et. al, (eds.), THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press, 2016).

In such cases where tensions abound on resource sensitivity, implementation, and the relative importance of a socioeconomic aim[299], framers usually have two options. The first is the inclusion of enforceable SER within the constitution which envisions *legal accountability* or include them as DPSP, which signals a proclivity for *political accountability.* Theories have been offered about the motivating impulses behind legal accountability which are sensitive to historical, social, and political context. These usually have to do with the correction of historic patterns of embedded systemic injustice[300], insurance swaps in return for the entrenchment of property right protections[301], or deficiencies in the political process in fulfilling socioeconomic demands.[302]

The DPSP, at first blush, appears to signal a form of morally salient, weakly contradjudicative political constitutionalism[303]. Indeed, this appears to be what B.R. Ambedkar had in mind with respect to the Indian DPSP when he stated at the CA that while governments could not be answerable in a court of law for their breach, they would "certainly have to answer for them before the electorate at election time" and that the "value these directive principles possess will be realized better when the forces of right contrive to capture power."[304] Over time, however, constitutional interpretation by the Supreme Court of India has cast a long shadow over the DPSP, conceiving a form of *hybrid politico-legal accountability* which was likely not envisaged at the time of framing. This, however, has not been the case in Ireland, where courts have been very reluctant to enforce DPSP, or read positive obligations into the implied rights that may be protected by Article 40.3, with courts not wishing to "commend to the Executive

[299] Lael K Weis, *Constitutional Directive Principles* 37(4) Oxford Journal of Legal Studies 916, 935 (2017).
[300] Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution* 8 South African Journal on Human Rights 464, 465 (1992); Ismael Muvingi, *Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies* 3(2) International Journal of Transitional Justice 163 (2009).
[301] Rosalind Dixon and Tom Ginsburg, *The South African Constitutional Court and socio-economic rights as 'insurance swaps'* 4(1) Constitutional Court Review 1 (2011).
[302] Cass Sunstein, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 230 (Oxford University Press, 2001).
[303] Tarunabh Khaitan, *Constitutional Directives: Morally Committed Political Constitutionalism*, Modern Law Review (2019)
[304] See Constituent Assembly of India Debates (Proceedings) - Volume XI (Friday, the 25th November, 1949).

what is desirable or to fix the priorities of its health and welfare policy".[305] Therefore, the nature of the judicial branch, its disposition, as well as its relation to the coordinate branches, determine the ways in which DPSP are employed by institutional actors. While in India, it has been used by the judiciary to legitimate intervention in socio-economic rights cases, as well as to discover certain kinds of unenumerated rights like the right to shelter within its broad 'right to life' provision, the Irish courts, motivated by separation of powers concerns, has opted for non-intervention, except in cases involving the enumerated right to education and the right for children to be cared for by the state.[306]

3.4. Third Wave of SER Constitutionalization: Differing Historical Contingencies and Judicial Primacy

The second wave of SER constitutionalization occurred primarily through DPSP, which enabled the expressive accommodation of radical social ideas within a liberal-egalitarian constitutional milieu. The formulation of these provisions underscored their moral salience while displaying elements of avoidance and deferral for certain stated socioeconomic goals. Yet, it was their open-textured formulation that paved the way for their subsequent use by the judiciary in India and Ireland to legitimate intervention in socio-economic rights cases. This model also found takers in Africa, with Nigeria adopting a version of DPSP in its 1979 Constitution.[307].

Enumerated, judicially enforceable SER would come to be the hallmark of the Third Wave of SER Constitutionalization. For some countries in Latin America, it was the pushback against

[305] State (C) v. Frawley [1976] IR 365, 373.
[306] Paul O'Connell, VINDICATING SOCIO-ECONOMIC RIGHTS: INTERNATIONAL STANDARDS AND COMPARATIVE EXPERIENCES 144 (Routledge, 2012).
[307] See sections 16, 17, Constitution of Nigeria, 1979. See also B. Obinna Okere, *Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution* 32(1) International and Comparative Law Quarterly 214 (1983).

the forces of market globalization in states emerging from decades of military rule that prompted judicially enforceable SER constitutionalization. The motivations for constitutionalization for South Africa, which would come to be the standard-bearer for judicially enforceable SER, were different. Here, decades of state-sanctioned apartheid had resulted in its majority black population being systematically denied access to housing, education, healthcare on an equal basis with its white minority. The political process, despite being in the de facto control of the African National Congress, is seen as being inadequate with SER opening up the possibility of *promoting a certain kind of deliberation and directing political attention to interests that would otherwise be disregarded in ordinary political life*.[308]

3.4.1. Latin American Social Constitutionalism

SER provisions can now be found in the constitutions of the vast majority of countries in Latin America.[309] However, many countries in the continent had already displayed varying degrees of proclivity toward constitutionalization of social rights in the late 1930s.[310] In the period between 1937 and 1949, Brazil, Bolivia, Cuba, Uruguay, Ecuador, Argentina and Costa Rica had modified their constitutions to include some measure of constitutional social rights.[311] Most of these changes related to the rights of workers[312], education[313], and the entrenchment of social security.[314] In the post-war period which followed, most of these countries went

[308] Cass Sunstein, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 230 (Oxford University Press, 2001).
[309] Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges* 89 Texas Law Review 1587, 1591 (2011).
[310] Roberto Gargarella, *Too much "Old" in the "New" Latin American Constitutionalism*, available at https://law.yale.edu/system/files/documents/pdf/SELA15_Gargarella_CV_Eng_20150512.pdf
[311] Roberto Gargarella, *Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution* 4(1) Notre Dame Journal of International & Comparative Law 8,12 (2014)
[312] Take, for example, the Uruguay Constitution, 1942, which one commentator stated had "*inaugurated a regime of social democracy and has incorporated into the constitution principles of social and economic security creating a pension fund for all workers, employers, employees, laborers including rural laborers and domestic servants*." See, Ignacio Winizky, *A Survey of Constitutional Developments in Argentina and Uruguay*, 8 Southwestern Law Journal 418,443 (1954).
[313] See, for example, the Brazil Constitution of 1937:
Article128:
"Primary education is compulsory and free..."
[314] See, for example, the Argentine Constitution of 1949: Art.37(6), 37(7):

through periods of democratic instability and authoritarian regimes.[315] However, democratic renewal began afresh in the period following the overthrow of many of these authoritarian regimes, with renewed international attention being granted to the problem of inequality in the Global South, as well as calls for the establishment of what was known as the New International Economic Order.[316]

This led to what Brinks and Forbath describe as three waves of social and political transformation beginning in the 1970s.[317] The first was their transition to democracy and the second was their economic transition embodied by the pursuance of neoliberal economic policies. It was in the 1980s that these began to translate into concrete changes in policy and law in a number of Latin American countries.[318] This transition was characterized by reductions in social services, the removal of controls on the flow of goods into the country, and a gradual shift away from a conventional archetype of the welfare state which had been present in many of these countries.[319] In order to mitigate the harshness of this revised economic model, a set of robust SER began to be included as a way to ease the pressures exerted by these policies.

"6. **Right to welfare**. The right of workers to welfare, whose minimum expression is expressed in the possibility of having housing, clothing and food.
In order to satisfy their needs and those of their family without worries, in a way that allows them to work with satisfaction, rest free of worry and enjoyment of spiritual and material expansions, it imposes the social need to elevate the family. level of life and work with direct and indirect resources: that allows the economic development.
7. **Right to social security** -The right of the. individuals to be protected. In cases of decline, suspension or loss of capacity for work, it promotes the obligation of society to take unilaterally the corresponding benefits or to promote aid regimes. obligatory mutual allowances destined, both, to cover or supplement the insufficiencies or aptitudes inherent to certain periods of life or those resulting from misfortunes resulting from eventual risks."

[315] Javier Couso, *The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America*, in Javier Cuoso, et. al. (eds.) CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 141 (Cambridge University Press 2010).

[316] Julia Dehm, *Highlighting inequalities in the histories of human rights: Contestations over justice, needs and rights in the 1970s* 31 Leiden Journal of International Law 871 (2018); See also, generally, Samuel Moyn, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (Harvard University Press, 2018).

[317] Daniel Brinks and William Forbath, *Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-Poor Interventions* 89(7) Texas Law Review 1943, 1948 (2011) (hereinafter Brinks and Forbath, *Social and Economic Rights in Latin America)*.

[318] Kurt Weyland, *Neoliberalism and Democracy in Latin America: A Mixed Record,* 46(1) Latin American Politics and Society 135 (2004).

[319] Id.; See also, generally, Daniel Brinks & Abby Blass, THE DNA OF CONSTITUTIONAL JUSTICE IN LATIN AMERICA: POLITICS, GOVERNANCE, AND JUDICIAL DESIGN (Cambridge University Press, 2019).

I do not intend to provide an exhaustive catalog of these constitutional provisions, yet this phenomenon can be instantiated through the 1991 Constitution of Colombia, which provided a broad set of SER provisions, is usually considered one of the most exhaustive in the region. It is important to stress here the manner in which the 1991 Constitution was different from the1886 Constitution which was considered a "conservative document, born out of elite distrust of the popular will, which conceptualized rights as concessions from the state rather than as inalienable possessions of all citizens"[320] The new Constitution had sought to change that. There was, however, disagreement over the place of normative, enforceable social rights in the same bill of rights as civil-political rights. The two camps were split between those in the Gaviria government (who advocated a position on social rights which would privilege legislative formulations in fulfilling social goals) and those who wished that the new constitution recognize the indivisibility and inter-linkage of social and civil-political rights, as well as recent trends in the judicial enforcement of social rights. Ultimately, having delineated the Constitution as establishing Colombia as an " *Estado Social de Derecho*" (social state based upon rights), it sought to create "the institutional conditions necessary for the successful transition to a market economy, but on the other, entailed a series of substantive goals for elected governments."[321] Some SER provisions are below:

In relation to social education, the 1991 Constitution provides:

"*Education is an individual right and a public service that has a social function.*
Through education individuals seek access to knowledge, science, technology, and

[320] R. M. Nunes, *Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health* 52(03) Latin American Politics and Society 67, 78 (2010) (Nunes, *Ideational Origins of Progressive Judicial Activism*).
[321] Id.

the other benefits and values of knowledge."[322]

With respect to healthcare, the Constitution states that

"Public health and environmental protection are public services for which the State is responsible. All individuals are guaranteed access to services that promote, protect, and rehabilitate public health…
...Every individual has the right to have access to the integral care of his/her health and that of his/her community"[323]

It is here that we see that this provision exists in between the realm of being a public service (one which is dependent upon the state for fulfilment in a way that they choose fit)[324] and an individual right which can be enforced judicially. Therefore, it becomes clear that although worded similar to Latin American constitutions in the first and second waves of constitutionalization, the Colombian Constitution goes a step further with the mechanism of *tutelas* to enforce these rights.

Rights enforcement is done through the *tutela* proceedings which can be instituted before ordinary courts, with an appeal lying to the Constitutional Court,[325] which has been described as "the most powerful and influential tribunal in Latin America, and perhaps one of the most powerful high courts in the world".[326] *Tutela*s serve a constitutional individual complaint mechanism which is similar to the more familiar *amparo* in other Latin American jurisdictions. However, there are three important distinct features – the time-bound nature of the proceedings, their relative informality, as well as their horizontal application to certain kinds of private actors

[322] Article 67, Colombia Constitution, 1991.
[323] Article 49, Colombia Constitution, 1991.
[324] This is similar to the formulation of CSED which I refer to in Chapter 1 in the 1917 Mexico Constitution.
[325] Article 86, Colombia Constitution 1991: (2) "*The protection shall consist of an order so that whoever solicits such protection may receive it by a judge enjoining others to act or refrain from acting. The order, which shall be implemented immediately, may be challenged before the competent judge, and in any case the latter may send it to the Constitutional Court for possible revision*."
[326] David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law* 51 Harvard International Law Journal 319 (2010).

where petitioners who are private actors "before whom the complainant finds him/herself 'in a state of subordination or vulnerability'" or "where that actor provides a public service".[327]

There is conflicting academic opinion on the effects of the constitutionalization of these rights, and the concomitant power given to the judiciary for their enforcement. While some laud the judiciary in charting bold ways forward[328], others lament the elite capture of judicial institutions for the advancements of their socioeconomic interests at these fora,[329] as well as the reliance of the regime on the network of supra-national human rights bodies like the Inter-American Commission and Court of Human Rights.[330] While we should be sceptical of a monolithic conception of a Latin American social constitutionalism, it is of little doubt that they exerted exogenous pressures upon the constitution-making processes of countries which were undergoing democratic transitions in and around the same time.

3.4.2. Social Constitutionalism in South Africa

In this section, I provide an account of the social, legal and political conditions which led to the adoption of a justiciable set of SER in the 1996 Constitution of South Africa. The manner in which this section proceeds is to illustrate the catalog of theoretical objections for and against the inclusion of SER which were presented at the time when the countries under study were being drafted, most of which have been discussed at length in the preceding sections.

The sociopolitical context within which apartheid-era South African constitutional law should be looked at is one stained by injustices resulting from racial discrimination. Access to education, healthcare, housing and sanitation were marked by stark disparities between the

[327] David Landau, *Constitutional Court of Colombia (Corte Constitucional de Colombia)*, Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL], available at http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e524#law-mpeccol-e524-bibItem-76.
[328] César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America* 89 Texas Law Review 1669 (2010)
[329] David Landau, *The Reality of Social Rights Enforcement*, 53(1) Harvard International Law Journal 189 (2012).
[330] Landau, *Judicial Role and the Limits of Constitutional Convergence in Latin America*.

black, white and other communities.[331] The legal regime had also institutionalized discrimination against the black population in many other respects and given a legal veneer to apartheid. Following the eruption of a number of violent uprisings against the NP government and several declarations of states of emergency, it was becoming clear that the erstwhile government could no longer rule on behalf of a white majority of South Africans. Consequently, the central demand of the forces led by the ANC who were inimical to the rule of the NP was the aim was no longer the "overthrow of the white minority state, but a negotiated settlement that would bring about a black, democratically-elected government"[332]

It is also important to note that in the apartheid period preceding liberal constitutional development in South Africa, the doctrine of parliamentary supremacy entrenched in the pre-1993 Constitutions, coupled with the complete absence of a Bill of Rights and the legal training of the primarily white judiciary, which had thus far preserved the extant regime, had greatly delegitimized the judiciary.[333] In response to this, the framers of the Constitution chose to adopt a constitutional court modeled after the Federal Constitutional Court in Germany which would be charged with appellate responsibility in adjudicating disputes arising out of constitutional provisions. This was acknowledged, at least in political circles, in the belief that the Anglo-American model of constitutionalism, which sought primarily to channel and limit government power, and which also did not originally contain an enumerated bill of rights, was outmoded and contingent upon the fulfilment of a specific set of background conditions.[334] Kibet and Fombad set out the ideational terrain of the drafting of the South African Constitution as:

[331] Liebenberg, ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION; Stu Woolman & Jonathan Swanepoel, *Constitutional History* in Stu Woolman & Michael Bishop(eds.), CONSTITUTIONAL LAW OF SOUTH AFRICA (hereinafter, Woolman & Swanepoel, *Constitutional History*)
[332] Woolman & Swanepoel, *Constitutional History*.
[333] Eric Kibet and Charles Fombad, *Transformative constitutionalism and the adjudication of constitutional rights in Africa* 17(2) African Human Rights Law Journal 340, 349 (2017).
[334] Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights* 8(4) South African Journal on Human Rights, 451–463(1992) (Haysom, *Constitutionalism, Majoritarian Democracy*).

The appeal of the values of democracy, the rule of law and human rights, drummed up by the West, took centre stage now that the Cold War had ended or weakened. This influence was readily taken up and reflected in South Africa's constitutional change and subsequent practice. …and perhaps most importantly, was the recognition of the inadequacies of the Western liberal constitutional model to prevailing socio-political realities in South Africa. Constitutionalism, simply understood as the idea of limited government, was transplanted into African constitutional thought mainly through the agency of European colonial powers who acted as patrons of the decolonisation process and handed down to the newly-independent African states constitutions modelled after European constitutions. However, these models, fashioned after Western liberal ideology, failed to meet the peculiar needs of African situations characterised by widespread poverty, underdevelopment, wide ethnic and cultural diversity as well as African communitarian orientation.

The paragraph above is indicative of the manner in which the framers of the interim constitution were not only well acquainted with the workings of models of judicial review but that the final model of rights which emerged had a distinct indigeneity to it. There was also persistent tension between securing a peaceful transition to democracy and marking a rupture from apartheid. Three areas were especially fraught with difficulty: the status of property rights, the need for affirmative action to remedy decades of systemic discrimination against blacks, and the tension between the equality ideal in the Interim Constitution and the need to constitutionally treat the white minority and black majority differently.

The ANC's first proposal for a set of SER was put forward in 1990, with there being three categories of rights: "enforceable 'minimum' rights such as the right to primary school education; 'framework' rights capable of expanding content through statutory amendment but contingent upon resources; and aspirational goals".[335] However, the 1993 Interim Constitution omitted SER, and this can be attributed to internal divisions within the ANC over judicial enforceability.[336] There were some who favoured questions of allocative justice to be decided

[335] Haysom, *Constitutionalism, Majoritarian Democracy* 453.
[336] James Fowkes, BUILDING THE CONSTITUTION: THE PRACTICE OF CONSTITUTIONAL INTERPRETATION IN POST-APARTHEID SOUTH AFRICA 244 (Cambridge University Press, 2016) (Fowkes, BUILDING THE CONSTITUTION).

in the representative branches, while some proposed the creation of a Social and Economic Rights Commission as the primary enforcer of socio-economic rights.

As a result of these divisions, the ANC preferred a deferment of the decision on SER to the elected Constitutional Assembly that would write the 1996 Constitution. This constitution, which contained a robust set of SER[337] with a central role given to the judiciary for their enforcement, was subject to judicial certification of conformity with the 34 principles set out in Schedule 4 of the Interim Constitution of 1993. These principles were politically negotiated and included racial and gender equality, separation of powers, representative government, as well as principles to adjudge the allocation of power between various horizontal and vertical levels of government.

3.4.3. Engagement with institutional concerns with a robust judicial role

The Constitutional Court, when deciding the conformity of judicially enforceable contained in Final Constitution 1996 with the Constitutional Principles in the 1993 Interim Constitution, had to first rule on issues relating to whether SER (the content of which was not universally accepted) could be included in the Bill of Rights[338]. Second, it also had to decide whether the judicial enforcement of SER violated the principle of separation of powers[339] The Court held that Constitutional Principle II CP II permitted the Constituent Assembly to "supplement the universally accepted fundamental rights with other rights not universally accepted."[340] It also

[337] Sections 26-29 of the 1996 Constitution set out provisions on access to housing, healthcare, food, water, social security, education, and certain children's rights.
[338] The question which confronted the Constitutional Court was whether the rights contained in Sections 26-29 conflicted with the Constitutional Principle II: "Everyone shall enjoy all *universally accepted fundamental rights*, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution." (emphasis mine), See Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26 (CC) (6 September 1996) (*Certification Judgment*), para 77.
[339] The conflict was with Principle VI: There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."
[340] *Certification Judgment*, para 76.

stated that while the judicial enforcement of SER contained in Sections 26-29 may entail budgetary reallocation, courts routinely did so while deciding matters relating to civil-political rights as well.[341] This helped resolve only some of the doctrinal confusion surrounding SER; courts were still grappling with the precise contours of these relatively 'new'[342] set of rights and how to best go about interpreting them while maintaining their institutional capital. The avoidance of inter-institutional conflict through drafting was also done in other ways. First, the SER provisions deviated from international practice by enumerating *access rights* instead of direct rights to social goods like housing and education, and thereby was able to shift primary responsibility for the provision of the good away from the government, and toward secondary duties. Second, the internal qualifiers on each of the SER provisions on the taking of reasonable measures to achieve progressive realization within available resources made sure that courts would have devise standards to evaluate government action, as well as weigh up their institutional capital in case of finding a violation of such a right.

The practice of judicial interpretation of SER by the Constitutional Court of South Africa (CC) has gone through a number of phases, each marked by a varying approach to the different approach to inter-branch relations, perhaps reflecting some of the unresolved ambivalences which had come to mark the second and third waves of constitutionalization. This is best judged by the variance between the first SER case to come before the CC and a more recent one. It was in *Soobramoney*[343] that the Court was seized with an SER claim and was asked to evaluate

[341] The position of the Constitutional Court in this regard is revealed in the following paragraph from the judgment: "*However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers*." *Certification Judgment*, para 77.

[342] I base this understanding on Fowkes' account of the phenomenon of the 'newness' of socioeconomic rights in the Constitution of South Africa, 1996: "*Law that is new in this sense is law that is not accompanied by settled understandings, familiar expectations and institutional frameworks with established procedures and officials who are accustomed to them*." See Fowkes, BUILDING THE CONSTITUTION 131.

[343] 1998 (1) SA 765 (CC).

a claim grounded in the right to have access to healthcare services as well as the right to not be denied emergency healthcare services. The claimant wished to avail of dialysis services, for which he was rendered ineligible due to government policy which, as a condition precedent, required a patient to be free of "significant vascular or cardiac disease", which he was not. The SACC held that this policy was a rational medical and political determination taken in good faith with which it would be low to interfere with.[344] Nearly ten years later, the SACC was asked to determine the constitutional validity of a determination made by local authorities of the amount of water through the Free Basic Water Policy which a household was entitled to receive in the city of Johannesburg[345], which as recent coverage has highlighted, is a town with severe issues with water shortage. The Court refused to fix an amount, stating that it would defer to an executive determination.[346]

3.4.4. Conceptual and Institutional Configurations in the Third Wave of SER Constitutionalization

In the period of constitution-making which began in the wake of the Cold War, there is a marked mistrust of the political process to deliver results, which lead to constitution-makers granting primacy to the judicial branch, while also inaugurating what has now come to be known as transformative constitutionalism, which is meant to signal a much broader process[347] of social transformation which could be shepherded by a negotiated constitutional document, gained a mercurial currency since its genesis[348], has focused on the process of adjudication by

[344] Id. at para 29.
[345] [2009] ZACC 28
[346] Id, at para 159 ("The outcome of the case is that the applicants have not persuaded this Court to specify what quantity of water is "sufficient water" within the meaning of section 27 of the Constitution. Nor have they persuaded the Court that the City's policy is unreasonable").
[347] Some authors urge the use of the Postamble to the 1993 South Africa IC, as a guide: "a historic bridge between the past of a deeply divided society characterised 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, irrespective of colour, race, class, belief or sex". See Pius Langa, *Transformative Constitutionalism*, 17 Stellenbosch Law Review 351, 352 (2006).
[348] Karl E. Klare, *Legal Culture and Transformative Constitutionalism* 14(1) South African Journal on Human Rights, 146, 150(1998) ("long-term project of constitutional enactment, interpretation, and enforcement

courts[349]. Framers in this period also had a choice of providing individual rights which could be judicially enforced intra-partes without systemic effects, as seen in the Colombian constitution, or could grant access rights, which would be subject to internal qualifiers such as the need for reasonable legislative measures to ensure progressive realisation. These would configure judicial review standards in order to minimize inter-branch tension, and ensure that the judiciary in these new democracies would not come into direct conflict with the representative branches.

3.5. The Fourth Wave of SER Constitutionalization

Judicial primacy in enforcement is the central feature of SER which was constitutionalized in the 3rd wave. By the time that constitution-makers began drafting in the 2000s, the conceptual leaps which had made strong judicially enforceable SER unthinkable had been made, their 'newness' been engaged with, and debates about whether they belonged in constitutions had been largely settled. Newer concerns had emerged from the jurisprudence of South Africa's seemingly pioneering Constitutional Court, concerns which can broadly be classified as those relating to the separation of powers, the standard of review adopted by courts, and what is seen as the possibility of judicial interference with, or reordering of government spending priorities. What's undisputed is that the judiciary is the best bet, with perhaps a quiet acquiescence to the inevitability of weak institutional structures. Framers in the fourth wave had to contend with growing unease with the rise of judicial supremacy, but also needed to be responsive to cases

committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.").

[349] Although Klare himself clarifies in the 1998 piece that he is committed to exploring only some parts of the puzzle ("The major question underlying the scholarly initiative of which this paper forms a small part is whether it is possible to achieve this sort of dramatic social change through law-grounded processes. This is a big question, and here I will attempt only to explore some pieces of the puzzle"), Klare, *Legal Culture and Transformative Constitutionalism* 150.

involving intransigent governments who could claim a lack of financial resources when faced with SER claims[350], as well as non-compliance with judicial orders.[351]

3.5.1. The Constitution of Kenya, 2010

The first three decades following the independence of Kenya in 1964 have been described as being characterized by "*despotism, a refusal by the state to institute land reforms, and widespread human rights abuses*." [352] The Kenyan Constitution, adopted by popular referendum, has been described as one "written to serve the people", which "puts serious restrictions on the authority of the government and prescribes how it must exercise the powers of the state."[353] While the process has often been described as an example of elite deal-making[354], it is important to appreciate that the desire for a radical re-haul of institutional structures occurred in the backdrop of a set of troubling social circumstances. These circumstances have been described as one characterized by "poverty, inequality and exclusion along lines of region, ethnicity, class and gender", which "...were rooted in the social order but vouchsafed and promoted by the constitution and by state power in general."[355]

While there was a felt need to constrain the exercise of political power by constitutional means, there was also a need for the redressal of "poverty, inequality and exclusion along lines of

[350] There are various ways to address the issue of governments taking recourse to the argument of rights being progressively realizable, including accountability mechanisms like the minimum core, and non-retrogression doctrines, and exercises in comparative rankings. See, generally, Katharine Young, *Waiting for Rights: Progressive Realization and Lost Time*, in Katharine Young (ed.), THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS (Cambridge University Press (2019).

[351] See Christopher Mbazira, *Non-implementation of court orders in socio-economic rights litigation in South Africa: is the cancer here to stay?* 9(4) ESC Rights Review 2 (2008).

[352] Eric Kibet and Charles Fombad, *Transformative constitutionalism and the adjudication of constitutional rights in Africa*) 17 African Human Rights Law Journal 340, (2017)

[353] Yash Pal Ghai, *Constitutions and constitutionalism: the fate of the 2010 constitution*, in Godwin R. Murunga, Duncan Okello and Anders Sjögren (eds.), KENYA: THE STRUGGLE FOR A NEW CONSTITUTIONAL ORDER 119 (Zed Books, 2014).

[354] Cornelia Glinz, *Kenya's New Constitution: a Transforming Document or Less than Meets the Eye?* Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America Vol. 44, No. 1 (2011), pp. 60-80 (hereinafter, Glinz, *Kenya's New Constitution)*

[355] Godwin R.Murunga, Duncan Okello and Anders Sjögren, *Towards a new constitutional order in Kenya: an introduction*, in Godwin R. Murunga, Duncan Okello and Anders Sjögren (eds.), KENYA: THE STRUGGLE FOR A NEW CONSTITUTIONAL ORDER 1 (Zed Books, 2014).

region, ethnicity, class and gender". These "were rooted in the social order but vouchsafed and promoted by the constitution and by state power in general". The economy was in disarray, and due to decades of mismanagement, there was widespread dissatisfaction at the prevailing conditions.[356] It was in this backdrop that Kenya adopted a constitution which contained a strong set of socio-economic rights[357], with a set of corollary provisions relating to the obligations of the government[358] in this regard. It also enshrined a child's right to education and healthcare.[359] However, the drafters, who had experience with the contours of constitutional litigation in South Africa, were aware of the risks of court judgments on SER having an impact upon legislative budgetary allocations – either rearranging existing ones or ordering new, unforeseen expenditure. This is not to say that the drafters sought unquestioning deference from the judiciary to government measures in respect of SER. In addition to relaxed standing rules[360] that attempt to keep formal documentation to a minimum[361] (mirroring similar

[356] See Nicholas Wasonga Orago, *Socio-Economic Rights and the Potential for Structural Reforms: A Comparative Perspective on the Interpretation of the Socio- Economic Rights in The Constitution of Kenya, 2010*, in Morris Kiwinda Mbondenyi, et. al. (eds.) HUMAN RIGHTS AND DEMOCRATIC GOVERNANCE IN KENYA: A POST-2007 APPRAISAL 39 (Pretoria University Law Press, 2015).

[357] Constitution of Kenya, 2010, Article 43. **Economic and social rights**
(*1) Every person has the right—*
(a) to the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare;
(b) to accessible and adequate housing, and to reasonable standards of sanitation;
(c) to be free from hunger, and to have adequate food of acceptable quality;
(d) to clean and safe water in adequate quantities;
(e) to social security; and
(f) to education.
(2) A person shall not be denied emergency medical treatment.
(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependents."

[358] Constitution of Kenya, 2010, Article 21. **Implementation of rights and fundamental freedoms**
"(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43."

[359] Constitution of Kenya, 2010, Article **Children**
"(1*) Every child has the right—*
…(b) to free and compulsory basic education;
(c) to basic nutrition, shelter and healthcare…"

[360] The Kenya Constitution, 2010 makes both personal injury standing and third-party standing available. See Sections 22(1) and 22(2).

[361] Constitution of Kenya, 2010, Article 53. **Enforcement of Bill of Rights** (*3): The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—*
(a) the rights of standing provided for in clause (2) are fully facilitated;

clauses in the South African Constitution, 1996) Article 20(5)[362] presents a tiered approach to cases where governments claim resource inadequacy in response to a failure to implement a right. In such a case, the responsibility lies upon the government to adduce evidence of unavailability of resources. The provision also makes certain resource allocation principles clear in its requirement of prioritizing efforts to "to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances", while also enjoining the government to take into consideration "the vulnerability of particular groups or individuals". With respect to courts interfering with legislative or executive decisions on spending priorities, the provision explicitly states that "the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion."[363]

In adopting such a robust set of SER, it is clear that the drafters of the Kenyan constitution, many of whom were experts in South African constitutional law[364] were looking to advance a vision of constitutional justice which was meant to be transformative[365] but would also avoid

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
(c) no fee may be charged for commencing the proceedings;
(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

[362] Constitution of Kenya, 2010, Article 20. **Application of Bill of Rights**
5) *In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—*
(a) it is the responsibility of the State to show that the resources are not available;
(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

[363] Article 20(5), Kenyan Constitution.

[364] Glinz, *Kenya's New Constitution.*

[365] See Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] EKLR (per Mutunga CJ, Rawal DCJ, Tunoi J, Ibrahim J, Ojwang, Wanjala and Ndungu, J):
"*Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's*

some of the pitfalls which SER litigation in South Africa had faced. This is why the Kenyan Constitution should be considered as being emblematic of the *fourth wave of constitutionalization* of SER. Why is this so? *First*, because it recognizes that the absence of judicially manageable or discoverable standards with respect to the realization of SER may hamper effective and meaningful adjudication.[366] To this end, it goes a step further than the South African Constitution in requiring the State to take "legislative, policy and other measures, including the *setting of standards*, to achieve the progressive realization of the rights guaranteed under Article 43." By avoiding the idiom of 'reasonableness' and requiring the setting of standards against which government action can be tested, it was able to textually redress some of the difficulties faced by petitioners with SER litigation in South Africa in the CC's reluctance to go into the substance of SER.

Second, by textually requiring the government to produce evidence of a lack of resources in implementing a right, the Kenya Constitution 2010 was able to facilitate judicial examination of materials to prove such an assertion. This requirement should be read with the resource allocation principles highlighted above which also tasks governments to take into consideration the needs of vulnerable groups. These evidentiary and resource allocation principles are able to engage with intransigent governments which are reluctant to part with materials which would definitively prove lack of resources, as well as serving to rebut assertions that the consideration of vulnerable groups amounts to 'queue jumping'.[367]

Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy…" "…The transformative concept, in operational terms, reconfigures the interplays between the States majoritarian and non-majoritarian institutions, to the intent that the desirable goals of governance, consistent with dominant perceptions of legitimacy, be achieved."

[366] To this end, see, for example, the observation of the Constitutional Court in Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15, para 37:
"*It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be*"

[367] To this end, see for example, City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd Case CCT 37/11 [2011] ZACC 33.

Third, the Kenya Constitution 2010 recognizes that certain outcomes in SER adjudication have the potential to cause inter-branch conflict, especially in the reordering of spending priorities. By adopting Section 20(5), it has been able to place a textual bar on instances of courts interfering with a spending plan.

3.5.2. Conceptual and Institutional Configurations in the Fourth Wave

Constitution drafters in the fourth wave of constitutionalization, of which Kenya is emblematic, had sought to restore some of the primacy which the representative branches had lost, by ensuring that there are only very specific instances where courts are able to interfere with government spending priorities, albeit after demonstrating carefully that it has discharged its constitutional obligations. However, there has been a pushback against excessive judicial interference in SER cases from the High Court Kenya in the *Mitu-Bell* case in 2016, when it was dealing with an appeal from a stayed eviction order from the trial court which had asked for details of policies relating to housing from the government. The High Court went against this, asking *what the trial court would do with such policies if tabled* and that *the court could not interfere or evaluate the soundness of the policy"* It added that questions which involve "the formulation of policy and implementation" which are "within the province of executive".[368] It, therefore, appears that across the four waves, there is a back and forth on which institution is best left in charge of SER demands, and which of the executive or judiciary is the best fit to respond to polycentric, information and expertise sensitive decisions.

3.6. Conclusion: Back to the Future for Socioeconomic Rights

Constitutional SER have come a long way in the twentieth and twenty-first centuries, with debates over their place in constitutions being largely overcome, and there being a general

[368] Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR at para 100.

consensus for their importance in promoting conditions which enable human flourishing by providing a measure of shelter, healthcare, and education. However, academic debates still abound and take different forms in different jurisdictions. Critics have questioned the uncoupling of questions of sufficiency from those around inequality[369], the looming shroud of inter-branch tensions obscuring the need for judicially manageable and predictable minimum standards in SER[370], and the legitimacy of courts interfering with (seemingly) democratically responsive determinations of budgetary priorities by the representative branches[371].

How do these relate to the history of SER constitutionalization across the four waves? What, if anything, do the conceptual and institutional accounts I provide, add to the resolution of some of these dilemmas? At least three things come to mind. First, the original sin with SER had been its conception as judicially unenforceable CSED which were declaratory yet seemed to have tangible effects on the political branches in directing its legislative energies. Modern debates on SER are focused almost exclusively on the judiciary, and there is an urgent need for rediscovering their potential as morally salient bases for action from the representative branches. It is also important to pay attention to the ways in which social movements have used the rights vocabularies to advance claims at the political and judicial levels. Second, varying degrees of judicialization which can be seen in different jurisdictions are greatly dependent upon their historical trajectories, as well as the constitutional wave in which SER came to be part of their constitutions. This affects the position of the judiciary relative to the coordinate branches, and consequently, responses, whether political or judicial, to the current debates will take varying forms.

[369] See generally, Moyn, NOT ENOUGH; for a Global South perspective, see Rodrigo Uprimny Yepes and Sergio Chaparro Hernández *Inequality, Human Rights, and Social Rights: Tensions and Complementarities* 10(3) Humanity 376 (Winter, 2019).
[370] David Bilchitz, *Towards a defensible relationship between the content of socio- economic rights and the separation of powers: conflation or separation?*, in David Bilchitz and David Landau, THE EVOLUTION OF THE SEPARATION OF POWERS BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH 57, 60 (Edward Elgar, 2018)
[371] Jeff King, *The Justiciability of Resource Allocation* 70(2) Modern Law Review 197 (2007).

Third, newer, more participatory forms of judicial review, such as those associated with complex remedies, are likely to lower the heat of political conflict between the branches of government in cases involving SER. This dissertation investigates the phenomenon of complex remedies that can engage with concerns around the polycentricity of SER disputes, judges' lack of democratic legitimacy, and the remedial pathologies discussed in Chapter 1 of this thesis. These complex remedies can also foster forms of accountability which are in between the legal and political that are likelier to produce better and more implementable outcomes for petitioners in such cases, with a lower likelihood of reprisals from the representative branches, as well as the conservation of institutional capital. In such forms of review, courts serve as "catalysts of processes of public reasoning and institutional innovation" along with a robust articulation of the normative demands posed by SER provisions, as well as a "means-oriented, moderate approach to judicial remedies that leaves to public deliberation and collective problem solving the details of SER content beyond the minimum core", along with a "strong, court-orchestrated monitoring mechanisms".[372]

Although the future of SER is unlikely to resemble its past[373], many of its idiosyncratic features have been influenced by its heterodox, non-uniform past. Its ideational beginnings as political symbology with little practical relevance may have been largely overcome through decades of social and political mobilization, but current debates involving them, as well as their contested future trajectories may have much to learn by looking back at its beginnings.

[372] Cesar Rodriguez Garavito, *Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication*, in Katharine Young (ed.), THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 233 (Cambridge University Press, 2019).
[373] Katharine Young, Introduction, in Katharine Young (ed.), THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 1 (Cambridge University Press, 2019).

4. Complex Remedies in Indian Social Rights Litigation

4.1. Introduction

The previous chapter covered the evolution, issues and prospects of complex remedies in South Africa. This chapter turns to India and the use of complex remedies in its jurisprudence. I seek to displace the Court as the dominant actor in the story of the development of social rights and remedies by showing how support structures – comprising civil society, members of opposition political parties, and activist lawyers and legal organizations – have been crucial to developing complex remedies.

The dominant narrative on social rights in India focuses on the creative use of the Constitution's non-justiciable directive principles of state policy (DPSP) by an activist judiciary beginning in the 1980s.[374] In this linear account, the Supreme Court is cast as the dominant actor that shepherds the development of social rights. This chapter challenges this court-centric narrative. It outlines how ideas in the Indian political imagination that predate the country's independence remain relevant today. The narrative in this chapter is deeply institutionalist: although one institution cannot credibly lay claim to outlining or discovering social rights, a productive interaction between various institutions gives complex remedies their normative and empirical force.

Part I of the chapter sets out a brief history of social rights in India from the time of drafting to the present day, telling Part II sets out the three types of complex remedial models seen in India, using case law. Part III provides examples of each of the models.

[374] Jeremy Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible* 37 Am. J. Comp. L. 495 (1989); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court* of India 4 Third World Legal Studies 107 (1985).

4.2. Case Selection

In the following sections, I have chosen case law that best illustrates the characteristics of a chosen complex remedial model. This is in line with the prototypical method for case selection as part of the comparative method used in this dissertation.[375] Since the dissertation uses a limited number of cases drawn from each jurisdiction, the ones selected exhibit critical characteristics of the kinds of remedial forms I have described that are often seen in a large number of cases. Therefore, these prototypical cases "serve as exemplars of other cases with similar characteristics."

As the sections below outline, complex remedial forms in social rights cases having the three characteristics of being multi-step, multi-stakeholder, and dialogic, did not arise in Indian constitutional litigation till the *Right to Food* litigation in 2001. This meant that the case law on complex remedies only started in the early 2000s. This dissertation has sought to maintain decisions from apex courts as the central unit of analysis, except with India and Kenya, where there is a discussion of high court cases since the Supreme Court in Kenya has decided two social rights cases so far since the new Kenyan Constitution came into force in 2010. This chapter discusses a case from the High Court of Karnataka on out-of-school children, but the dissertation takes care to modify the research design to consider this deviation.

[375] Ran Hirschl, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 256 (Oxford University Press, 2014).

4.3. A Brief History of Social Rights & Remedies in India

4.3.1. Social Rights between Independence, Economic Liberalization, and Beyond

The dynamics of social protection in India have broadly tracked four political periods following the independence of India in 1947, and have also been influenced by two distinct periods of economic policy: a socialist-style economy (1947-1990) and a neoliberal-style market economy (1991 - present). The first two political periods were marked by Congress domination and consolidation (1952-1967), with a focus on poverty alleviation and economic growth, including policies with a minimal set of economic protections for workers in the formal sector.[376] In the second phase (1967 to 1989), the Congress sought to enact left-populist policies aimed at poverty alleviation and infrastructure investment for welfare delivery.[377] Thereafter, the era of coalition politics (1989 to 2014) was unstable and witnessed a number of exogenous shocks brought about by economic liberalization[378]. During this period, the Congress-led United Progressive Alliance (UPA), pushed by left-progressive forces in their coalition and a need to appeal to an electoral base beyond the urban middle class, sought to enact a number of laws aimed at securing the right to livelihood[379], nutrition and education, which some argue helped usher in India's new 'rights agenda'[380] with cross-partisan support.[381] Social movements articulated their demands in a language of rights and local institutions that made some mention of India's international obligations (although that was not its primary focus)[382]. In this period, the Supreme Court also played an important role, catalyzing legislative

[376] Ellen Ehmke, *Ideas in the Indian Welfare Trajectory*, 28 Journal Für Entwicklungspolitik 80 (2012).
[377] Mukul Sanwal, *'Garibi Hatao': Improving Implementation* 20(49) Economic and Political Weekly 2176 (1985).
[378] See Jayati Ghosh, *Social Policy in Indian Development*, in Thandika Mkandawire (ed.) SOCIAL POLICY IN A DEVELOPMENT CONTEXT 284-307 (Basingstoke: Palgrave Macmillan, 2004), pointing to a decline in rural employment generation, per capita food grain consumption, and the provision of public service.
[379] See the Mahatma Gandhi National Rural Employment Guarantee Act 2005.
[380] Sanjay Ruparelia, *India's New Rights Agenda: Genesis, Promises*, Risks 86(3) Pacific Affairs 569 (2013).
[381] See James Chiriyankandath, Diego Maiorano, James Manor, Louise Tillin, THE POLITICS OF POVERTY REDUCTION IN INDIA: THE UPA GOVERNMENT, 2004 TO 2014 (Orient Blackswan 2020).
[382] Shareen Hertel, *A new route to norms evolution: insights from India's right to food campaign*, 15 SOCIAL MOVEMENT STUDIES 610–621 (2016).

action or spurring state and central governments into greater coordination to ensure the implementation of rights-based legislation.[383]

Following independence, the approach of the Indian state toward social protection was marked by a *welfare* approach that was *not universal* in nature. In line with the Constitution's transformative mandate, social citizenship was primarily about relieving absolute poverty for the most vulnerable and eradicating social evils like untouchability.[384] The expansion of social protection was constrained by India's relative underdevelopment. Rapid industrialization and increasing the social product were seen as a vehicle for improving the standard of living for all.[385] Therefore, the first three decades after independence were marked by contestation between two competing visions of development. The first focused on raising consumption for the poor and the attendant economic development that it would bring, which often conflicted with a more holistic view of development that could boost the productivity of the people through greater investments in social infrastructure.[386]

Notably, after independence and continuing into the 1980s, any welfare intervention was articulated in the idiom of state largess, charity, and paternalism. In the absence of their formulation as *rights*, government programs – ranging from food subsidies to free public goods like electricity or water – were linked to electoral populism. Regimes of social protection seeking short-term electoral gain in this period were unable to affect citizen-empowerment that the rights-based regimes that came in the early 2000s would have. The Indian citizen was seen as a *bearer* of duties, rather than a *claimant* of rights against the state. These features of Indian governance led to minimal financial and infrastructural investment for the provision of public

[383] Gaurav Mukherjee, *The Supreme Court of India and the Inter-Institutional Dynamics of Legislated Social Rights* 53(4) Verfassung und Recht in Übersee/ World Comparative Law 411 (2021).
[384] Jayal, CITIZENSHIP & ITS DISCONTENTS at 167.
[385] Id, at 168.
[386] Raj Sekhar Basu, *Understanding The Poverty Amelioration Programmes of the Congress: The Narratives from the Jawaharlal Nehru and Indira Gandhi Years* 4(2) Societal Studies 361 (2012).

goods like healthcare and education during this period. Some Indian states, however, were nimbler and more effective at enacting social protection programs in this era of greater decentralization than we see today.[387]

In the period between Independence and the 1980s, the Congress-led government's inability on shoring up and expanding the access to public goods and services (e.g., healthcare, housing and education) resulted in greater judicial involvement across a number of these areas. Greater judicial involvement can be also explained through a convergence of its institutional interests. The Congress's reservoir of goodwill had been damaged by the imposition of Emergency (1975-77) that saw a marked decline in civil liberties and a government crackdown on political dissent.[388] The party was seeking to reassert its legitimacy among the poor by instituting a set of well-intentioned, but ultimately halting anti-poverty programs.[389]

The institutional capital of courts is reliant on public support and the maintenance of legitimacy. The Indian Supreme Court's legitimacy had been dented by its facilitative role in the perpetuation of the Emergency. Some accounts argue that its rehabilitation was led by what has been described as Public Interest Litigation, essentially ordinary writ petitions, but with liberalized rules of *locus standi*, that sought to make the Supreme Court more participatory and democratic.[390] The PIL mechanism sowed the seeds for thinking about public goods like education and healthcare in terms of rights, rather than charity.

Following economic liberalization in 1991, there was a gradual expansion of social protection – which many claim was because of the fiscal space created by rising revenues for the state[391].

[387] Atul Kohli, THE STATE AND POVERTY IN INDIA 17 (Cambridge University Press, 1989).
[388] Chinnappa Reddy, THE COURT AND THE CONSTITUTION OF INDIA: SUMMITS AND SHALLOWS 69-73 (New Delhi: OUP, 2008).
[389] Theunis Roux, THE POLITICO-LEGAL DYNAMICS OF JUDICIAL REVIEW – A COMPARATIVE ANALYSIS 148-150 (Cambridge, 2018).
[390] Upendra Baxi, *Judicial Activism: Usurpation or Re-democratization*? 47 Social Action (Oct-Nov, 1997).
[391] Devesh Kapur & Prakirti Nangia *Social Protection in India: A Welfare State Sans Public Goods?*, 14:1 India Review, 73, 82 (2015).

Liberalization coincided with the inauguration of an era of coalition politics in India where both the left-of-center Congress party and the right-wing Bharatiya Janata Party (BJP) needed to accommodate a broad range of ideological and constituency interests.[392] After an interregnum of BJP rule (1999-2004), the Congress came back to power in 2009 on a manifesto where it promised to enact a progressive social protection agenda that would build on a number of Indian Supreme Court rulings on the rights to food and education.

The Congress party, pushed by progressive coalition partners and members of civil society, enacted a policy agenda focused on establishing *rights* to social provision that could enable citizens to demand better service delivery BY WHO?.[393] Legislation on education, food security, employment guarantees, and the right to information enacted in this period set up government obligations that were more robust than those prevailing in international law and practice.[394] Grassroots mobilization for the right to food relied largely on domestic law, institutions, and networks rather than the 'vernacularization' of international norms or transnational advocacy.[395] This progressive agenda helped Congress to a second successive term in Central government (2009-2014). However, allegations of graft and corruption paved the way for its eventual defeat in the 2014 national elections to a coalition known as the National Democratic Alliance (NDA), made up of right-leaning parties led by the BJP. The NDA initially sought to gradually reduce government outlays for the existing rights-based schemes when they came to power in 2014, but their popular salience prompted a reversal.[396]

[392] Id., at 85.
[393] Louise Tillin *Does India have subnational welfare regimes? The role of state governments in shaping social policy,* 10:1 Territory, Politics, Governance 86, 87(2022).
[394] Sanjay Ruparelia, *India's New Rights Agenda: Genesis, Promises*, Risks 86(3) Pacific Affairs 569 (2013).
[395] Shareen Hertel *A new route to norms evolution: insights from India's right to food campaign*, 15:6 Social Movement Studies 610, 617 (2016).
[396] We return to the political story of social rights in greater detail in Part III, with a focus on the return to discretionary, largesse-based formulations of welfare in the current era.

With a conclusion of the story of social rights in the political and legislative fields, we turn our attention to judicial approaches in the next subsection of this chapter.

4.3.2. Judicial Enforcement of Social Rights: History & Remedies

In the early period following Indian independence, there was little understanding that the judicially unenforceable directive principles of state policy would later provide a basis for social rights. Consequently, rights-based litigation before courts was largely on the basis of rights enumerated in Part III[397], which did not include anything that looked like what we today refer to as social rights. Legal mobilization around social entitlements is usually contingent on a set of background social and political conditions that simply were not present in the early decades of the Indian republic.[398] While the early stages of the development of social rights were centered around judicial victories, legislative enshrinements of the kind seen in the early 2000s were able to entrench and codify rights-based legal frameworks. These developments were crucially dependent on a network of support structures comprising civil society and members of the political elite who coalesced around the cause to ensure that greater public attention, resources, and judicial energy were diverted to these causes.[399]

Arun Thiruvengadam suggests three temporal stages for the evolution of the social rights jurisprudential canon of the Supreme Court of India.[400] The first period extends roughly from 1950-1980, when there was a "struggle to establish a constitutional foundation for social rights in India". In this period that began in the 1980s, a set of institutional priorities focused on its own public re-legitimation were set for the Supreme Court of India by a set of influential judges

[397] The part dedicated to judicially enforceable fundamental rights.
[398] Adam Chilton and Mila Versteeg, HOW CONSTITUTIONAL RIGHTS MATTER (ch.2), (Oxford University Press, 2021).
[399] Charles Epp, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).
[400] Arun Thiruvengadam, Characterising and evaluating Indian social rights jurisprudence into the 21st century, unpublished paper, available at https://azimpremjiuniversity.edu.in/SitePages/pdf/Characterising-and-evaluating-Indian-social-rights-jurisprudence-into-the-21st-century.pdf

by using a set of cases to lay the doctrinal foundations for social rights.[401] Many of these cases were filed by social justice organizations like the Azadi Bachao Andolan and public-minded activists like *Olga Tellis*. In this period, the Court worked to draw the necessary doctrinal linkages between its Right to Life provisions and the judicially unenforceable Directive Principles of State Policy.

The second phase lasted approximately between 1980 and 2000, with cases that involved the rights to work, shelter, health, education and food, and a Supreme Court that had to decide the levels of deference it would grant to the coordinate branches, especially when it came to reordering the demarcation of resources for the fulfilment of these rights. A notable example of a case from this period is the *Olga Tellis* judgment. The third phase of the development of judicial social rights lasted approximately between 2000 and 2010, which was marked by a Supreme Court appeared conscious its institutional incapacity to deal with implementation issues. In this era, the Court explicitly sought to set up monitoring mechanisms for ensuring compliance with its orders. The fourth phase of the development of social rights jurisprudence is underway, with the Court reverting to a model of procedural, rather than substantive remedies, with a renewed mindfulness of its institutional place and its attitudinal stance of governmental deference. In the current period, most litigation is initiated through the Public Interest Litigation (PIL) mechanism, which contributes to the instability of precedent, while the jurisprudence provides little guidance to future litigants and clarity to governments on the exact nature of their obligations.

The PIL mechanism permits grievance redressal at the micro-level for minor infractions, but provides no legal avenues to challenge the mismanagement of funds and broader institutional failures such as a failure by governments to disburse necessary funding. Rights-based social

[401] Rehan Abeyratne, *PN Bhagwati and the Transformation of India's Judiciary*, in Rehan Abeyratne & Iddo Porat (eds.), TOWERING JUDGES: A COMPARATIVE STUDY OF CONSTITUTIONAL JUDGES (Oxford University Press, 2021).

legislation like those relating to food or rural employment security requires government action across a range of actors and can be gummed up by legislative or executive inaction, inattentiveness, or inertia.[402]

In the last decade, judicial intervention has been aimed at facilitating the conditions for the effective realization of social rights, with an emphasis on forcing governmental accountability and cooperation between branches of government in India's federal system. The characteristics of the current phase were seen most clearly in the Indian Supreme Court's approach to cases during the pandemic. The Court appears to display a heightened awareness of the risks of deciding polycentric disputes in a top-down manner, opting instead to create the conditions necessary for government, civil society, and private stakeholders to engage in legally bounded deliberation and problem-solving.

4.4. The Architecture of Social Rights Judicial Remedies: Origins, Issues & Prospects

The first period of the Supreme Court following Indian independence as this chapter introduces above was characterized by declaratory relief as the mainstay of its remedial jurisprudence, leading both foreign observers[403] and India scholars to bemoan the right-remedy gap.[404] However, in the period that followed, the Supreme Court gradually developed a practice where detailed interim orders were passed pending final determination.[405]

[402] Gaurav Mukherjee & Juha Tuovinen, *Designing Remedies for a Recalcitrant Administration* 37 South African Journal on Human Rights 1 (2021)
[403] Clark D. Cunningham, *Public Interest Litigation in the Indian Supreme Court: A Study in Light of the American Experience*, 29 Journal of the Indian Law Institute 505, 506 (1987).
[404] S.K. Agarwala, PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE 36 (1985)
[405] See the orders passed in the undertrial prisoner case over several years: Hussainara Khatoon (3) v. State of Bihar, (1980) 1 SCC 93 : AIR 1979 SC 1360; Hussainara Khatoon (4) v. State of Bihar, (1980) 1 SCC 98 : AIR 1979 SC 1369; Hussainara Khatoon (5) v. State of Bihar, (1980) 1 SCC 108 : AIR 1979 SC 1377; Hussainara Khatoon (6) v. State of Bihar, (1980) 1 SCC 115 : AIR 1979 SC 1819; Hussainara Khatoon (7) v. State of Bihar, (1995) 5 SCC 326.

In the second period, the Court was concerned with rehabilitating its post-Emergency image, and a range of doctrinal innovations and changes in procedural rules opened the Supreme Court up toward entertaining petitions for the violations of fundamental rights. The evolution toward more detailed orders that went beyond declarative and injunctive relief came in 1985 with the *Olga Tellis*[406] case. In one of the most celebrated cases in this period, where the Court permitted the evictions of a group of slum and pavement dwellers to clear the sidewalks under the provisions of the Bombay Municipal Corporation Act but required that alternate accommodation be provided and that the Slum Upgradation Programme be implemented. Its decision was based on a conjoined reading of the Directive Principles of State Policy and the right to life under Article 21 of the Constitution, which lead the Court to state that being evicted without access to alternate accommodation would impede upon their right to livelihood and the right to life guaranteed by the Indian constitution. The second phase was marked by a great degree of institutional comity[407], and mandatory orders were thought of as sufficient by the judiciary to remedy constitutional violations. Importantly, mandatory orders signaled the end of the litigation and the judicial process, with implementation being left to the executive branches.[408] However, there were several notable very public failures, such as the non-implementation of the Court's orders in the undertrial prisoner case that had begun in 1980.[409] This led the Court to retain jurisdiction over the matter by joining fresh petitions arising out of the same cause of action to the original case, issuing orders and directives, without delivering a final judgment in order to retain jurisdiction over the matter.

[406] Olga Tellis v Bombay Municipal Corp. (1985) 3 SCC 545.
[407] There were instances where the Supreme Court chided High Courts for seeking compliance reports from state authorities, see State of H.P. v. Parent of a Student of Medical College (1985) 3 SCC 169; see also State of H.P. v. Umed Ram Sharma, (1986) 2 SCC 68.
[408] Rohan J. Alva, *Continuing Mandamus: A Sufficient Protector of Socio-Economic Rights in India*, 44 Hong Kong Law Journal 207, 230 (2014).
[409] Mihika Poddar & Bhavya Nahar, C*ontinuing Mandamus - A Judicial Innovation to Bridge the Right-Remedy Gap*, 10 NUJS Law Review 555 (2017).

With the rise of coalition politics in the 1990s the Court assumed a larger role in ensuring 'good governance',[410] while a more sclerotic political process was often seen as beholden to a range of divergent ideological interests. As described previously, public interest litigation developed as a model for expanding access to the courts in the late 1980s and 1990s. It was during this period that the concept of the 'continuing mandamus'[411] took hold. The Court in *Vineeth Narain*[412] sought to ensure effective discharge of statutory duties by federal investigative agencies while being free from political bias and influence. Although Vineet Narain had laid the doctrinal groundwork for more invasive remedial forms, what is important to note is that the remedies prior to the Right to Food Case remained in a command-and-control mode, with little room for learning from remedial failure, collaboration between stakeholders, and iteration of remedies.

It was not until the third period beginning in the early 2000s that more complex remedies that included civil society members began to be used by the Supreme Court. The most notable use came with the Right to Food litigation discussed below. However, this freewheeling judicial process, without adequate procedural safeguards, is rife with potential for exploitation by a self-interested judicial role conception, as well as by judges who wish to message to particular constituencies. Anuj Bhuwania and Gautam Bhan[413] pioneered the field of study of the Indian judiciary and its politics by suggesting that PILs, since their inception as a device for

[410] Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 Washington University Global Studies Law Review 1, 49-52 (2009).
[411] The present Chief Justice of the Supreme Court of India D.Y. Chandrachud, described a continuing mandamus as being founded on the premise that a "*one-time direction by the court in terms of formulating doctrine would not be adequate to deal with serious situations involving social deprivation. The continuing inertia of an administering agency would require directions by the court from time to time in order that the court may monitor compliance of its directions*". See D.Y. Chandrachud, *Constitutional and Administrative Law in India* (2008) 36 International Journal of Legal Information 335, available at http://scholarship.1aw.cornell.edu/ijli/vol36/iss2/15.
[412] Vineet Narain v. Union of India (1998) 1 SCC 226.
[413] Gautam Bhan, *"This is no longer the city I once knew". Evictions, the urban poor and the right to the city in millennial Delhi* Environment and Urbanization 21: 127 (2009); Gautam Bhan, *The impoverishment of poverty: reflections on urban citizenship and inequality in contemporary Delhi.* Environment & Urbanization. Vol 26 (2): pp. 1-14 (2014).

democratizing access to the courts, had become a force to drive demolitions of irregular settlements, the displacement of poor and vulnerable communities, and a range of other causes. According to them, the lack of procedural safeguards has resulted in unwieldy, poorly reasoned jurisprudence, mortgaged on the unaccountable rise of judicial power in the last decade of the Court.[414]

One broader implication of this line of work is mistrust in the judiciary as a force for progressive good, an agent of social transformation. Yet, the central message of the sections that follow is to stress that contestations over social transformation cannot be the province of the judiciary alone. The coordinate branches are forever in conversation, in this case, facilitated judicially through these complex, multi-step, multi-stakeholder remedies.

4.5. Complex Remedial Models in India

4.5.1. Judgment Oversight and the Right to Food Litigation

The most salient illustration of complex remedies where civil society has been involved in the oversight of judgment implementation is the right to food litigation. The litigation started at Supreme Court of India (SCI) when the People's Union of Civil Liberties (PUCL) took the initiative by filing a series of Public Interest Litigations (PILs).[415] Their aim was to compel the attention of the judiciary towards the tragic occurrences of starvation deaths across the nation, particularly in drought-stricken regions. Responding to these petitions, the SCI issued a judgment that addressed the collective pleas put forth by the People's Union of Civil Liberties. Their objective was clear: to establish the recognition of the right to food as a legal entitlement for every individual in the country, irrespective of gender or age.

[414] Anuj Bhuwania, *Courting the people: The rise of Public Interest Litigation in post-emergency India* (2014) 34(2) Comparative Studies of South Asia, Africa and the Middle *East* 314.
[415] People's Union for Civil Liberties v. Union of India, (2001) 5 SCALE 303. Note: The orders in these series of cases were staggered over time and multi-fold – the citation here refers to the first public interest litigation filed by the People's Union for Civil Liberties in the Supreme Court in 2001.

Subsequently, a series of orders ensued, which were not intended to conclusively resolve the original petition or fulfill the sought-after relief. Rather, these orders transformed eight government-run schemes pertaining to food, livelihood, and social security into enforceable entitlements. Expanding beyond the initial scope of relief sought, a 2008 order from the case established a Commissionerate responsible for monitoring hunger and the implementation of interim orders pertinent to the *Right to Food Case* throughout the country. One of the Commissioners appointed in the case commended this development, asserting that it laid the foundation for an enforceable right to food, thereby preventing governments from eliminating or diluting these schemes under fiscal constraints.[416]

In addition, these orders established a monitoring mechanism by appointing a Commissioner to oversee the implementation and performance of various government schemes.[417] With time, the Commissioners began making numerous recommendations, which the court sought to impose not only on the federal government but also on several state governments that had become involved in the case. The SCI directed these states to identify vulnerable groups within their jurisdiction and ensure that these groups were informed about how their right to food could be fulfilled. Among the recommendations made by the Commissioners was the provision that school meals should be locally produced, hot, and cooked (as opposed to the dry snacks or grains that were previously distributed by many governments). These meals were also required to be hygienic, nutritious (meeting a prescribed minimum caloric level), and offer varied menus for each day of the week.

[416] Harsh Mander, *Food from the Courts: The Indian Experience*, IDS Bulletin Volume 43 Number S1 (July 2012).at 17.

[417] Supreme Court Commissioners, *What We Do*, available at http://www.sccommissioners.org/. The full text states that the Commissioners' "*mandates are entrenched in orders dated 8th May 2002 and 29th October 2002. The former empowers them to investigate violations of interim orders related to the case and demand redress, while, the latter extends their authority to monitoring and reporting the implementation status of said orders to the Supreme Court and conducting inquiry to respective government authorities on their efforts in placing the orders functional*.".

Strategic litigation, of this kind, represented just one aspect of the organizational framework surrounding the social movements that coalesced around this case. These movements were accompanied by an increasing reliance on the language of constitutional rights. The connection between the National Food Security Act (NFSA) and the Mahatma Gandhi National Rural Employment Guarantee Act (NREGA) lies not only in their origins rooted in strategic litigation but also in the amalgamation of well-articulated demands by social movements and the substantial political support that led to the enactment of these laws. This reminds us of the importance of support structures to the initiation and eventual success of social rights litigation. It is this structure that exerts pressure on the political process and aids their inclusion in the drafting committee for the NFS Act, which was based on the judicial set out in the Right to Food litigation. Complex remedial processes where members of civil society are involved enable their proximity to centres of elite policymaking and they become allies, instead of subversives.

The NFS Act, ultimately passed in late 2013, had as its stated goal "to provide for food and nutritional security in a comprehensive approach, ensuring access to adequate quantity of quality food at affordable prices, allowing people to live a life of dignity." The crux of this legislation was to enshrine into law the entitlements that had already been recognized through the previous Right to Food litigation. Furthermore, it included a reduction in the prices of food grains sold at public distribution shops and introduced cooked meals at anganwadi centers for pregnant and lactating mothers, as well as children below the age of six. These measures were integral to the Integrated Child Development Scheme, which also encompassed the provision of meals to school children under the Midday Meals scheme. Additionally, the law provided a maternity benefit of Rs 6,000 for every pregnant woman.

4.5.2. Report Back to Court Model: The Employment Guarantee & Food Security Cases

In the cases that follow, the disputes arose out of legislated social rights and resulted in complex remedies that are both substantive and procedural. This matters for two reasons. First, the fact that the disputes arise from rights enshrined in legislation means that the judicial remedies are (largely) bounded[418] by the avenues envisaged in the law, meaning that more complex remedial forms – where the court appoints a committee or engages civil society to oversee remedial implementation – are harder to justify. Second, the remedies laid out in these cases reiterate the essential requirements of the statute (100 days of remunerated employment in the rural employment security law case and for release of food grain in the food security law case), while also setting out a process by which various governmental authorities, dispersed across departments in the federal and state governments, would come together to problem solve.

The Swaraj Abhiyan cases discussed here were decided by what had been called the 'social justice bench' of the Supreme Court.[419] This was a specialized two-judge bench that had been set up by then Chief Justice H.L. Dattu in 2016 to decide disputes arising out of 'social causes'.[420] The bench was to be staffed by Justices Lalit and Lokur in order to provide a

[418] I say largely since Indian courts often make use of their inherent powers under procedural rules and their ability to do 'complete justice'. See Civil Procedure Code, Section 151:
"Saving of inherent powers of the Court – "*Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court*.", read with article 142, Constitution of India: 142. **Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc**.-
(1) *The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.'*

[419] Apurva Vishwanath, *Was the social justice bench of the Supreme Court a failed idea?* Minti, 29 Mar 2016, https://www.livemint.com/Opinion/HesmpZOsct2rJtCBdi7xnN/Was-the-social-justice-bench-of-the-Supreme-Court-a-failed-i.html.

[420] The term is borrowed from the press release from the Supreme Court of India which stated:
"*The Constitution of India in its Preamble has assured the people a three dimensional justice including social justice. Under the domain of 'social justice', several cases highlighting social issues are included. To mention summarily, about the release of surplus food grains lying in stocks for the use of people living in the drought affected areas; to frame a fresh scheme for public distribution of food grains; to take steps to prevent untimely death of the women and children for want of nutritious food; providing hygienic mid-day meal besides issues relating to children; to provide night shelter to destitute and homeless; to provide medical facilities to all the*

"specialized approach for (the) early disposal (of social justice cases) so that the masses will realize the fruits of the rights provided to them."[421] The bench was disbanded in 2016, but one of the judges, Madan Lokur, continued hearing the Swaraj Abhiyan petitions when it came to the follow up decisions. This continuity in judicial personnel is important for two reasons.

The first relates to the nature of social rights cases. Alok Prasanna Kumar, senior resident fellow at the Vidhi Centre for Legal Policy, a legal think tank in New Delhi, stated that "…*the nature of cases before the social justice bench required constant monitoring and not speedy disposal. When multiple functionaries of the government are involved, if we don't keep track of the progress the issues could get diffused*".[422] His statements indicate that social rights cases require the judge to be familiar with the issue and vigilant monitoring, which becomes harder in case the personnel hearing the case changes. This difficulty is heightened in institutions like the Supreme Court of India that do not sit *en banc*, where cases are assigned to single-judge, two-judge, three-judge, or constitution benches (five, nine or thirteen judges)[423] by the Chief Justice. The second relates to an insight from studies on institutional behavior, which establish tentative links between personnel continuity in courts to the development of greater expertise and interest in a category of cases.[424]

citizen irrespective of their economic conditions; to provide hygienic drinking water; to provide safety and secured living conditions for the fair gender who are forced into prostitution, etc., these are some of the areas where the constitutional mechanism has to play a proactive role in order to meet the goals of the Constitution (sic)"
See Press Release from Supreme Court of India dated 17 December 2014, *available at* https://main.sci.gov.in/pdf/cir/2014-12-17_1418816381.pdf

[421] Id.

[422] Apurva Vishwanath, *Was the social justice bench of the Supreme Court a failed idea?* Mint, 29 Mar 2016, https://www.livemint.com/Opinion/HesmpZOsct2rJtCBdi7xnN/Was-the-social-justice-bench-of-the-Supreme-Court-a-failed-i.html.

[423] Constitution benches are set up by the Chief Justice to decide 'substantial questions of constitutional law'. See Constitution of India, Article 145(3): "…*The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five*…".

[424] Brian J. Ostrom & Roger A. Hanson, *Understanding and Diagnosing Court Culture*, 45 Court Review: The Journal of the American Judges Association 104, 107 (2009).

Following the enactment of social rights legislation, the Court entertained public interest litigation[425], the thrust of which were governance issues which arose while implementing the legislation. The dynamics produced by these two laws and the subsequent litigation are catalytic and antagonistic, and call for greater attention to the interactions between the branches of government toward the fulfilment of social rights in India.[426] In the litigation judicial remedies perform what Khosla and Tushnet have described as a state-capacity building function.[427] The cases result in remedies that urge the federal and state governments forward in building the infrastructure necessary for carrying out the legislated social rights obligations[428], while inviting critical attention from national media[429] - thus drawing the public gaze and enabling civil society to bring their struggles to a judicial platform.

4.5.3. Report Back to Court Model: The First Employment Guarantee Case

The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 was enacted to provide for the "enhancement of livelihood security of households, primarily in rural areas, by providing at least one hundred days of guaranteed wage employment every household whose adult members volunteer to do unskilled manual work"[430]. The enactment of MGNREGA drew inspiration from DPSP provisions on the right to work[431] and from employment guarantee

[425] Centre for Environment & Food Security v. Union of India, (2011) 5 SCC 676; Swaraj Abhiyan (VI) v. Union of India Writ Petition (Civil) No. 857 of 2015.
[426] Gaurav Mukherjee, *The Supreme Court of India and The Inter-Institutional Dynamics of Legislated Social Rights* 53(4) Verfassungs und Recht in Übersee/World Comparative Law 411 (2021).
[427] Madhav Khosla and Mark Tushnet, *Courts, Constitutionalism, and State Capacity: A Preliminary Inqui*ry 70(1) American Journal of Comparative Law 95 (2022).
[428] See for example Centre for Environment & Food Security v. Union of India, (2011) 5 SCC 676: "*The findings of CEFS survey are shocking, scandalous and outrageous…Our survey findings have revealed that there is participatory loot, plunder and pillage in Orissa's rural job scheme*..."
[429] See Press Trust of India, *Orissa NREGA scam: Supreme Court pulls up Centre*, NDTV, 14 March 2011, available at https://www.ndtv.com/india-news/orissa-nrega-scam-supreme-court-pulls-up-centre-449974.; Press Trust of India , *MGNREGA compensation delayed by Centre or states in around 50% cases: study*, Livemint, 4 August 2017, https://www.livemint.com/Politics/wVH3yGzVq94juZiogGDEtL/MGNREGA-compensation-delayed-by-Centre-or-states-in-around-5.html.
[430] See Statement of Objects and Reasons, National Rural Employment Guarantee Act, 2005 (later renamed Mahatma Gandhi National Rural Employment Guarantee Act, available at https://nrega.nic.in/amendments_2005_2018.pdf (hereinafter MGNREGA 2005)
[431] See Constitution of India, Article 41**. Right to work, to education and to public assistance in certain cases**: "*The State shall, within the limits of its economic capacity and development, make effective provision for securing*

schemes at the subnational level that had been in place since the 1980s like Employment Guarantee Scheme, as well as the Jawahar Grameen Yojana at the national level. Experts in the field had been concerned about how these laws prior to the MGNREGA were plagued by shortcomings like petty corruption, dissatisfactory targeting of beneficiaries, inadequate employment generation, and a lack of guaranteed on-demand employment.[432] The MGNREGA brought in certain key changes to landscape of employment guarantee schemes by using a rights-based framework for wage employment[433], time limits for fulfilling the legal guarantee of providing employment and penalties for delay[434], payment in case of inability to fulfil the guarantee[435], a shared fiscal burden between the federal and state governments[436], and extensive inbuilt transparency and accountability safeguards.[437] Even though the litigation discussed here highlights some of the lacunae in the law[438], experts lauded the design of the law.[439]

The cases discussed here were filed as public interest litigation by a non-governmental organization, the Centre for Environment and Food Security (CEFS) and Swaraj Abhiyan, a political party. CEFS had conducted a number of surveys in the state of Orissa[440] and incorporated them into the submissions in the case that showed gross misutilization of funds

the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."

[432] S.K. Das, INDIA'S RIGHTS REVOLUTION: HAS IT WORKED FOR THE POOR? 107,108 (Oxford University Press, 2013) (Das, India's Rights Revolution); Centre for Environment and Society, *The National Rural Employment Guarantee Act (NREGA) Opportunities and Challenge*s 2 (2008).

[433] Section 3, MGNREGA 2005.

[434] Section 7(1), MGNREGA 2005.

[435] Section 7, MGNREGA 2005.

[436] Sections 20 and 21, MGNREGA 2005; Das, India's Rights Revolution.

[437] Centre For Enviornment & Food Security v. Union Of India (16 December, 2010) (CEFS I); Centre For Environment & Food Security v. Union Of India (12 May 2011) (CEFS II).

[438] See Das, India's Rights Revolution: "…lack of guaranteed employment on demand wages paid were inadequate and often below the minimum wage levels of employment generated were below the amount needed."

[439] Jean Dreze, *Employment Guarantee and the Right to Work*, in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds.), THE OXFORD COMPANION TO POLITICS IN INDIA 123 (2011).

[440] See Parshuram Rai, *Performance Audit of Food Security Schemes in Orissa and UP*, Centre for Environment and Food Security, New Delhi 2011, available at http://www.indiaenvironmentportal.org.in/files/performance%20audit%20of%20food%20security.pdf; Parshuram Rai, Dalits of Bundelkhand: Living with Hunger and Dying of NREGA Mafia, Centre for Environment and Food Security, available at http://www.indiaenvironmentportal.org.in/files/dalits%20of%20bundelkhand.pdf.

and extensive leakages, helped in part by Central disbursement of funds without a framework for their administration. CEFS sought directions for formation of appropriate schemes and proper utilization of funds, as well as a direction that the social audits which were mandated were actually conducted.[441] Due to a partial failure of the government to comply with the court orders in CEFS I, CEFS II was launched at the instance of the organization three years later seeking directions that the directions in the original order be fulfilled.

The *Swaraj Abhiyan* case was part of a series of petitions filed by Swaraj Abhiyan, a non-governmental organization[442] that later became a political party. The petition sought to force judicial intervention into relief for drought-stricken areas of India within the framework of existing legislation.[443] The drought[444] had claimed thousands of lives and public attention was very much on the range of institutional failures across the central and state governments in preventing deaths. Two institutional responses were thrust into the public discourse: how the newly enacted food security law could help people access food at subsidized prices, and how the existing employment guarantee scheme could put some money into people's hands and stave off the worst. The original *Swaraj Abhiyan* petition in respect of the MGNREGA sought timely payment for employment of 150 days[445] under the Act to the drought-affected people.[446] There had been extensive negative press coverage of the Swaraj Abhiyan case: activists and

[441] CEFS I.
[442] Among its aims, Swaraj Abhiyan lays claim to the goal of launching a "*nation-wide movement will be built up for the plight of farms and farmers, to prevent the loot of 'Jal', 'Jangal' and 'Jameen', where tribals, non-tribal land lords, landless tenant farmers, sharecroppers, unorganized agricultural labors, fishermen, milk producers can be included*." See Anon, What is Swaraj Abhiyan?, available at https://www.swarajabhiyan.org/vision-english/.
[443] Ajith S, *SC issues notice to Central Govt and 11 states on Swaraj Abhiyan's PIL seeking relief & compensation to drought affected citizens*, LiveLaw, 17 December 2015, available at https://www.livelaw.in/sc-issues-notice-to-central-govt-and-11-states-on-swaraj-abhiyans-pil-seeking-relief-compensation-to-drought-affected-citizens/.
[444] See *Written Submissions filed on behalf of Swaraj Abhiyan in W.P. 857 of 2015* (on filed with author), citing the declaration of drought in Uttar Pradesh, Madhya Pradesh, Karnataka, Andhra Pradesh, Telangana, Maharashtra, Odisha, Jharkhand and Chhattisgarh. The written submissions also urge judicial recognition of drought like circumstances in "the states of Bihar, Gujarat and Haryana have not yet declared a drought despite recording rainfall deficit of 28%, 14% and 38% respectively" (para 4.2).
[445] This is over and above the 100 days of employment guaranteed under the Act.
[446] *Written Submissions filed on behalf of Swaraj Abhiyan in W.P. 857 of 2015* (on filed with author), p.14.

the government were trading allegations[447] and refutations[448] on the timely release of Central funds to drought-hit states. The *Swaraj Abhiyan* petitions were filed in the areas of employment guarantee and food security, and the original petition led to six judgments over the course of several years.

The Court in *CEFS I* stated that the MGNREGA converted the right to livelihood, which is part of the DPSP[449], into a statutory right. In light of the evidence of gross levels of leakages in the State of Orissa the Court directed that the state and federal governments to formulate schemes for the proper utilization of funds. The Court engaged in extensive deliberations regarding three significant matters within the *Swaraj Abhiyan* case. Firstly, it addressed the issue of the Central Government's failure to distribute funds when states or Union Territories surpassed the predetermined 'approved labour budget.' This budget was formulated by estimating the wage demands or projections put forth by the respective states or UTs, along with their historical performance. Secondly, the Court tackled the matter of funding limitations arising from the aforementioned failure. Lastly, the Court examined the problem of delays in disbursing wages and unemployment allowances to the intended beneficiaries. Regarding the first issue, the Court upheld the validity of the approved labour budget as a suitable mechanism for fund allocation to the states. This budget was established based on projections and the past performance of the states. However, the Court also emphasized that the delayed release of wages constituted a violation of Section 3 of the MGNREGA. In instances where such violations occurred, it was deemed the joint responsibility of the relevant state and Central

[447] Press Trust of India, *MGNREGA a huge public interest project, Centre tells SC*, The Economic Times, 14 March 2018, available at https://economictimes.indiatimes.com/news/politics-and-nation/mgnrega-a-huge-public-interest-project-centre-tells-sc/articleshow/63305467.cms?from=mdr.

[448] Press Trust of India, *Govt tells SC no delay in releasing MGNREGA funds for drought-hit farmers*, Business Standard, 10 December 2017, available at https://www.business-standard.com/article/economy-policy/govt-tells-sc-no-delay-in-releasing-mgnrega-funds-for-drought-hit-farmers-117121000070_1.html.

[449] Article 39. "The State shall, in particular, direct its policy towards securing—
(a) that the citizens, men and women equally, have the right to an adequate means of livelihood" Constitution of India.

government to take corrective measures by ensuring the provision of unemployment allowances.

In the case of CEFS I (2010), the Court issued an order demanding compliance report from both the Central Government and the State of Orissa. These reports were intended to provide insights into various aspects, including the release and utilization of funds, social audits, and the actual employment opportunities generated through the funds allocated by the Center to the state. Subsequently, during the proceedings of *CEFS II* (2011), the Court became convinced that the situation necessitated an investigation by the Central Bureau of Investigation (CBI) in order to establish a higher degree of accountability. In the context of *Swaraj Abhiyan*, the Court declared that the delays in remunerating workers for their completed labor amounted to a violation of the governing legislation. Consequently, the Court mandated that the Central Government, in collaboration with the State Governments, undertake the development of an "urgent time- bound mandatory program" aimed at promptly disbursing wages and compensations to the deserving workers.[450] This formed part of the final order's remedial component in the case.

In *CEFS I*, the Court, while retaining jurisdiction of the case, instructed the parties to return to court once the schemes had been formulated and the social audits conducted. The government's repeated failure to comply with these directions, even in the companion case, led the Court to order an investigative probe into the corruption in administering MGNREGA disbursals in the State of Orissa and the lack of Central Government oversight mechanisms. At the time of writing, the case is pending and no further hearings on the matter are available on record. It is not clear what the findings of the investigative probe have been and whether it has been placed before the Court.

[450] Swaraj Abhiyan VI at para 45.

In the *Swaraj Abhiyan* case, the Court, through a series of hearings and orders, acceded to the Central Government's adoption of the 'approved labour budget' framework as a means of resource allocation. This approach relies on states' projections and historical performance in fund utilization. However, critics argue that the Court could have advocated for heightened levels of accountability by actively involving states in the decision-making process regarding budgetary allocations. Cases pertaining to socioeconomic rights inherently involve determinations about the distribution of government resources to fulfill these guaranteed entitlements. As a consequence, courts are frequently confronted with the quandary of whether such matters are better entrusted to the branches of government that have been democratically elected by the people. In such instances, courts often navigate their decision-making based on factors such as their perceived lack of democratic legitimacy, the multifaceted nature of social welfare issues, and their own limitations in terms of expertise.

The Employment Guarantee Cases: A Partial Success of the Report-back-to-Court Model

The complex remedial model of parties returning back to court after engaging in dialogue is partially successful in *Swaraj Abhiyan* but fails in *CEFS I & CEFS II*, as evinced by the lack of further hearings or followup with the case. In both of *Swaraj Abhiyan* and *CEFS*, the Court is acting in a role that is different from that in previous SER cases since there the disputes arise out of legislation, despite being brought as public interest litigation. In Swaraj Abhiyan, the reporting back to court served to force Central and State governments to reconsider their fiscal and coordination obligations under the MGNREGA legislation in light of judicial decisions, while also being responsive to their electoral base. The archives from the Ministry of Rural Development reveal a remarkable surge of executive engagement triggered by the verdicts rendered in *Swaraj Abhiyan (III)* and *Swaraj Abhiyan (VI).* Additionally, meticulous efforts were undertaken by state and national governments to establish meetings and coordination

frameworks with the objective of executing the specific aspects of the judgments pertaining to the persisting issue of delayed wage disbursements.[451] However, no such action is evident in the *CEFS* cases.

This inaction might point to the ways in which central authorities like the Central Bureau of Investigation foreclose further action on the part of courts and governments. The reports from these investigations are notoriously difficult to obtain and often, the mere ordering of the probe seals it shut from public view, obscure any further from the original petitioners, and closes the judicial imagination.

While the court in *CEFS I* is alive to its institutional position as one that resolves disputes, it encourages capacity building through its initial orders (to conduct social audits and monitoring mechanisms), and then proceeds to order a probe into the corruption in the administration of MGNREGA in the state of Orissa and a lack of activity on the part of other states to set up implementation mechanisms under the Act. In contrast, the *Swaraj Abhiyan* case helped draw public attention to the questions of delayed wage payments to workers[452] and aids actors in the Court's support structure who help the Court. A key reason why Swaraj Abhiyan was able to secure orders that aided in the fulfilment of the nutritional obligations in the MGNREGA may have been the public scrutiny the Court was under due to the droughts in the country. Courts are able to act in different ways under circumstances of emergency than in ordinary times, with

[451] Letters dated 16 May 2016 (copy of judgment), 30 May 2016 (titled '*Payment of Compensation for delayed payment of wages to the workers in compliance with the Judgement passed by the Hon'ble Supreme Court of India in the Writ Petition(C) No.857 of 2015(Swaraj Abhiyan-(III) vs Union of India & Ors*.' sent to all states' principal secretaries in charge of MGNREGA) on 13th May 2016 and 7 June 2016 (letter to principal secretaries of states informing them of video conferring about implementation of delayed wage payment section of the judgment) (in respect of Swaraj Abhiyan III), and letters to principal secretaries (or equivalent) in charge of MGNREGA dated 7 June 2018 (titled '*Meeting to devise action plan on the directions of Hon'ble Supreme Court in its judgement dated 18th May 2018*)', as well as a Workshop to Strategize Timely Payments & Compensation for Delay organized on 27 June 2018 by the Ministry of Rural Development to implement the directions of the Court in Swaraj Abhiyan VI, all available on https://nrega.nic.in/netnrega/circular_new.aspx.

[452] Nikhil Dey, Monumental failures in implementing MGNREGA, The Telegraph 30 January 2019, available at https://www.telegraphindia.com/opinion/monumental-failures-in-implementing-mgnrega-by-narendra-modi-s-bjp-led-government/cid/1683121

a response from the coordinate branches that are less hostile and more facilitative. We will see more of this kind when the chapter turns to the pandemic cases, where the Court acts in a facilitative role and encourages dialogue between parties using what it described as a 'bounded deliberative' approach.

4.5.4. Report Back to Court Model: The Swaraj Abhiyan Food Security Case

Recall the expansive remedies that the Court grants in the *PUCL* litigation and how it set up a monitoring authority dedicated exclusively to securing compliance with its orders. We will see how the enactment of the National Food Security Act, 2013, results in parts of its *PUCL* orders being made into enforceable law, and how the provisions of the legislation enable certain kinds of remedial interventions, while constraining more radical ones like those in PUCL.

The *Swaraj Abhiyan* Food Security case[453] arose out of the same petition in the previously discussed MGNREGA case that occurred in the backdrop of a declaration of drought in a number of Indian states. The petition prayed for "any writ or direction, to immediately make available foodgrains as specified under National Food Security Act, 2013 to all the rural people in drought affected areas irrespective of any classification".[454] Beyond the fulfillment of preexisting obligations under the National Food Security Act (NFSA), the petition before the Court also implored interim directives to be issued to the Central Government. These directives entailed the provision of an additional allotment of 2 kilograms of lentils per month at a rate of Rs. 30 per kilogram, as well as one liter of edible oil per month at a cost of Rs. 25 per liter, through the Public Distribution System for each Ration Card holder or individuals possessing

[453] Swaraj Abhiyan vs Union Of India on 21 July, 2017 (Swaraj Abhiyan II).

[454] Id., at page p.14. This relief was requested from the Court on account of the targeted (as opposed to universal) nature of foodgrain provision in the NFSA through the Public Distribution System: "Section 3. **Right to receive foodgrains at subsidized prices by persons belonging to eligible households under Targeted Public Distribution System.** *Every person belonging to priority households, identified under sub-section (1) of section 10, shall be entitled to receive five kilograms of foodgrains per person per month at subsidised prices specified in Schedule I from the State Government under the Targeted Public Distribution System…"*

equivalent identity documents, specifically in drought-affected districts.[455] Furthermore, the petitioners sought instructions to ensure that children residing in the affected states would receive either one egg or 200 grams of milk per day (six days a week) as part of the Mid-Day Meal Scheme, which they requested to be operational even during school recess periods.[456] The motivation behind Swaraj Abhiyan's involvement in this particular case evidently derived from the pressing circumstances of widespread drought prevailing in several Indian states, compelling them to seek appropriate directions from the Court in response.

The *Swaraj Abhiyan* PIL filed in December 2015 eventually led to 6 judgments from the SCI across nearly two years, out of which 4 pertained to the NFSA. The free-wheeling nature of judicial interventions has been the subject of academic commentary [457] and judicial observations.[458] The Court in the opening parts of the judgment, engaged with some of these concerns in *Swaraj Abhiyan I* when justifying its intervention through the PIL mechanism. It did so by first pointing to the *humanitarian* (as opposed to the *political)* nature of the petition[459] second, by stating that petitioners were a civil society organization, and third by emphasizing the necessity of PILs in "a welfare state such as ours", which is bound to the principle of *parens patriae* to protect of its citizens as "parent particularly when citizens are not in a position to protect themselves"(sic).[460] The Court also justifies its intervention stating that it is moved by

[455] See *Written Submissions for Interim Relief filed on behalf of Swaraj Abhiyan in W.P. 857 of 2015* (on filed with author).
[456] The NFSA provides for a minimum nutritional value for meals made available under the Mid Day Meal Scheme to children between the ages of 6 and 14 in all schools run by local bodies, Government and Government aided schools except on school holidays. See section 5(1)(b) and Schedule II (Nutritional Standards), NFSA, 2013.
[457] See, for example, Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 Washington University Global Studies Law Review 1, 49-52 (2009); see generally, Anuj Bhuwania, *Public Interest Litigation as a Slum Demolition Machine* 12 Projections: MIT Journal of Planning 67 (2016); Anuj Bhuwania, *The case that felled a city: Examining the politics of Public Interest Litigation through one case* 17 SAMAJ: South Asia Multidisciplinary Academic Journal (2018).
[458] See for example, the observations of Justice Katju in Divisional Manager, Aravali Golf Club v. Chander Hass (2008) 1 SCC 683 (para. 24): "*Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like Emperors. . . . [I]t is not the business of this Court to pronounce policy. [The Court] must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic*"
[459] Swaraj Abhiyan vs Union Of India And Ors on 11 May, 2016, at para 5.
[460] Swaraj Abhiyan I, at para. 13.

the "bureaucratic inactivity and apathy", "executive excesses", and the "ostrich-like reaction of the executive" to pass orders in the PIL.[461] The orders that responded to first *Swaraj Abhiyan* writ petition was passed in May 2016 and sought information on the implementation failures of the NFSA from the parties, including the state governments where the conditions of drought existed, as well as the federal government ministries that are charged with enforcing the food security law. In its second hearing in July 2017 when the parties returned to court, the Court passed orders by modifying some of the conditions under which benefits could be claimed under the Act. I classified these as relating to a conditional universalization of existing entitlements, the modification of the temporal availability of existing entitlements, and a modification of eligibility criteria for obtaining existing entitlements.[462]

The court in its rulings in *Swaraj Abhiyan II* and *V*, brought about modifications to the targeted nature of entitlements. It explicitly declared that the monthly allocation of food grains, as stipulated by the National Food Security Act (NFSA) of 2013, should be provided without any regard to whether individuals fall under the category of priority households or not.[463] This move showcases the Court's engagement with the intricate issue of beneficiary identification, which remains a critical fault line within contemporary discussions surrounding the delivery of social welfare.[464] Additionally, the Court emphasized that the absence of a Ration Card should not serve as a basis for denying access to these essential food grains, thereby emphasizing inclusivity and equitable provision. Furthermore, the Court issued an order ensuring that mid-day meals are served to children attending public schools even during holiday periods, thereby addressing the continuity of nutrition for these vulnerable individuals.

[461] Swaraj Abhiyan I, at para. 15. The reference to the flightless bird is likely due to the states of Haryana, Bihar and Gujarat denying the existence of drought-like conditions within their territories.
[462] Mukherjee, Inter-Institutional Dynamics.
[463] See Swaraj Abhiyan II, at para 30.
[464] See for instance, Vishnu Padmanabhan, Has Aadhaar improved welfare delivery?, LiveMint, 21 April 2019, available at https://www.livemint.com/news/india/has-aadhaar-improved-welfare-delivery-1555861461316.html.

The *Swaraj Abhiyan II* and *V* judgments also encompassed directives pertaining to governance matters, aiming to activate both Central and State governments in effectively implementing the NFSA. Recall how the Court in the MGNREGA cases also required into the conduct of social audits and other implementation schemes as required under the statutes, acting in a capacity building, or enforcement role. Something similar is at play here with this kind of a complex, return-to-court model. The *Swaraj Abhiyan* II directions, delivered on May 13th, 2016, mandated the establishment of State Food Commissions (SFC) and District Grievance Redress Committees (DGRC) in drought-affected states.[465] Subsequently, in *Swaraj Abhiyan* V, handed down on July 21st, 2017, the Court expanded the scope of its orders to include all states where SFCs and DGRCs had not been constituted, while also requiring the formation of vigilance committees and the conduction of social audits, all of which are required by various provisions in the NFSA of 2013.[466]

The Swaraj Abhiyan Food Security Case: A Reminder of the Power of Return-to-Court Complex Remedial Models

The Court in *Swaraj Abhiyan II* engaged in a facilitative role that reminds us of the potential of a return-to-court model of complex remedies in ensuring implementation of existing obligations and removing barriers to access (and expanding access under conditions of emergency).[467] Notably, the Court does not accede to the petitioners' prayer for food beyond the levels set in the law, stating that it could not compel State Governments to move out of the bounds of the law [468] and that in terms of "financial issues and prioritization of finances, it

[465] State Food Commissions are meant to have a role in overseeing implementation, as well as advising State Governments, and handling complaints of entitlement denials under the NFS Act. See section 16, NFS Act, 2013.
[466] Swaraj Abhiyan V, at para 42.
[467] See Sandra Fredman, COMPARATIVE HUMAN RIGHTS LAW 99-100 (Oxford University Press, 2018).
[468] See Swaraj Abhiyan V, at para 13: "*Today, Swaraj Abhiyan prays for the supply of dal/lentil and edible oils; tomorrow some other NGO might pray for the supply of some other items. This might become an endless exercise and would require us to go beyond what Parliament has provided. While this Court or any other constitutional court can certainly intervene, to a limited extent, in issues of governance it has also to show judicial restraint in some areas of governance, and this is one of them*."

"should defer to the priorities determined by the State, unless there is a statutory obligation that needs to be fulfilled".[469] Abeyratne and Misri have argued that the Court's Swaraj Abhiyan food security decision makes short shrift of federalism (by calling for the federal declaration of an drought emergency) and the general presumption against interference with budgetary allocations (by relaxing the eligibility criteria and enabling a wider class of claimants to gain benefits under the food security law).[470] Such an argument overlooks the contours of the Disaster Management Act, which permits federal declarations of emergency in addition to state-based ones. The denial of legitimate claimants due to an absence of identifying documents is a long-standing problem in India[471], and a relaxation of these criteria would not have a significant effect on the state budget.

The judgment in *Swaraj Abhiyan* enabled the Court to clarify the federal division of power and responsibility, a persistent problem in SER enforcement in India. This is partly because the Indian Constitution envisions cooperative responsibility in realizing social welfare since both states and the Central Government share legislative competence in this field.[472] Notably, while the majority of social spending and the attendant legal framework rests at the state level[473], the broader trajectory of Indian federalism, exacerbated since the BJP's ascent to power in 2014[474], has tended toward fiscal centralization.[475] Greater centralization has the effect of constraining states' innovation capacities [476] and in some cases, retrogressing on levels of existing

[469] Swaraj Abhiyan V, at para 17.
[470] Rehan Abeyratne and Didon Misri, *Separation of Powers and the Potential for Constitutional Dialogue in India* 5:2 Journal of International and Comparative Law 363, 384 (2018).
[471] Sitakanta Panda, *Political Connections and Elite Capture in a Poverty Alleviation Programme in India*, 51(1) Journal of Development Studies 50(2015).
[472] See Concurrent List to the Constitution of India, Article 246 (2), Constitution of India.
[473] Rajeshwari Deshpande, K. K. Kailash & Louise Tillin, *States as laboratories: The politics of social welfare policies in India* 16(1) India Review 85, 90 (2017).
[474] Indira Rajaraman, *Continuity and change in Indian fiscal federalism* 16(1) India Review 66 (2017).
[475] Avani Kapur, *Federalism and social policy*, Seminar # 717: The Union and the States: a symposium on the changing federal dynamic in India (May 2019); see generally, Yamini Aiyar and Louise Tillin, *The Problem*, Seminar # 717: The Union and the States: a symposium on the changing federal dynamic in India (May 2019).
[476] For an account of this phenomenon in the field of the biometric identification program and the fiscal incentives offered to states to comply, see Malavika Prasad & Gaurav Mukherjee, *Reinvigorating Bicameralism in India* 3(2) University of Oxford Human Rights Hub Journal 96 (2020).

protection.[477] The centralization of welfare funding has received discursive pushback in Indian political practice[478], and despite devolution to states in the last few years, new challenges in intra-state equity in terms of financing and state capacity have emerged.[479] One of the ways to address this is to ensure that states are able to plan, design and implement social policy programs national policy frameworks while improving its technical and implementation capacity in deliberative spaces for Centre-State dialogues.[480] It may well be that cases like *Swaraj Abhiyan* provide such spaces, while also helping develop judicially manageable standards for adjudicating violations of social rights in legislation. Although the NFS Act 2013 mapped onto existing public food distribution networks and infrastructure, by creating new institutional arrangements like the SFC, it wanted to "invent new ways of facilitating the participation of states in the formulation of national policies and motivating them for effective implementation"[481]

The remedial form that *Swaraj Abhiyan* took enabled coordination between the federal and state governments through a judicial remedy. For example, in the *Swaraj Abhiyan II* and *V* cases, the Court examined the absence, in some cases, the inadequacy of an enforcement infrastructure for the NFS Act 2013 in terms of Article 256[482] of the Constitution. In *Swaraj Abhiyan II*, the Court had directed a time-bound period within which to constitute SFC and

[477] Aiyar and Tillin note that "*The provisions in the National Food Security Act (NFSA), for instance, were far less ambitious than practices followed in states like Chhattisgarh and Tamil*", Yamini Aiyar and Louise Tillin, *The Problem*, Seminar # 717: The Union and the States: a symposium on the changing federal dynamic in India (May 2019).

[478] Yamini Aiyar, *The Opportunities and Challenges confronting India's welfare architecture*, in POLICY CHALLENGES 2019 – 2024: THE KEY POLICY QUESTIONS FOR THE NEW GOVERNMENT AND POSSIBLE PATHWAYS, Centre for Policy Research, available at https://www.cprindia.org/sites/default/files/Policy%20Challenges%202019-2024.pdf.

[479] Chanchal Kumar Sharma &Wilfried Swenden, *Continuity and change in contemporary Indian federalism* 16(1) India Review 1 (2017).

[480] Aiyar, *The Opportunities and Challenges confronting India's welfare architecture*.

[481] Balveer Arora, India's Experience with Federalism: Lessons Learnt and Unlearnt, available at https://www.uni-bielefeld.de/midea/pdf/Balveer.pdf.

[482] Article 256. Obligation of States and the Union: "*The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose*" See Swaraj Abhiyan V.

DGRC in the drought-affected states[483]. Unsurprisingly, this was not complied with. When the parties returned back to court over a year later in *Swaraj Abhiyan V*, it also ordered the creation of these structures in all states in India which had not done so, and required the conduct of social audits and the setting up of vigilance committees. We therefore see an incremental change in the ambit of the order following executive intransigence and non-compliance. Unlike in the MGNREGA cases, the Court held that a lack of resources would not be a valid argument in the face of existing statutory duties.

Disappointingly, while complex remedies in cases like *Swaraj Abhiyan* and others[484] kickstart or speed up the process of setting up accountability mechanisms, it is not clear whether compliance has yet occurred. Cases filed in the Supreme Court[485] and High Courts[486] raised similar issues on accountability mechanisms, institutional structures, and the identification of beneficiaries.

[483] Swaraj Abhiyan II, at para 30.
[484] E.g. in *Vaishnorani Mahila Bachat Gat v. State of Maharashtra* (Civil Appeal No._2336 of 2019 (Arising From SLP(C) No.10103 of 2016)) (19 February 2019) the SC annulled contracts awarded to private contractors for the provision of freshly cooked meals to Anganwadi Centres. which was in violation of its RTF litigation order to give preference in awarding such contracts to local, women-led self-help groups. See Arefa Johari, *Women's groups win as Supreme Court cancels anganwadi contracts worth Rs 6,300 crore in Maharashtra*, Scroll, March 11 2019, available at https://scroll.in/article/916022/womens-groups-win-as-supreme-court-cancels-anganwadi-contracts-worth-rs-6300-crore-in-maharashtra.
[485] Prabhati Nayak Mishra, *Right To Food : SC Issues Notice To All States On Establishment Of Grievance Redressal Mechanism To Ensure Food To All*, LiveLaw, 9 Dec 2019, available. at https://www.livelaw.in/news-updates/right-to-food-sc-sends-notice-to-all-states-150626.
[486] Nitish Kashyap, *Bombay HC Directs Govt. To Set Up Food Commission Under National Food Security Act* LiveLaw, 19 Sep 2019, available at https://www.livelaw.in/news-updates/ood-commission-under-national-food-security-act--148226.

4.5.4. Expert Remedial Design Through Court-Appointed Committees & the Out of School Children Case[487]

Judges often have to confront informational gaps and uncertainties about the best ways forward. Complex remedial forms which incorporate a collaborative process of arriving at solutions can often help alleviate some of these gaps and uncertainties, and pave the way for experimentation, learning, and iteration. Courts are aided in this endeavor by strong support structures – the networks of civil society and members of the political elite who are involved with a particular cause. In the case I discuss next, I was personally witness to the sophisticated civil society space in Karnataka which involved itself with a range of strategic litigation around education rights, and the informal networks some members had with judges.

The intricacies surrounding the acquisition and utilization of information within judicial systems and its dispersal among the 'support structures' are vividly illustrated by the difficulties encountered by the High Court of Karnataka in the *Out-of-School Children Case* of 2015.[488] Prompted by a newspaper exposé shedding light on the alarmingly high number of primary school children dropping out in the state of Karnataka, the High Court took it upon itself to initiate proceedings under its *suo motu* jurisdiction.[489] This case epitomizes a complex

[487] Part 4.5.5. draws from and may bear similarity to Gaurav Mukherjee, *Democratic Experimentalism in Comparative Constitutional Social Rights Remedies* 2 Milan Law Review 75 (2020).
[488] Registrar (Judicial) of High Court of Karnataka v. State of Karnataka W.P. 15768 of 2013.
[489] As discussed previously, the suo motu jurisdiction of both high courts and the Supreme Court is exercised. See Arun K. Thiruvengadam, *Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India*, in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds.), TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS IN BRAZIL, INDIA AND SOUTH AFRICA (Pretoria University Press: 2013). For a more recent critique see Marc Galanter and Vasujith Ram, *Suo Motu Intervention and the Indian Judiciary*, in Sudhir Krishnaswamy & Shishir Bail, A QUALIFIED HOPE: THE INDIAN SUPREME COURT AND PROGRESSIVE SOCIAL CHANGE (Oxford University Press, 2014).

remedy wherein the realization of a right hinges not only on its substantive nature, but also on a range of extralegal factors exacerbated by the absence of a coherent institutional response.

Among the pantheon of social rights recognized within the Indian constitution, the right to education stands as the sole textual provision. Although other social rights have been "read in" to the right to life through a succession of judicial pronouncements and legislative measures, it was the right to education that was explicitly enshrined as a fundamental right through a constitutional amendment in 2002.[490] Since then, various constitutional challenges to the legal framework have arisen, most notably from minority religious groups and private school operators.[491] Concurrently, concerns have been voiced regarding the onerous infrastructural demands imposed on smaller educational institutions by the legislation[492], as well as the persistently low levels of educational attainment despite the implementation of the aforementioned Act.[493]

In response to a disquieting newspaper report published in 2013 that shed light on the staggering number of 150,000 out-of-school children in Karnataka, the High Court of Karnataka, in the exercise of its suo motu jurisdiction (Writ Petition No. 15768/2013), sought to tackle this pressing issue. It is important to note that in India, state high courts share

[490] In 2002, Article 21A was inserted into the Constitution through The Constitution (Eighty-sixth Amendment) Act, 2002, which stated that "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine". See, Florian Mathey Prakash, THE RIGHT TO EDUCATION IN INDIA: THE IMPORTANCE OF ENFORCEABILITY OF A FUNDAMENTAL RIGHT (Oxford University Press, New Delhi, 2019) for description and analysis of the process of enactment and subsequent judicial interpretation of the right.

[491] Gaurav Mukherjee, *The Case Against Excluding Minority Institutions from the Right to Education Act*, in Salman Khurshid, Lokendra Malik, and Yogesh Pratap Singh (eds.), THE SUPREME COURT AND THE CONSTITUTION: AN INDIAN DISCOURSE (Wolters Kluwer, 2020).

[492] Geeta Kingdon, *Schooling without learning: how the RTE act destroys private schools and destroys standards in public schools*, in Times of India, 26 August 2015, https://timesofindia.indiatimes.com/blogs/author/geeta-kingdon/.

[493] Special Correspondent, *Annual status of education report flags poor learning outcomes in schools*, The Hindu, 15 January 2020, https://www.thehindu.com/news/national/aser-flags-poorlearning-outcomes-in-schools/article30569671.ece .

concurrent jurisdiction with the Supreme Court to address violations of fundamental rights, such as the one in this particular case.

The endeavor to rectify the predicament of out-of-school children unfolded through a three-step process.[494] First, in compliance with the High Court's directive, the state government constituted a committee comprising representatives from all 14 state government departments, civil society organizations that had approached the Court, as well as their legal counsels (56). This collaborative approach sought to harness the collective expertise and resources available to address the challenge. Secondly, with the assistance of civil society representatives and government officials, the committee embarked on the arduous task of identifying the out-of-school children, revealing a startling figure nearly 200% higher than the initial estimates. This step was crucial in understanding the magnitude of the problem and formulating targeted solutions.

In the third phase, government officials and members of civil society orchestrated enrolment drives and admission camps across numerous villages in the state. Their aim was to enroll and retain the children who had been identified as out-of-school. Over a span of two years, this concerted effort yielded a remarkable 75% reduction in the number of out-of-school children. During this period, the High Court's interim orders mandated monthly committee meetings and required the state government to provide regular status reports on the progress made in reducing the number of out-of-school children. It is worth noting that this case also prompted introspection within the education bureaucracy of the affected districts in Karnataka, raising broader questions about the impact of litigation on social welfare administration.[495]

[494] Gaurav Mukherjee & Jayna Kothari, *The Out of School Children Case: A Model for Court-Facilitated Dialogue?* (with Jayna Kothari), Oxford Human Rights Hub Blog, 18 September 2015.
[495] Open Society Justice Initiative, *Strategic Litigation Impacts: Insights from Global Experience*, 58-59 (2018) https://www.justiceinitiative.org/publications/strategic-litigation-impacts-insights-global-experience.

The committee's deliberations and actions had significant policy implications, leading to an amendment that modified the definition of out-of-school children. Previously, a child was categorized as out-of-school if absent for 60 consecutive school days; this was revised to seven consecutive school days. Furthermore, an "attendance authority" was established, responsible for promptly contacting parents when a child was absent for seven consecutive days.[496] This procedural change aimed to ensure a more timely and responsive approach, as authorities would no longer be allowed to wait for two months before intervening.

The *Out-of-School Children* case remains ongoing, and it is important to acknowledge that some of the initial successes in reducing dropout rates and encouraging re-enrolment have encountered setbacks. Concerns have been raised regarding the surveys employed by education authorities to gather data for court reporting.[497] Moreover, the capacity of teachers within the existing school infrastructure to effectively educate newly enrolled learners has emerged as a pressing issue (61). This scenario highlights the inherent polycentric nature of social rights problems, where new considerations arise at each stage of the remedial process, necessitating an iterative approach. Unintended consequences may emerge, which are not immediately foreseeable. In this case, although the primary objective of re-enrollment was achieved, the subsequent integration of these students into the learning cycle was hindered due to insufficient preparation or resource allocation by the state.

The *Out-of-School Children* case in Karnataka serves as a compelling illustration of a complex form of judicial remediation in response to a critical social issue and of a complex remedial form at work. The collaborative efforts of various stakeholders, guided by the High Court's

[496] Government Of Karnataka, *Notification ED 38 MAHITI 2013*, 15 March 2014, in http://schooleducation.kar.nic.in/Prypdfs/rte/RTENotification150314.pdf.
[497] Special Correspondent, *Survey of out-of-school children not done as per law*, in The Hindu, 11 March 2020, https://www.thehindu.com/news/national/karnataka/survey-of-out-of-schoolchildren-not-done-as-per-law/article31042740.ece.

orders, yielded tangible results, albeit with challenges along the way. It underscores the importance of ongoing evaluation and adaptation to ensure sustained progress.

4.5.5. Expert Remedial Design Model & the Pandemic Cases

Complex remedial forms often work under conditions of uncertainty, where the way forward isn't entirely clear to judges. The case discussed here originated during the second wave of the Covid-19 pandemic in India, where there was a severe shortage of oxygen cylinders and hospital beds. The courts were activated in response, and the Supreme Court appeared especially mindful of the criticism[498] it had been the subject of due to its lack of action on issues like migrant worker welfare and the lack of a social safety net during the lockdown.

4.5.5.1. Adjudicating Vaccine Procurement & Rollout

The complex remedial approach where the Court acts in its role as a facilitator of dialogue between stakeholders is most clearly seen when it took *suo motu* cognizance of a set of issues concerning the supply of oxygen and essential drugs, the method and manner of vaccination; and finally, the declaration of lockdown.[499] In doing so, it set in motion a complex remedial process - where the judicial process itself can be seen as the remedy, and the Court provides a stamp of validity and legal finality to the final decision.

The Court first sought information on the 'existence or otherwise and requirement of setting up of a coordinating body that would consider allocation of the resources' we outlined in a consultative manner, which for the bench, meant with the involvement of concerned States and Union Territories; second on whether it was necessary to declare essential medicines and

[498] Rahul Mukherji, *Covid vs. Democracy: India's Illiberal Remedy* 31(4) Journal of Democracy 91, 99(2020). see also Madhav Khosla and Milan Vaishnav, *The Three Faces of the Indian State* 32(1) Journal of Democracy 111 (2021): "*If the legislature is no longer an effective check on the executive, much the same can be said for the judiciary. This is startling: Only a few years ago, the judiciary was seen as one of the most powerful branches of government. Now, even the highest courts are becoming known for avoiding controversial cases*".

[499] In Re: Distribution Of Essential Supplies And Services During Pandemic (order dated 22 April 2021) (per Bobde, Nageswara Rao, Bhat, JJ) (*Covid Second Wave Judgment I*).

medical equipment as essential commodities in relation to the pandemic; and finally, the coordination of logistical support for inter-State and Intra-State transportation and distribution of the above resources.

The Court went to considerable lengths to justify its suo motu intervention, likely to allay concerns about the separation of powers and the separation of judicial and executive functions. The Court stated that it was engaged in what is described as 'bounded deliberation', where courts can augment the deliberative dimension of democracy by insisting that decision-makers be in a position to persuade the court that they have fulfilled their human rights obligations, with account being taken of room for reasonable disagreement.[500]

The political economy of vaccine procurement and its intersection with federalism during the second wave of the pandemic revolved around the legal capacity of states to procure vaccines from the open market and the manner of allocating vaccines from the Central pool based on population estimates.[501] These were challenged on the basis of the Liberalized and Accelerated Phase 3 Strategy of COVID-19 Vaccination from 01 May 2021 introduced by the Union government that ostensibly sought to grant greater control and responsibility to state governments for pursuing their respective vaccination priorities. Recall that the power to regulate 'public health' is covered under the 'State List'. Second, it also sought to provide an entry point to private sector immunization services providers in addition to public vaccination by state governments. The new Vaccination Strategy also permitted the use of imported, fully ready-to-use vaccines in 'other-than Government of India' channels, i.e., by state governments and the open market (including private immunization service providers and others). Both moves were ostensibly made with the input of certain stakeholder states that were asking for

[500] Sandra Fredman, COMPARATIVE HUMAN RIGHTS LAW 67 (Oxford University Press, 2018).
[501] In Re: Distribution Of Essential Supplies And Services During Pandemic (order dated 31 May 2021) (per Bobde, Nageswara Rao, Bhat, JJ) (*Covid Second Wave Judgment III*).

increased decentralization combined with fiscal empowerment to undertake purchase. The Union Government, in its affidavits, also referred to this decentralization leading to 'competitive prices and higher quantities of vaccines.'[502]

However, the plan ran into considerable hurdles: the tender process commenced by state and local governments was unsuccessful at attracting interest from firms due to their inability to provide financial guarantees and their lack of full legal capacity to enter into agreements of this nature[503]. Second, the allocation of the number of vaccines was to be based on the respective populations of states in the 18-44 age group. This may seem like a straightforward basis for allocation but is made complicated when taking into account the varying levels of state government capacity, inter-state migration (for which very poor data exists), and overall data on demographics.[504] In its order, the Court made queries (asking the Union government for more information), non-binding recommendations, and certain findings of unconstitutionality which also provided the opportunity for the state and central authorities to report back to the Court. Such an approach advances the frontiers of bounded deliberative approaches to judicial review that can take the institutional incapacity of courts seriously, while also dialing down the heat of political conflict: in this case both between various tiers of government and between branches.[505]

The case also highlights how courts can manage the informational and expertise concerns that inhere in its design by seeking expertise from amici curiae, who had bolstered many of the claims raised by state governments. The Court noted that the aim of the Liberalised Vaccination Policy to spur 'competitive prices and higher quantities of vaccines' would not be realized due

[502] *Covid Second Wave Judgment III,* paras 8 and 21.
[503] *Covid Second Wave Judgment III*, para 21.
[504] *Covid Second Wave Judgment III*, para 20.
[505] Sandra Liebenberg & Katharine G. Young, *Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?* in Helena Alviar García et al. (eds.), SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 238 (2015).

to the relative incapacity of states to negotiate with vaccine manufacturers. It also stated that the Union Government, with its monopoly purchase power, might be better placed to negotiate with vaccine manufacturing firms. With respect to the basis of *pro rata* allocation to state governments, the Court sought further information due to its lack of clarity with regarding the extent to which the Union government would intervene in the distribution process of vaccines. It has been advanced that the Court in this respect returned a finding of a lack of clarity and incompleteness. The Court thereafter enquired whether the Union Government would 'seek(s) to address these concerns within the vaccination policy such that the State/UT Governments have a realistic assessment of the assistance they can anticipate from the UoI'. In an interesting move which will be of interest for scholars of courts and resource allocation, the Court also asked the Union Government to clarify how the amount of INR 35000 crore had been spent so far and why they cannot be utilized for vaccinating persons aged 18-44 years.[506]

In response, the Union Government, on 7 June 2021, revised its policy, bearing the responsibility of procuring 75% of the vaccines and administering them free of cost to persons above the age of 18 years, while also capping the price that could be charged for the remainder 25% of vaccines being procured by private hospitals from manufacturers. The judicial intervention that we see here is important because it highlights the uneven bargaining power between the Union and States, in this case exemplified by the lack of legal personality and capacity that the latter is characterized by, that undergirds the relationship between the two. The pandemic laid bare the potential deleterious impact of inter-state competition for scarce public goods over which the Union should have exercised responsibility. States often have the short end of the stick, a problem that is not easily resolved even through the mechanisms of ordinary politics. Judicial review into these relationships can serve to highlight public attention

[506] *Covid Second Wave Judgment III*, para 30.

and shift the public discourse toward one where the Union government is held accountable for its actions: actions which can often detract from the public interest.

4.5.5.2. Adjudicating the Supply of Oxygen

The procurement and distribution of oxygen had become a central cause for concern during the second wave of the pandemic. Due to the concurrent filing of litigation on this issue[507] and friction between the state governments (especially the National Capital Territory of Delhi) and the Union Government, the three-judge bench of the Supreme Court sought to consolidate the litigation and pass comprehensive orders.

The central issue for the Court was to determine the rationality of the decisions taken by the federally constituted Empowered Group (set up under the provisions of the Disaster Management Act) which was tasked with determining oxygen demand based on actual data and projections and the logistics of supply. The manufacture of oxygen is concentrated in a few states in India, while demand is dispersed across all of India. Coordination of supply and logistics therefore assumes great importance, with a shortfall in supply primarily occurring due to the inability of State Governments to avail of the allocated quantity of oxygen from assigned supply points; transportation bottlenecks caused by inter-State movement of tankers; and technical failure of certain plants leading to reassessment of allocation on a real -time basis.[508]

The Court noted that the National Capital Territory of Delhi, which had been the epicenter of the second wave of the pandemic, and therefore, exposed to higher levels of oxygen demand, should work with the Union government to ensure that the gap between the projected demand

[507] Union Of India vs Rakesh Malhotra on 5 May, 2021 (Arising out of impugned final judgment and order dated 01-05-2021 in WP(C) No. 3031/2020 and 04-05-2021 in WP(C) No. 3031/2020 passed by the High Court of Delhi at New Delhi.
[508] In Re: Distribution Of Essential Supplies And Services During Pandemic, 30 April 2021) (*Covid Second Wave Judgment II).*

and supply be bridged (*Covid Second Wave Judgment II*, para 29). The Court also ordered the creation of a buffer stock of oxygen to meet future demand. Yet, much of the deliberation and coordination between the Union government and the state governments in fact happened during oral arguments, where counsel for the respective parties were engaged in negotiating the supply of oxygen based on their projected demand. The oral arguments took on a chaotic form and although it is far from clear whether the Covid Second Wave Judgment II gives us any guidance on what a rights-based approach to questions of the federal provision of social goods may look like, it may yet become a model for how courts can abandon a command-and-control model for judicial review, and instead require stakeholders to deliberate to arrive at solutions that are undergirded by a rights and structural constitutional principle-based logic.

In its order on oxygen supply, the Court during oral arguments outlined what could be the seeds of a rights-based understanding of the logistics of a public good like oxygen the distribution of which is contingent on federal arrangements, but which has knock-on effects on citizens' rights. This may be yet another strength of complex remedies, where incompletely understood rights, such as the right to health in India, may find fuller judicial explication, along with an unpacking of institutional dynamics and arrangements that affect the right's fulfillment and possible violations.

The fluid nature of the public health crisis that engulfed India during the second wave of the pandemic may have foreclosed a more robust articulation of a right to health-based approach to federal powers sharing, but clearly exerted pressure on an unbounded, ad-hoc, and ultimately deleterious approach to an essential component of the public health infrastructure like oxygen supply. The complex remedial form here helped dial down the heat of political conflict between the Centre and the States. Similarly, the orders of the Supreme Court with respect to vaccine procurement and distribution are rooted in equality and non-discrimination but have broader

undertones of a concern with the incapacity of the existing legal regime governing Indian states to be able to fulfil their constitutional responsibility toward citizens.

4.6. Factors Influencing the grant of complex remedies in India

1. *Textual basis*: Complex remedies do not have an explicit textual basis in the Indian constitutional order. However, there is nothing that forbids them either. Constitutional remedies, usually in the form of writs in India, are awarded by the Supreme Courts and High Courts in pursuance of their jurisdiction under articles 32 and 226 of the Constitution.[509]The complex remedies arising out of the social rights litigation discussed in this chapter usually take the form of a continuing mandamus, which is a judicial creation that makes full use of Indian appellate courts' residuary powers to do 'complete justice'. The rise of public interest litigation since the 1990s in India has been characterized by judicial abandonment of the procedural rules associated with ordinary litigation. However, the design of Indian social rights legislation has failed to devise effective grievance redress mechanisms nor provide for adequate oversight by courts in case of violations. Interventions through courts' writ or in some cases, their *suo motu* jurisdiction, have become the only way to address rights violations. In the cases discussed, Indian courts are concerned with devising an effective remedy while being mindful of their institutional position. They use the extensive residuary power that is granted to High Courts and Supreme Courts to devise a range of remedies.

2. *Judicial awareness of structural remedies:* A key driver of the use of complex remedies is judicial awareness of structural remedies. Several judges on the Supreme Court of India, including the current Chief Justice DY Chandrachud, hold foreign qualifications, which no

[509] See Constitution of India, article 32**: Remedies for enforcement of rights conferred by this Part**
"(1) *The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed*
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs ***in the nature of*** *habeas corpus,* ***mandamus****, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part*.." (emphasis mine)

doubt exposes them to judicial developments around the world. Indian judges are often members of networks of judicial organs, fora at which judges can receive training and capacity building.[510] While these may be in their infancy, judges appear to often be in conversation with one another, through citations and other forms of mimesis and learning.[511] These networks are helped by foreign-trained law clerks and lawyers who now form a part of the bar and bench in India.[512]

3. *Likelihood of government non-compliance with order:* The likelihood of noncompliance by the government is an important factor guiding the grant of complex remedies in India. This factor can be seen at play in the report-back-to-court models, where the Court's frustration with the national and state government's failure to set up monitoring mechanisms and social audits as required by the terms of the employment guarantee law led it to order further follow up and an investigative probe. The Supreme Court's approach is more facilitative in the pandemic cases, where the likelihood of non-compliance was low, given how closely the media was covering the case.

4. *Degree of harm by non-grant/consequentialism:* The degree of harm that would occur should a complex remedy not be granted is a key factor in the decision to grant a complex remedy. This is evident in the approach of the Court in the drought cases, where the court asked for status reports on judicial relaxation of eligibility criteria for availing welfare benefits and for the government to ensure the timely payment of employment guarantee dues for those in

[510] For an overview, see Janet M. Box-Steffensmeier, Dino P. Christenson, and Claire Leavitt, *Judicial Networks* in Jennifer Nicoll Victor, Alexander H. Montgomery, and Mark Lubell, (eds.) THE OXFORD HANDBOOK OF POLITICAL NETWORKS

[511] See generally Tania Groppi and Mari-Claire Ponthoreau (eds)., THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES (Hart Publishing, 2013); Giuseppe Franco Ferrari (ed.), JUDICIAL COSMOPOLITANISM: THE USE OF FOREIGN LAW IN CONTEMPORARY CONSTITUTIONAL SYSTEMS (Brill 2019).

[512] Swethaa Ballakrishnen, *Homeward Bound: What Does a Global Legal Education Offer the Indian Returnees Colloquium: Globalization and the Legal Profession* 80 Fordham Law Review 2441 (2011-2012).

drought-affected areas. It justified this remedy on the basis that hundreds of thousands of people were affected by drought and would benefit from the order.

5. *Clarity of remedial steps:* Complex remedies are likelier to be ordered where the path forward to resolve a social rights dispute is not clear to the court. Take for example the approach of the Court in the out-of-school children case, where the way to reduce the high number of school dropouts in the state was not clear to the judges. This led the bench to constitute the panel that devised a series of steps where input had been sought and obtained from a range of stakeholders.

6. *Personal conduct of government officials and systemic nature of violation:* Much like the other jurisdictions under study in this dissertation, complex remedies are ordered by courts not when the cause of action arises from the personal conduct of certain government officials. The cause of action in the cases discussed in this chapter arose from systemic issues, and not from the conduct of a few officials.

7. *Extent of diffusion of powers in cooperative government:* The division of power and responsibility between the federal and state governments is a considerable obstacle for the fulfilment of social rights. Such a division often results in conflicting and overlapping areas where both levels of government can make laws and policy, often making it difficult to locate the duty bearer in case of a social right violation. For example, the overlapping responsibility for managing public health in India between national, state, and local government made the task of procuring oxygen and vaccines much more difficult.[513] Complex remedies help alleviate

[513] Mathew Idiculla and Gaurav Mukherjee, *Pandemic Federalism*, in Matteo Nicolini, et.al. (eds.), LOCAL GOVERNANCE IN FEDERAL SYSTEMS COMPARATIVE AND ALTERNATIVE APPROACHES TO THE TRADITIONAL PARADIGM (Brill - Martinus Nijhoff, forthcoming 2023).

some of these concerns by bringing stakeholders across levels of government into dialogue with one another, as seen in the employment guarantee and pandemic cases.

4.7. Conclusion: Social Welfare without Social Rights in India?

This chapter has traced the origins, current use, and prospects for complex remedies in India. I have tried to show how the institutional responsibility for the fulfilment of social rights has rested with the representative branches, and how concerns over the appropriateness, practicality, and affordability of including judicially enforceable reverberate in constitutional litigation and the drafting of social rights legislation today.

These tensions influence the realization of social rights today and the nature of the jurisprudence, as well as help open up the space for 'support structures' to operate. The nature of the legal text, the judiciary, and their support structures in India have often come together to create the conditions for setting up a web of social rights protections in India. Complex remedies helped open up judicial spaces for members of these support structures to enter into, a move that resulted in a period of busy legislative activity to create rights-based frameworks for social rights.

The lack of a judicially enforceable constitutional basis for social rights has not proved to be an obstacle for judicial intervention into their enforcement, especially after a slew of rights-based legislation in the 2000s. Yet, it is not difficult to discern a dip in the use of complex remedies by the Supreme Court except in case of an emergency situation like the pandemic. The disbanding of a dedicated bench for a 'social justice' case also exacerbates the issues with a court that does not sit en banc and has rotating personnel.

The social state has expanded greatly under India's Hindu nationalist BJP government in the last few years. The future electoral success of the BJP hinges upon the success of its welfare schemes, coming amidst the backdrop of its failure to address the twin crises of unemployment

and inflation in India.[514] India may be witnessing a slow return to the discretionary, largesse-based social protection politics as seen in 1960s-1980s, with a turn away from the rights-based frameworks of the 2000s.[515] While courts can play only a limited role in enforcing these essentially discretionary schemes, their interventions in the cases during the pandemic shows how they can force governments to justify their decisions, prevent retrogression, and enable coordination between the national and state governments in a federal system like India.

[514] ANI, *BJP workers to go door-to-door, brief people on govt welfare schemes*, The Print, 24 May, 2022, < https://theprint.in/india/bjp-workers-to-go-door-to-door-brief-people-on-govt-welfare-schemes/968383/>
[515] Gaurav Mukherjee & Arun Thiruvengadam, *Social Rights in India: The Diminishing Impact of International Human Rights Norms and The Controlling Influence of Domestic Factors*, in Mila Versteeg & Neha Jain (eds.) OXFORD HANDBOOK ON COMPARATIVE HUMAN RIGHTS LAW (Oxford University Press, forthcoming 2024).

5. COMPLEX REMEDIES IN SOUTH AFRICAN SOCIAL RIGHTS LITIGATION

5.1. Introduction

In the previous chapter, I discussed three instances of complex remedial action arising out of social rights litigation in Indian courts. The instances demonstrate how these complex remedies can dial down the heat of political conflict between branches of government as well as levels of government in federal jurisdictions. In this section, I discuss complex remedies which have been granted by courts in South Africa.

The negotiated and mostly peaceful transition from an apartheid regime in South Africa to democracy occurred in the period between 1991 and 1993. This period was tumultuous, with a looming threat of civil war and domestic unrest dogging this transitional period.[516] The Final Constitution of South Africa, adopted in 1996, was a momentous event in the country's history. The Constitution contained an extensive list of social and economic rights and a strong enforcement mechanism that envisaged a prominent judicial role. Such a position was striking, not least because of the widely discredited apartheid South African judiciary whose members were constrained by the legal system in such ways to not able to mount an effective bulwark against the regime[517], notwithstanding the near absence of judicial review in the country during that time.[518] Therefore, while there may have been near unanimity for social change mediated through law, especially social and economic rights, it was not clear whether the institutional position of the Constitutional Court could be used by the white minority, weaponizing a

[516] Heinz Klug, THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS 25 (Bloomsbury, 2010).
[517] See generally, John Dugard, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (Princeton University Press, 1978); see generally, David Dyzenhaus, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER (Oxford: Hart Publishing, 1998).
[518] See Theunis. Roux, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005 145 (Cambridge University Press, 2013): "*At the time of the transition to democracy, South Africa had almost no experience of constitutional judicial review*".

grammar of constitutional rights, to block a legislative reform agenda.[519] Such concerns were largely laid to rest by constitutional practice.

In the period that followed, the Constitutional Court has oscillated between institutional positions that in the first decade since its establishment, saw it being deferent to the national government, seeing itself as a partner in the process of legally bounded social transformation.[520] The Court's institutional position as a newly minted constitutional court (that would later become an appellate Supreme Court dealing with not just constitutional matters) was tenuous. The social rights remedies that emerged from the Court in its first decade ranged from being deferential to government in its early cases[521], to a more proceduralized form that continued to avoid substantive engagement with governmental obligations in its later cases.[522] This was a court that sought to enforce accountability for social rights violations, but sought to make allowances for the sluggish pace of social transformation in the light of the ravages of apartheid, rapid urbanization and the huge demands on public services.[523]

Much has changed since then. The Court's institutional position has been affected by its interventions in a range of disputes with the government, especially in the area of executive malfeasance and corruption.[524] The Constitutional Court has also begun to order remedies that are stronger and more invasive. Through a combination of supervisory orders and judgment supervision, its jurisprudence has incorporated complex remedial forms of the kind envisaged

[519] See James Fowkes, BUILDING THE CONSTITUTION: THE PRACTICE OF CONSTITUTIONAL INTERPRETATION IN POST-APARTHEID SOUTH AFRICA 100-105 (Cambridge University Press, 2016).
[520] Theunis. Roux, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005 145 (Cambridge University Press, 2013)
[521] Id.
[522] Brian Ray, ENGAGING WITH SOCIAL RIGHTS: PROCEDURE, PARTICIPATION AND DEMOCRACY IN SOUTH AFRICA'S SECOND WAVE
[523] Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core* 22(1) American University International Law Review 163, 196 (2006).
[524] Theunis Roux, *The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?* 10 Constitutional Court Review 1 (2020).

in this dissertation. The change in its remedial stance can be seen to be at least in part caused by the combination of two factors: siphoning off of resources through rampant corruption, and serious incompetence intransigence or lack of capacity in government departments at national, provincial and municipal level.[525] The result has been a massive increase in inequality, leaving SA as the most unequal country in the world and a huge backlog in delivery of basic social rights and commitments.[526] These include housing, property, education, and health. The Constitutional Court has been responsive to these failures, mortgaging its institutional position on the back of stronger remedies that are complex, collaborative, and dialogic.

The chapter is arranged as follows. In Part I, I trace the emergence and entrenchment of complex remedial forms in South African constitutional litigation. This part covers the textual basis for the stronger remedial forms that emerge over time, as well as the shortcomings in the initial remedies in South Africa. Part II outlines the kinds of complex remedial forms that are seen in South African constitutional social rights litigation. This part covers four forms: a) the report back to court model, b) the consensual remedial formulation model, c) the expert remedial design model, d) the expert remedial implementation oversight model. Part III discusses the cases where these four types of complex remedial forms are seen. This part also outlines another unusual, outlier remedy where an expert took over the functioning of a government department, a form that is not seen in the other jurisdictions in this dissertation. Part IV discusses the factors that guided the grant of these complex remedial forms.

[525] Helen Taylor, *Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation* 9 Constitutional Court Review 247, 279 (2019).
[526] Wisani Baloyi, A worrying trend as service delivery challenges continue to plague SA, South African Human Rights Commission, 29 August 2022, https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/3243-a-worrying-trend-as-service-delivery-challenges-continue-to-plague-sa.

5.2. Case Selection

In the sections that follow, I have chosen case laws that best illustrate the characteristics of a chosen complex remedial model. This is in line with the prototypical method for case selection as part of the comparative method that is used in this dissertation.[527] Since the dissertation uses a limited number of cases drawn from each jurisdiction, the ones selected exhibit key characteristics of the kinds of remedial forms I have described that are often seen in a large number of cases. Therefore, these prototypical cases "serve as exemplars of other cases with similar characteristics."

5.3. The Emergence & Entrenchment of Complex Remedies in South Africa

The remedial power of the Constitutional Court of South Africa (CC) derives from the rights enforcement provision[528] in the Bill of Rights, as well as the broad power to grant remedies following an order of invalidity due to an inconsistency with the Constitution.[529] The remedial power in practice involves an interplay of legislation, constitutional provisions, and the common law.[530] The textual provisions indicate that in cases where a right is violated, the court

[527] Ran Hirschl, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 256 (Oxford University Press, 2014).

[528] 38. Enforcement of Rights -Anyone 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, including a declaration of rights.

[529] See Constitution of South Africa, section 172. **Powers of courts in constitutional matters**
"1. *When deciding a constitutional matter within its power, a court—*
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including—
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[530] This plays out in different ways depending on the context but take for example the remedies granted to persons facing eviction by a municipal authority. In such a case, there might be different remedies available under the

is obliged to declare that the conduct which caused such violation is inconsistent with the Constitution. Following an order of invalidity, the offending party (usually the government, since a large part of the Bill of Rights is enforceable against the State) is meant to remedy the action which caused the breach. Actions taken by the offending party may include reversing a decision, taking action to remedy departmental non-functioning, or any other measure appropriate to the context. This is known as declaratory relief and can be a powerful signal that obliges government to comply. Declaratory remedies often permit courts to safeguard its institutional position with respect to the coordinate branches. Declaratory relief had been at the forefront of the CC's remedial approaches in some of its early cases on SER - *Grootboom*[531] and *TAC*[532].

In *Grootboom*, the Court announced a declaratory relief that there had been a failure on the part of the government to consider the needs of particularly vulnerable groups such as those in need of emergency housing relief, but that it did not mean that the applicants would be entitled to any kind of relief in the form of providing shelter or housing on demand.[533] The decision was criticized for not prioritizing the needs of the poor[534], and merely delivering a socioeconomic

Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 1998 (PIE Act) (relating to conditions of notice), as well as an interdict against an eviction (which is derived from a mixture of Dutch-Roman and English law), and those which the CC has devised by a combined reading of the PIE Act and the requirements of Section 26 of the Constitution. The CC in Occupiers of Erven 87 & 88 Berea v. Christiaan Frederick De Wet N.O ([2017] ZACC 18) read a number of factors to be taken into consideration into the PIE Act in granting evictions apart from the bare-bones provision in 26(3), which includes: (a) consideration of all the relevant circumstances (section 26(3)) (b) to the joinder of the local authority and production by it of a report on the need and availability of alternative accommodation, derived from City of Johannesburg v Changing Tides 74 (Pty) Ltd [2012] ZASCA 116; (c) to a just and equitable order in terms of PIE (in keeping with the requirements of Sections 4(6)-(7) and 6(1) of PIE and (d) to temporary alternative accommodation in the event that eviction would result in homelessness (derived from City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd [2011] ZACC 33)

[531] Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

[532] Minister of Health and Others v Treatment Action Campaign 2002 5 SA 721 (CC) (TAC case)

[533] Grootboom at para 44.

[534] Theunis Roux, *Understanding Grootboom: A Response to Cass R Sunstein* 12 Constitutional Forum 46, 47 (2002).

right to a plan.[535] In *Grootboom*, the CC ordered the government to develop a plan to address the housing needs of the poorest, with an unclear statement about the Human Rights Commission, which had been an amicus in the case, to "monitor and, if necessary, report in terms of these powers on the efforts made by the State to comply with its Section 26 obligations in accordance with this judgment".[536] A later attempt by the Commission to report back to the Court on compliance was not entertained by it, citing its lack of supervisory jurisdiction over the matter.[537]

Similarly, in *TAC*, despite the Pretoria High Court ordered respondents in the case to report back to it[538], the CC refused to grant supervisory order because, in its opinion, 'the government has always respected and executed orders of this Court' and that there was 'no reason to believe that it will not do so.'[539] The CC ordered the national government to extend the availability of Nevirapine to hospitals and clinics, to make provisions for the availability of counselors, while also requiring the government to take reasonable measures to extend the testing and counseling facilities throughout institutions of public health. The enforcement of the remedy in *TAC* proved to be difficult, with little direct action in implementing some of the positive obligations that flowed from the CC's order to ``permit and facilitate' its use, and to `take reasonable

[535] Mia Swart, *Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor, South African* Journal on Human Rights 214, 237 (2005)
[536] Grootboom, at para 97.
[537] Lanford recounts this, stating: "*The SAHRC nonetheless reported on the implementation…its extensive efforts to monitor local and provincial plans to provide permanent accommodation to the community and on 14 November 2001 the SAHRC made an extensive report to the Constitutional Court concerning the dispute between branches of government over responsibility for implementation and the lack of clarity over the content of the declaratory order; but the court refused to entertain it, saying that it did not possess an ongoing oversight role*" See Malcolm Langford, *Housing Rights Litigation: Grootboom and Beyond*, in Malcolm Langford, Ben Cousins, Jackie Dugard, Tshepo Madlingozi (eds.), SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? 194 (Cambridge University Press, 2014). See also Kameshni Pillay, *Implementation of Grootboom: Implications for the enforcement of socio--economic rights* Law 6 Democracy and Development, 255 (2002).
[538] The order required a report setting out `what he or she has done to implement the order [to plan an effective comprehensive national programme]', as well as `what further steps he or she will take to implement the order and when he or she will take each such step'. See Treatment Action Campaign v Minister of Health and Others 2002 (4) BCLR 356 (T) (per Botha J).
[539] TAC at para 129.

measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV'.[540] It was only after the filing of complaints with the Human Rights Commission as well as contempt proceedings being launched against government officials at the provincial and national level that the provision of the medicine being sought was expanded by the national and provincial governments, which at the time were both largely under ANC control. The extreme executive intransigence (at the federal and provincial levels) contributed to the difficulty in implementing the *TAC* order, which of course occurred against the backdrop of active AIDS-denialism from the erstwhile President.[541] In these two cases, we see deficiencies of two divergent varieties. While CC judgments have usually been complied with by the national government, the tendency of provincial and municipal authorities to ignore court orders from SCA and HC was beginning to be noticed in the literature.[542] A systematic study found that some of the most powerful predictors of such non-compliance was alignment with the political interests of the ANC, and the institutional capacity of the implementing agency, as well as bureaucratic inertia.[543]

Systemic problems pertaining to deprivation of socioeconomic goods usually can be classified into a number of distinct areas which include government *inattentiveness, incompetence, and intransigence*[544]. Supervisory orders of the kinds I discuss in this section may also be on

[540] TAC at para 135.
[541] James Fowkes, BUILDING THE CONSTITUTION: THE PRACTICE OF CONSTITUTIONAL INTERPRETATION IN POST-APARTHEID SOUTH AFRICA 276-278 (Cambridge University Press, 2016).
[542] Christopher Mbazira, *Non-implementation of court orders in socioeconomic rights litigation in South Africa: Is the cancer here to stay?* 9(4) ESR Review 2 (2008).
[543] David Hausman, *When and why the South African government disobeys Constitutional Court orders* 48 Stanford Journal of International Law 437 (2012).
[544] This typology was originally developed by Chris Hansen in Chris Hansen, *Inattentive, intransigent and incompetent*, in S R Humm (ed.) CHILD, PARENT AND STATE 83 (1994); cited in Geoff Budlender and Kent Roach, *Mandatory Relief And Supervisory Jurisdiction: When Is It Appropriate, Just And Equitable?* 122 South African Law Journal 325 (2005); See also Sandra Fredman, COMPARATIVE HUMAN RIGHTS LAW 111 (Oxford University Press, 2018).

account of legislative inertia or blind spots[545]. It is also being increasingly acknowledged that persistent non-compliance with court orders may prompt the CC to take remedial action which is supervisory in nature[546], as well as shortcomings in governance which have a knock-on effect on the fulfilment of social rights.[547]

The deficiencies in the declaratory approach, the hallmark of the early cases of the Constitutional Court (1996-97), were being observed by the academy, and the Court's observations in *Pretoria City Council* (1998)[548] and *Fose* (1997)[549] that laid the groundwork for the possibility of complex remedies in which the Court could oversee implementation of the order. Complex remedies have certain similarities to supervisory orders where the court retains supervision over the performance of the remedy.[550] The purpose of this is three-fold: (a) to determine the terms of a more detailed future order as part of the same cause of action or dispute; and (b) to ensure compliance with the order, c) to secure compliance when the court believes for a variety of reasons that its orders may not be complied with.[551] Supervisory orders usually take the form of a structural interdict coupled with a reporting requirement for the respective government agency.

[545] See Rosalind Dixon, *The Core Case for Weak-Form Judicial Review* 38 Cardozo Law Review 2193 (2019) and Jeff King, JUDGING SOCIAL RIGHTS (Cambridge University Press, 2012) (also identify blockages in the legislative process like legislative "blind spots" and "burdens of inertia" which can come in concrete cases before the court).
[546] See Helen Taylor, *Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation* 9 Constitutional Court Review 247 (2019) and the Mwelase case.
[547] See Black Sash Trust v Minister of Social Development & Others [2017] ZACC 8, 2017 (3) SA 335 (CC)('Black Sash I'); Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening) [2017] ZACC 20, (2017) 9 BCLR 1089 (CC)('Black Sash II'); Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development & Others [2018] ZACC 36 (CC)('Black Sash III').
[548] "The court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order"1998 (2) SA 363 (CC).
[549] Fose v Minister of Safety and Security [1997] ZACC 6, urged the Court to "forge new tools" and "shape innovative remedies, if needs be" to ensure that when the legal process establishes an infringement of rights, it be effectively vindicated.
[550] Michael Bishop, *Remedies*, in Stu Woolman & Michael Bishop eds., CONSTITUTIONAL LAW OF SOUTH AFRICA 9-19 (Juta Press, 2013) (hereinafter, Michael Bishop, Remedies).
[551] Michael Bishop, Remedies, at 179.

Viljoen and Makama outline the key elements of structural interdicts as follows:

- "a declaration by the court about governmental non-compliance with its constitutional obligations,
- the judicial placement of a positive duty on the state to comply with the Constitution;
- an obligation to produce a report, stipulating the steps that the state has taken to vindicate the right; and
- the report is made an order of court if the suggested governmental steps will vindicate the infringed right."[552]

These have been recognized by the CC in its observations in the *Mpumalanga Education Department* case from 2009[553], which concerned the State obligation to ensure access to education in the official language of one's choice. The Court, in its judgment, stated:

> *"It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct.77 This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders.78 This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution."*

This position was affirmed by the Constitutional Court in *Sibiya*[554], which was the follow-up companion case to operationalize the release of prisoners held on death row after the Court struck down the death penalty in *Makwanyane*. The Court held that successful supervision involves the following steps: a) the provision of detailed information be placed at the disposal

[552] Sue-Mari Viljoen & Saul Porsche Makama *Structural relief – a context-sensitive approach*, 34(2) South African Journal on Human Rights 209, 213 (2018).
[553] Head of Department, Mpumalanga Department of Education and Another v. Hoërskool Ermelo and Another (CCT40/09) [2009] ZACC 32.
[554] Sibiya & Others v DPP, Johannesburg High Court & Others 2006 (2) BCLR 293 (CC), at para 22.

of a court, b) a careful analysis and evaluation of the details provided, c) the full cooperation of others in the process, and d) an exercise of flexibility in the supervisory process.

This short history shows that judicial supervision is well recognized in the South African constitutional order. It is this recognition that forms the basis of the Court's stronger remedial actions, some of which result in complex remedial forms. In the next sub-section, I outline the forms that complex remedies take in South Africa.

5.4. Complex Remedial Forms in South Africa

Complex remedies issued by courts in South Africa are usually in the form of a supervisory order (which is a term of art in South Africa). They usually comprise a structural interdict, which follows a declaration of a constitutional breach, as well as a reporting requirement on the part of the government on the remedial actions taken to redress such violations. It is what happens thereafter that can be descriptively categorized into at least four categories based on the case law of the CC.

1) *Report Back to Court Model* -This is the most used model of complex remedy, requiring respondents to report back to court after the finding of a violation on a plan to remedy the violation. The form that a report back to court model takes is different from the meaningful engagement model, and usually comprises a declaratory remedy followed by a requirement that parties report back to it by a date with a remedial plan in mind. In some cases, courts may go beyond the declaratory remedy and order a structural remedy with a supervisory component. The case I will illustrate this with is the decision of the High Court in the *Blue Moonlight* case.

2) *Consensual Remedial Formulation Model*: In this model that is unique to South Africa, opposing parties deliberate themselves, usually at the insistence of a court on issues which concern them. The consensual remedial formulation is usually done through a process of what is described as 'meaningful engagement'. Thereafter, the solution so arrived at becomes a solution which is not top-down, but has been arrived at after dialogue between stakeholders. This has some features of democratic experimentalism in its shift from top-down, directive approach to one which is facilitative and supportive[555]. Consensually formulated remedies can boost accountability and transparency by using existing procedural infrastructure in a way otherwise not possible[556]. However, the accountability and transparency of these processes are dependent on a number of factors, including whether there are records produced before the court of the processes and minutiae of negotiations (so that courts may evaluate compliance with procedural norms of fairness and participatory parity). The consensual plan of action thus formulated, if deviated from, may serve as the basis for future litigation in the event of non-compliance, which therefore pins the government to a pre-committed course of action Consensual processes, however, may have the effect of lengthening court involvement[557]. However, consensual processes of this sort also depend for their success on some uncertainty amongst the parties as to what the court will do if they do not agree, as was the case in some of the litigation on the resettlement of refugees discussed below.

3) *Expert Remedial Design* – In complex remedial forms of this kind, experts design the remedy. While it is highly dependent on context, these experts often act through the courts' supervisory powers and in some cases, their functioning is considered judicial or quasi-judicial. *Mwelase* is the case where the most expansive remedial powers were granted to an expert, with the

[555] Charles F. Sabel & William H. Simon, *Democratic Experimentalism*, in Justin Desautels-Stein & Christopher Tomlins (eds.), SEARCHING FOR CONTEMPORARY LEGAL THOUGHT (Cambridge University Press, 2017)
[556] Id.
[557] Owen Fiss, *Against Settlement*, 93 Yale Law Journal 1073 (1984).

individual not just devising a plan to improve the functioning of the Department of Land Reform, but also devise its budget. In this kind of remedial design exercise, experts voices are privileged – sometimes at the expense of others, including stakeholders who suffer from historic disadvantages. [558] Principles of deliberative equality and mandatory stakeholder consultation can help manage this problem. At least three kinds of sub-models can be seen in the jurisprudence of the CC, all of which I deal with separately: 1) expert remedial formulation only (*AllPay 2*) b) expert remedial judgment oversight (*Black Sash II*) c) expert executive oversight (*Mwelase*).

5.5. Complex Remedial Models in South Africa

5.5.1. Report Back to Court Model: Blue Moonlight and Evictions

The report back to model is the most common of remedial models, and the *Blue Moonlight* case was one of the first cases where the resistance to eviction from inner city evictions by a combination of civil society and tenant group pressure resulted in the creation of a necessary policy. The City of Johannesburg had to admit to the Court that a policy for emergency housing in case of evictions had not been formulated and the iterative nature of the remedy meant that these omissions could be highlighted, and necessary action taken to remedy it.

All the complex remedies which I have discussed here have a reporting requirement that compels parties back to court. However, for the sake of comprehensiveness, I have included this to indicate the cases where a declaratory relief is ordered, in some cases accompanied by

[558] Contentions of this sort have been particularly presented in the Indian context, where the predominant voices of amicus curiae have had to balance the rights of informal settlement inhabitants against environmental considerations and the property rights of landowners. See Anuj Bhuwania, *The Case that Felled a City: Examining the Politics of Indian Public Interest Litigation through One Case* SAMAJ 17: THROUGH THE LENS OF THE LAW: COURT CASES AND SOCIAL ISSUES IN INDIA (2018).

an interim interdict to restrain the government from carrying out the offending action, and then asking them to report back to the Court with a plan. In some cases where unlawful occupation is involved, it is usually the private owner of the property that seeks a court order under sections 6 and 7 of the PIE Act, and the local government is usually joined as a party due to their obligation to provide alternate accommodation.[559]

The *Blue Moonlight* case[560] involved 86 residents of a community living in an industrial property that had fallen into disrepair situated at 7 Saratoga Avenue, Berea, in the inner-city area of Johannesburg (picture of the property below). The premises comprised old and dilapidated commercial buildings with office space, a factory building and garages. [561] The residents of the property had been paying rent to a property letting firm since 2000. In 2005, the property was purchased by Blue Moonlight Properties.

The company wished to exercise their right to develop their property and sought an eviction order from the South Gauteng High Court. The community of residents of the Blue Moonlight property were represented by the Centre for Applied Legal Studies (CALS), an organization housed within the University of Witwatersrand founded in 1978 by John Dugard. The High Court granted the eviction[562], but asked the City, which had by then been joined to the case, to shift the occupants to alternate accommodation since it accepted the occupants' argument that they would be rendered homeless on account of the eviction and therefore would constitute an emergency situation.

[559] The triangular constellation of interests involved is analyzed in Gustav Muller & Sandra Liebenberg (2013) *Developing the Law of Joinder in the Context of Evictions of People from their Homes*, 29(3) South African Journal on Human Rights 554 (2013).
[560] City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Occupiers Of Saratoga Avenue CCT 37/11 [2011] ZACC 33 (Blue Moonlight CC).
[561] Blue Moonlight CC para 1.
[562] Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue and Another, Case No 11442/2006, South Gauteng High Court, Johannesburg, 4 February 2010, unreported.

In the course of hearings, the City challenged the approach of the occupiers, arguing that it did not have the space or resources to house persons rendered homeless by evictions from private properties, but had developed accommodations for persons who were rendered homeless and were in an emergency situation due to no fault of their own. The policy was also reserved for people it evicted from derelict buildings in terms of the National Building Regulations and Building Standards Act 103 of 1977. Following the decision of the High Court, the officials of the city of Johannesburg made their displeasure known. The national Minister of Human Settlements, Tokyo Sexwale, reportedly told members of Parliament in March 2010 even though he recognized the principle of 'the separation of powers', new forms of litigation were impacting housing policy in unexpected ways and 'may end up pushing us into chaos'.[563] The Minister's May 2010 Budget Vote speech termed the Blue Moonlight High Court judgment amounted to 'the legalisation of illegality'.[564]

The High Court's order was challenged at the Supreme Court of Appeal (SCA), which upheld the eviction order, but ordered a stipend payment of R850 a day to each resident the City for its failure to provide alternate accommodation. The SCA also overruled the distinction the City had sought to draw between persons who were rendered homeless from private lands and public lands that had been declared unsafe. The City preferred an appeal to the Constitutional Court from these orders. The Constitutional Court struck down the stipend payment, finding no basis in law for this.

[563] Kate Tissington & Stuart Wilson, *SCA upholds rights of urban poor in Blue Moonlight judgment* 12(1) ESR Review 3, 5 (2011).
[564] Id.

The Court also held upheld the SCA's position on the private/public distinction the City had espoused. It stated that the difference was an artificial one which could not stand constitutional scrutiny and that the City's housing policy was unconstitutional in that it 'excludes people evicted by a private landowner from its temporary housing programme, as opposed to those relocated by the City'.[565] In doing so, it rejected the argument which had been advanced by the City that this distinction existed so as to not unjustly benefit people who sought to 'jump the queue' for public financed housing. It also agreed with the finding of the Supreme Court of Appeal that the City had failed to demonstrate that it lacked resources to provide accommodation.[566] It also held that the private owners of the property 'could not be expected indefinitely to provide free housing to the Occupiers,' but that 'its rights as property owner must be interpreted within the context of the requirement that eviction must be just and equitable'.[567] In granting the eviction of the *Blue Moonlight* occupiers, it said that it would be 'just and equitable under the circumstances only if linked to the provision of temporary accommodation by the City.'[568]

The *Blue Moonlight* case also highlights the difficulties of diffused power and responsibility in South Africa across the city, provincial, and national government. Tissington and Wilson argue that South African cities conceive of their role as enforcers of building regulations and health and safety by-laws.[569] Cities have persistently argued that the primary responsibility for providing housing falls within the ambit of the national Department of Housing. Wilson and Tissington state that as a result, city governments approach the issue of housing quite in a

[565] Blue Moonlight CC, para 85.
[566] For an account of this metaphor and how it constrains the jurisprudence of the CC, see Katharine Young, *Rights and Queues: On Distributive Contests in the Modern State* 52 Columbia Journal of Transnational Law 65 (2016).
[567] Blue Moonlight CC, para 85.
[568] Blue Moonlight CC para 86.
[569] Kate Tissington & Stuart Wilson, *SCA upholds rights of urban poor in Blue Moonlight judgment* 12(1) ESR Review 3, 6 (2011).

separate way through providing ownership of houses in new township developments on the urban periphery. [570] The repeated interactions that the courts had with the municipal government and other government departments established that the primary responsibility for providing alternate accommodation irrespective of where the person had been evicted from.[571]The complex remedy here also sought to balance the interests of the evictees with those of the state and the private party, and the iterative, dialogic nature of this interaction no doubt helped the court arrive at the remedy.

[570] Id.
[571] Stuart Wilson, *Curing the Poor: State Housing Policy in Johannesburg after Blue Moonlight* 5 Constitutional Court Review 280 (2013).

The picture above is of the premises at 7, Saratoga Avenue in Berea, Johannesburg, taken in 2022 by the author.

5.5.2. Consensual Remedial Formulation Model: Meaningful Engagement

Apart from the choice of standard of review and non-engagement with the substance of the right, one of the persistent features of the first wave of cases from the CC on the right to housing was its inability to accommodate the views of those affected by government decisions on evictions and the provision of alternate housing. However, hidden within its decisions was a

nod to the incommensurable conflict between the right to housing and property rights of landowners, which continues to be a key facet of public discourse and political contestation. As indicated already, a complex matrix of legislated, constitutional, and equity-based rights are implicated in judicial decisions to grant evictions, but the CC had held that a key factor is whether 'proper discussions, and where appropriate, mediation have been attempted'[572] and that 'the procedural and substantive aspects of justice and equity cannot always be separated'.[573] This was a sign that there was to be a procedurally inclusive protection of unlawful occupiers in addition to the substantive benefits which section 26 of the Constitution conferred, and that their participation was vital in finding solutions to the conflicts between them and property owners.

5.2.2.1. Olivia Road: Rooting Engagement in a Structural Reading of the Constitution

The procedural aspect highlighted above found recognition in the decision of the CC in the *Olivia Road* case[574], where the court, in what seemed like another regular challenge to the dispossession of accommodation by residents in the Berea Township (a neighborhood in North Gauteng, which has Johannesburg as its capital), of urban renewal or upgradation due to their buildings being declared unsafe.[575] In an interim order[576], the CC asked the municipal authorities and the parties to the case to engage meaningfully 'in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the

[572] Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC) para 43 (Port Elizabeth Municipality).
[573] Port Elizabeth Municipality para 39.
[574] Occupiers of 51 Olivia Road, Berea Township, And 197 Main Street, Johannesburg v. City of Johannesburg CCT 24/07 [2008] ZACC 1 (Olivia Road).
[575] City of Johannesburg v Rand Properties (Pty) Ltd and Others 2007 (6) SA 417 (SCA); 2007 (6) BCLR 643 (SCA)
[576] The interim engagement order was issued on 30 August 2007 – the parties were to report back to the CC on 3 October 2007 on the results of the engagement which was to take place on 27 September 2007.

citizens concerned.' [577] The parties were ordered to report back on the results of the engagement. The result of this process was a comprehensive settlement agreement on 1) how to make the buildings safer and more habitable, 2) clear delineation about the 'relocation of the occupiers to alternative accommodation in the inner city, which included the identification of relevant buildings, the nature and standard of the accommodation to be provided, and the calculation of the rental to be paid.' The agreement was endorsed by the Court.

The judgment provided guidance on the objectives of a process of engagement which was to be aimed at : 1) a determination of what the consequences of an eviction might, 2) whether the government could help in alleviating any dire consequences be, 3) whether any interim renovation was possible to make the buildings relatively safe, 4) to examine the existence and nature of any obligations to the occupiers from the municipal authority in the prevailing circumstances, and the manner of its fulfilment.[578]

The Court emphasized that the nature and extent of the engagement between parties would be contextual. It stated that 'the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement' involving 'competent sensitive council workers skilled in engagement' [579], implying that in some cases, ad hoc engagement could be appropriate.[580] The Court emphatically stated that[581]

> *Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or*

[577] Olivia Road para 5.
[578] Sandra Liebenberg, *Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'* 12 Africa Human Rights Law Journal 1 (2012).
[579] Olivia Road at para 19.
[580] Id.
[581] Olivia Road at para 15.

illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.

The processual requirements of meaningful engagement are that the parties 'engage with each other reasonably and in good faith', while an 'intransigent attitude' or the 'making of non-negotiable, unreasonable demands' could have the capacity to undermine the deliberative process.[582]

The judgment in the case was celebrated in some quarters[583] as heralding a new era of housing rights jurisprudence - one that was infused with both procedural and substantive, while others had been more cautious in its praise.[584] The judicial record in subsequent cases, noted that evictions which had previously been carried out on the basis of the National Building Regulations and Building Standards, 1977 (concerning health and safety regulations as applicable to buildings) had ceased, and municipal authorities now 'relocate the occupiers of such buildings voluntarily'.[585] As previously indicated, meaningful engagement, which is now a fairly standard requirement in eviction cases, allows parties to exchange views and raise contests in an informal manner. In social rights cases, where parties often have historical animus, these processes can help create the conditions for a more equal plane of deliberation and help build trust between the affected communities, governmental authorities, whether mediated through civil society or not.[586]

[582] Olivia Road at para 20.
[583] Christopher Mbazira LITIGATING SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: A CHOICE BETWEEN CORRECTIVE AND DISTRIBUTIVE JUSTICE 191 (Pretoria University Law Press, 2009) (Mbazira LITIGATING SOCIO-ECONOMIC RIGHTS).
[584] Sandra Liebenberg, *Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'* 12 Africa Human Rights Law Journal 1 (2012); Brian Ray, *Engagement's Possibilities and Limits as a Socioeconomic Rights Remed*y 9 Washington University Global Studies Law Review 399 (2010).
[585] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) [2011] ZACC 33 para 78.
[586] Mbazira LITIGATING SOCIO-ECONOMIC RIGHTS 190.

The picture above is of the premises at 51 Olivia Road, in Berea, Johannesburg, taken by the author in 2022.

5.2.2.2. Challenges in Meaningful Engagement Orders

The difficulties in meaningful engagement proceedings are many, and they include a) *participant selection*, i.e., a careful calibration of who can be part of the proceedings so as to ensure that persons who are not before the Court are not affected by the order[587]; b) *participatory parity*[588], that is, the need to ensure that the gross power imbalances which exist

[587] Mbazira LITIGATING SOCIO-ECONOMIC RIGHTS 191.
[588] This is a phrase used by Liebenberg borrowed from Nancy Fraser, *Social justice in the age of identity politics: Redistribution, recognition and participation* in Nancy Fraser & Axel Honneth (eds.), REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 744-45 (2003).

between governments and local communities affected by their decisions do not influence the outcomes of these participatory processes, c) *constitutional norm compliance and non-arbitrariness*, that is how to ensure that meaningful engagement does not 'descend into an unprincipled, normatively empty process of local dispute settlement.'[589]

Take for example the *Mamba*[590] case, where the CC was confronted with the issue of the closure of refugee camps by the Gauteng government following a series of xenophobic attacks on certain groups of refugees. The skeletal nature of the CC interim engagement order[591], which included an obligation to consult with NGOs[592] who had been assisting with the emergency-like situations left the Gauteng government to engage only in words, and not in practice. The Gauteng government persisted with the closure of the camps despite another order of the CC to engage with the refugees and their organizational representatives. Likely daunted by the failure of the order in preventing camp closures, a subsequent application instituted by an umbrella organization called the Consortium for Refugees & Migrants in South Africa, was withdrawn, and the case was dismissed as moot.

Ray argued that there were key differences in the *Olivia Road* and *Mamba* cases, including the proactive stance of the High Courts - which in *Olivia Road* had granted an interdict against evictions pending the final outcome, whereas in *Mamba*, the petitioners arrived at the CC through direct access after their injunctive relief was refused at the High Court level.[593] The CC was therefore left to adjudicate the situation without an appellate decision, which meant there was little substantive record. Ray states[594]:

[589] [589] Sandra Liebenberg, *Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'* 12 Africa Human Rights Law Journal 1, 19 (2012).
[590] Mamba v. Minister of Soc. Dev. 2008, Case No. CCT 65/08 (CC).
[591] Order dated 21 Aug. 2008, Mamba, Case No. CCT 65/08, para 1 (CC).
[592] Order dated 21 Aug. 2008, Mamba, Case No. CCT 65/08, para 1 (CC), at para 5.

[593] Mamba v. Minister of Soc. Dev. 2008, Case No. 36573/08 (HC, Pretoria Provincial Division).
[594] Brian Ray, *Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy* 9 Washington University Global Studies Law Review 399, 408 (2010); See also Brian Ray, *Proceduralisation's triumph and engagement's promise in socio-economic rights litigation* 27 South African Journal on Human Rights 107 (2011).

> *'These differences highlight the political nature of engagement and its dependence on sufficient incentives for the political branches to take the process seriously. The ambiguity inherent in engagement provides ample opportunity for resistance and, without additional political constraints, allows the government to fail to take it seriously in many situations without real political cost.'*

This case highlights the difficulties that inhere in taking engagement seriously as a remedy – it is my view that it is at best a step in the judicial process, not a remedy in itself, and one that needs to be more rigorously developed in the jurisprudence of the CC in order to give it full and robust delineation. Delineation would ensure that calls to enshrine a 'minimum core of participation'[595] can result in much more than the kinds of 'tokenistic participation' which has been seen in some of the engagement cases. Take for instance the Constitutional Court judgment in *the Welkom High School case*[596], where there was a dispute between two schools in the Free State Province and the Provincial Head of Department over policies relating to pregnant learners. While the two schools had policies which excluded their attendance in class for protracted periods, their readmission was ordered by the Provincial Head of Department. While considering an interdict application from the schools against this order, the Constitutional Court ordered the school governing board and the Provincial Head of Department to engage meaningfully to decide the content of the policy on pregnant learners. The tokenistic element in this form of engagement is reflected in the fact that not all stakeholders were consulted, which could have included "representatives of the directly affected rights-holders themselves -pregnant learners the Commission for Gender Equality, the Human Rights Commission, representative organisations of school governing bodies, as well

[595] Steven Friedman, *Proceduralism's Promise: The Constitutional Court, Social and Economic Rights and Democracy*, in Theunis Roux and Rosalind Dixon (eds.), CONSTITUTIONAL TRIUMPHS, CONSTITUTIONAL DISAPPOINTMENTS: A CRITICAL ASSESSMENT OF THE 1996 SOUTH AFRICAN CONSTITUTION'S LOCAL AND INTERNATIONAL INFLUENCE (Cambridge University Press, 2018).

[596] Head of Department, Department of Education, Free State Province v Welkom High School 2014 2 SA 228 (CC).

NGOs and academics specialising in gender equality, children's rights and the right to education."[597]

Therefore, the success of meaningful engagement is dependent on a number of factors which are outside the control of parties to the dispute, but may inhere in the nature of the parties themselves, such as the membership of parties in politically organized communities with social support (which was markedly lacking in the case of refugees in *Mamba*) or whether the interests of stakeholders are adequately represented (consider the case of a housing dispute where there are splintered interest groups); or upon the nature of the process itself and whether it adheres to certain procedural norms (which is difficult to ascertain).

The cases discussed highlight also the importance of thinking through the role of the court in three kinds of ways: *first* as an articulator of strong normative principles that shape and guide the kinds of conversation which occur in the process of engaging meaningfully, *second*, as a remedial actor which can use a requirement like meaningful engagement with stakeholders prior to a range of decisions made by the government, and *third*, as an institutional actor which decides on remedies based upon considerations of separation of powers.

In the first role, outlining strong norms for participation and participatory parity in decision-making relating to housing enables the Court to avoid spelling out the precise content of the right to access housing, couching it instead in procedural terms. This is a court exercising remedial flexibility and substantiation. Second, by imposing a remedy that finds general applicability in a range of other cases like *Mamba* and some education cases[598], it is able to pay

[597] Sandra Liebenberg, *Remedial principles and meaningful engagement in education rights disputes* 19(1) Potchefstroom Electronic Law Journal 1, 25 (2016).
[598] Governing Body of the Juma Musjid Primary School v Essay NO 2011 8 BCLR 761 (Supreme Court of Appeal).

lip service to a holistic approach to SER cases, while in reality, the varied outcomes point to the upshot of viewing them through the lens of separationism. Third, the court alleviates separation of powers tensions by articulating a strong remedial, but not a social rights norm, and is therefore able to defer to the coordinate branches. Therefore, the court here takes on two roles: the first is that of deciding on a remedy of meaningful engagement which does not require its pre-commitment to a substantive outcome, but rather a procedural one where certain principles which are primarily aimed at party parity are fulfilled, second, that of validating the outcome of such a processual remedy *only* if the preceding processual norms have been met.

In assessing meaningful engagement as a process in the attainment of better outcomes, it fulfils the condition of democratic validity by the inclusion of relevant stakeholders yet does not entirely solve the problem of splits or differences in the coalition groups. It attains dialogic and processual validity due to relative parity it is able to achieve in some of the cases and the ways time and information provided to all parties in at least the *Olivia Road* cases. It of course fails in Mamba, since there is demonstrable intransigence on the part of the Gauteng government. The outcome validity of the *Olivia Road* case is favorable - in part because of the strong actions of the High Court in the interim, as well as the national attention the case had received. Bilchitz's concerns[599] about the highly contingent nature of the outcomes in cases where dialogic forms of dispute resolution are used are valid. He states that in such cases, courts do not outline specific responsibilities incumbent on parties which causes a great deal of uncertainty about the outcome, while also being weak on normative and substantive grounds.[600] He illustrates this by using Liebenberg's approach, which she terms 'substantive

[599] David Bilchitz *Does Sandra Liebenberg's New Book Provide a Viable Approach to Adjudicating Socio-Economic Rights*, 27 South African Journal on Human Rights 546 (2011).
[600] Id, 549: "*The central difficulty is that one cannot have it both ways: the more content that is given to a right by a court, the less it remains open for contestation and determination in the future; the more open it remains, the less content it has and the less it provides individuals and communities with concrete entitlements to enforce in the future*".

reasonableness review', to state that the final decision of the Court in a case like *Mazibuko* could likely be replicated even if consultative processes like meaningful engagement being used between parties. This is because there can be reasonable disagreement on the amount of water which a household was entitled to daily, undergirded by a rejection by the Court of international best practices on household water requirements. How could this be avoided? Bilchitz argues that engagement with this problem would have required the Court to strongly articulate normative principles on access to water (derived from, among others, international best practices). These cannot be consensually arrived at, and this a key reason why he casts doubt on Liebenberg's charitable outlook on engagement as a deliberative process which can foster good petitioner results.

5.2.3. Consensual Remedial Formulation Model: Expert Remedial Design in the First Social Grants Cases[601]

In this particular type of legal order, a complex and multi-stage judicial process involving multiple stakeholders takes place, with amicus curiae intervening to provide the court with information and expertise. A notable example of experts being involved in devising a solution can be observed in the response to the social security payment crisis that affected South Africa between 2012 and 2013. The South African Constitution, specifically Section 27, guarantees the right to social security.[602] However, prior to the mid-2000s, the social security system in the country was largely fragmented. To address this, the South African Social Security Agency Act of 2004 was enacted, leading to a significant overhaul and consolidation of the social grant system. The act established the South African Social Security Agency (SASSA) as the administrative body responsible for managing and disbursing social assistance payments.[603]

Historically, litigation regarding social payments focused mainly on matters of eligibility and exclusions rather than the substance of the right itself.[604] However, in a series of cases related to social payments, the focus shifted to the conduct of SASSA in the tender process for

[601] Part 5.2.3. draws from and may bear similarity to Gaurav Mukherjee, *Democratic Experimentalism in Comparative Constitutional Social Rights Remedies* 2 Milan Law Review 75 (2020).
[602] See Constitution of South Africa, section 27: **Health care, food, water and social security**
"(1) *Everyone has the right to have access to* – . . . (c) *social security, including, if they are unable to support themselves and their dependents, appropriate social assistance."*
[603] Beth Goldblatt and Solange Rosa, *Social Security Rights: Campaigns and Courts,* in Malcolm Langford, Ben Cousins, and Tshepo Madlingozi (eds.) SOCIOECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? 253, 256 (Cambridge University Press, 2016).
[604] These were decided primarily on equality grounds: See Khosa & Ors v Minister of Social Development & Ors. Cited as: 2004(6) BCLR 569 (CC). See also the admission of Justice Kate O' Regan in Gary Pienaar, *Justice O' Regan: Finding The Aristotelian Golden 'Middle Way*' in Narnia Bohler-Muller, Michael Cosser and Gary Pienaar (eds.) MAKING THE ROAD BY WALKING: THE EVOLUTION OF THE SOUTH AFRICAN CONSTITUTION 126, 135 (Pretoria University Law Press, 2018): "*contrary to any perception that the Court had overreached and strayed into executive territory, should be attributed to appropriate weight being afforded to the fundamental constitutional right and value of equality. The decision did not signal an exception to the Court's approach to the progressive realisation of SERs."*

selecting a service provider to handle grant payments.[605] The court recognized that this governmental action directly impacted the realization of socioeconomic rights. Although the cases primarily revolved around administrative law grounds, the innovative remedies introduced in these cases have significant implications for the development of court jurisprudence concerning remedial powers in South Africa.

While the use of experts to assist courts in overcoming institutional limitations is not unprecedented, the involvement of external actors in overseeing the implementation of a remedy was unusual in South African constitutional jurisprudence. In certain cases, such as the *Linkside* case[606] involving teacher shortages in the Eastern Cape and the *Madzodzo* case[607] regarding school infrastructure evaluation, the appointment of an external claims administrator and an independent auditor respectively was observed. This process, known as remedial cross-fertilization, describes how higher judicial institutions adopt innovative remedies developed in lower courts, lending them legitimacy and bringing such innovations into the mainstream.

In the specific case of SASSA's contract with service providers for social grant payments, the existing contract was set to expire on March 31, 2012. SASSA issued a Request for Proposals (RFP) outlining the bidding process, which ultimately resulted in two bidders: AllPay and Cash Paymaster (CPS), with CPS winning the bid.[608] AllPay alleged several deficiencies in the bidding process that influenced the final outcome. The High Court declared the tender process

[605] AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others [2013] ZACC 42, 2014 (1) SA 604 (CC)('AllPay I') (this decided on the constitutional and statutory validity of the tender process); AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others (No 2) [2014] ZACC 12, 2014 (4) SA 179 (CC)('AllPay II') (this designed the remedy); AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others [2015] ZACC 7, 2015 (6) BCLR 653 (CC)('AllPay III') (this case concerned the non-compliance of the amended terms of the tender process [esp. the RFP] with the requirements set out by the CC in AllPay 2).
[606] Linkside & Others v Minister for Basic Education & Others [2015] ZAECGHC 36.
[607] Madzodzo & Others v Minister of Basic Education & Others [2014] ZAECMHC 5, 2014 (3) SA 441.
[608] AllPay 1 at para 9.

invalid but chose not to set aside the award due to the practical challenges involved.[609] The Supreme Court of Appeal reached a similar conclusion. However, the Constitutional Court (CC) determined that the bidding procedure was constitutionally invalid.[610] It identified SASSA's failure to ensure the objective confirmation of CPS's claimed black empowerment credentials and a lack of clarity in the RFP requirements regarding biometric verification. Consequently, only CPS was considered in the second stage of the process.[611]

When designing the remedy, the Constitutional Court recognized that SASSA, CPS, and AllPay could not adequately present the concerns that would arise if the contract with CPS were declared invalid and they could walk away from their responsibilities. Such an outcome would have significant consequences, including the potential denial of social grant payments to millions of beneficiaries.[612] However, the Court also acknowledged that procurement processes significantly impact socioeconomic rights, and the public has a vested interest in ensuring fairness, transparency, and cost-effectiveness.

To guide its decision-making, the Court considered evidence presented by Corruption Watch[613], the first amicus curiae focusing on rule of law concerns, and the Centre for Child Law, which preferred a suspended order of invalidity. The Centre for Child Law prioritized the

[609] AllPay 1 at para 2.
[610] AllPay 1 at para 72; For an interesting take on the role played by the CC in legitimating and guiding the statutory Black Economic Empowerment agenda of the ANC, see David K. Ma, *Explaining Judicial Authority in Dominant-Party Democracies: The Case of the Constitutional Court of South Africa* 52(3) Comparative Politics 1, 18 (2020): "*The ANC government needs an authoritative Court in place to be able to reap the huge political and economic benefits associated with implementing BEE equity transfers*."; The CC hints at this in AllPay 1 (para 4): "*Procurement policy under section 217 also involves the protection and advancement of persons or categories of persons disadvantaged by past unfair discrimination. The public interest in the fairness of that vital aspect of the economic transformation of our country is also clear*."
[611] AllPay 1 at para 91.
[612] AllPay 1 at para 4.
[613] Corruption Watch was described by the CC as "an independent, non-profit civil society organisation that seeks to promote transparency and accountability to protect beneficiaries of public goods and services. It also seeks to fight corruption and the abuse of public funds.".

interests of beneficiaries over broader rule of law and cost considerations raised by other amici, such as Corruption Watch and Black Sash, which raised concerns about unlawful deductions from payments.[614] Ultimately, the Court decided to suspend the declaration of invalidity, requiring CPS to fulfill its obligations under the existing contract to ensure continuity in grant payments.[615] Simultaneously, in a subsequent case (*AllPay II)*, the Court ordered a reconduct of the bid process, establishing specific criteria to be followed. The declaration of invalidity would remain suspended until the completion of the tender process, with SASSA required to report back to the Court if the process couldn't be completed as per the laid-down guidelines (*AllPay II* and *AllPay III*). Although the Court attempted to balance rule of law and social rights concerns, it was not entirely successful.

It is important to note that the decision primarily focused on reviewing the tender process based on administrative criteria defined in the Promotion of Administrative Justice Act, 2000 (PAJA). However, the Court consistently invoked the interests of beneficiaries of the social security system, who were not directly represented in court, in its interpretation of the constitutional and statutory propriety of the tender process. This highlights a classic example of a polycentric problem, where the court must consider the interests of parties not involved in the litigation (in this case, the recipients of SASSA's payments) before issuing an order. Such a level of

[614] See AllPay II (at para 26): "*The other amicus curiae, the Centre for Child Law (Centre), expressed a preference to suspend the declaration of invalidity until the end of the existing contractual period. The Centre's basic premise is that it would be inappropriate for the Court to order a new tender if it would result in a new registration process…According to the Centre, the relevant factors when considering setting the tender aside are the— (a) interest of beneficiaries in the uninterrupted payment of social grants, especially that of children* (para 27)."

[615] See AllPay II at para 66: "*Where an entity has performed a constitutional function for a significant period already, as [CPS] has here, considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all. The conclusion of a contract with constitutional obligations, and its operation for some time before its dissolution – because of constitutional invalidity – means that grant beneficiaries would have become increasingly dependent on [CPS] fulfilling its constitutional obligations. For this reason, [CPS] cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational*." The Court inferred a degree of constitutional obligation to a private entity in this case, an aspect that is analysed in Meghan Finn, *AllPay Remedy: Dissecting the Constitutional Court's Approach to Organs of State*, 6 Constitutional Court Review 258 (2013).

complexity can limit a court's ability to fully comprehend the range of concerns at play and produce outcomes where '*many interlocking factors that it is not susceptible to the decision-making processes of courts'*.[616]

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When examining how the Court addressed theoretical concerns in the literature, it becomes evident that it seeks guidance from experts when the best way forward is not clear to it. The expertise and inputs of the two amici are sought on the impacts of various remedial pathways, a key feature of complex remedies. Despite having various remedial options at its disposal, including declaring the CPS-SASSA contract entirely invalid, the Court considered the potential fallout, particularly the impact on social security for vulnerable individuals, such as children. The Court's judgment in *Black Sash I* (paragraph 18) suggests that, based on the progress report submitted by SASSA in compliance with the Court's order, the Court no longer deemed it necessary to retain jurisdiction over the case, despite acknowledging the unsatisfactory conduct of the government agency. This reflects the Court's respect for the principle of separation of powers. Additionally, in *AllPay II*, the Court only declared the contract award unconstitutional while leaving it to SASSA to determine whether to award a new contract, subject to the requirements set out by the Constitutional Court. This approach highlights the varying support structures required to fulfill rights through with court decisions.

It is also crucial to view both the *AllPay a*nd *Black Sash* cases not solely as administrative process issues but as cases with broader implications for the remedial process in socioeconomic rights cases going forward. These cases demonstrate how courts can be responsive to public

[616] Catherine O' Regan, *Breaking Ground: Some Thoughts on the Seismic Shift in Our Administrative Law*, 121 S. African Law Journal 424 (2004).

concerns regarding maladministration, corruption, or political stagnation, particularly when the underlying issues have significant national significance.[617]

5.2.4. Expert Remedial Oversight Model: The Second Social Grants Case

In the previously discussed *AllPay* cases, an important lesson emerged. Despite finding the tender unconstitutional, the court temporarily suspended the cancellation of the tender until it could be re-conducted. If the tender process couldn't be completed according to the specified terms, SASSA would have to inform the court of the reasons and whether they could take over grant payments instead of relying on a third-party provider.[618] Eventually, in November 2015, SASSA decided not to award a new tender and instead take charge of the payment of social grants. They assured the court that they would be able to meet the deadline of March 31, 2017. However, it became apparent by April 2016 that SASSA was unable to take over payments. Surprisingly, SASSA and the Minister failed to report this to the court. The Black Sash organization[619], which closely monitored the situation, brought the case to the Constitutional Court due to the exceptional circumstances involved.

To protect the rights of grant beneficiaries, the court ordered SASSA and CPS to ensure the payment of social grants until an entity other than CPS could take over. Failure to do so would infringe on the beneficiaries' constitutional rights to social assistance. The court suspended the declaration of the contract's invalidity for a period of 12 months starting from April 1, 2017.

[617] Robert A. Kagan, Diana Kapiszewski & Gordon Silverstein, *New judicial roles in governance* in Erin F. Delaney & Rosalind Dixon, RESEARCH HANDBOOKS IN COMPARATIVE CONSTITUTIONAL LAW 144 (Cheltenham, UK Northampton, US: Edward Elgar Publishing, 2018).

[618] Black Sash I (para 59): The Court stated that "*SASSA and the Minister have used the discharge by this Court of its supervisory jurisdiction as justification that there was no need for them to inform or approach the Court when it became clear that SASSA would not be in a position to assume the duty to pay the grants itself. This is disingenuous and incorrect*."

[619] Black Sash Trust describes itself as a "a 65 year old veteran human rights organisation advocating for social justice in South Africa.". See Black Sash, *Home*, available at https://www.blacksash.org.za/.

SASSA and CPS were required to enter into an interim agreement during this period, which included safeguards for data privacy.[620] After the 12-month period, the Minister and SASSA had to report back to the court with their plans for ensuring continued payment of social grants. In response to the Minister and SASSA's conduct, the Constitutional Court established an expert panel, consisting of the Auditor-General, qualified independent legal practitioners, and technical experts.[621] This panel would evaluate and report to the court on SASSA's compliance with the court's orders. [622]The court recognized the need for accountability and sought to address the institutional incapacity that prevented SASSA from taking over grant payments.

The court's decision to grant this invasive remedy had not been taken lightly and can be summed in its own words[623]:

> *In a constitutional democracy like ours, it is inevitable that at times tension will arise between the different arms of government when a potential intrusion into the domain of another is at stake. It is at times like these that courts tread cautiously to preserve the comity between the judicial branch of government and the other branches of government. But there was no constitutional tension about social grants in November 2015. There was no legitimate reason for the Court not to accept the assurance of an organ of state, SASSA, under the guidance of the responsible Minister, that it would be able to fulfil an executive and administrative function allotted to it in terms of the Constitution and applicable legislation. There was no threatened infringement to people's social assistance rights and no suggestion that the foundation of the Court's remedial order would be disregarded. Now there is.*

It was additionally influenced by several two other factors. First, it emphasized the lack of comity, which hindered the court's ability to engage more assertively with the principles of trust and respect underlying the separation of powers.[624] Second, broken promises by SASSA

[620] This was one of the suggestions which the amici had made
[621] Black Sash at para 1.
[622] The manner in which the panel was appointed was through mutual consent of the parties. See Black Sash I at para 11: "*The parties are, within 14 days from the date of this order, required to submit the names of individuals, with their written consent, suitably qualified for appointment as independent legal practitioners and technical experts*…".
[623] Black Sash I at para 10.
[624] See Black Sash I at para 13: "*Until the forced reply to this Court's directions there has certainly been no reciprocal comity from the Minister and SASSA in respect of the remedial order and withdrawal of the supervisory order, towards the judicial branch of government*".

and the Minister, resulting in personal costs imposed by the court, played a role and enforcing a degree of personal accountability for widespread violations.[625]

The *Black Sash* case demonstrates that the court was less concerned with the separation of powers arguments that had dominated its previous decisions, including the *AllPay* cases. Instead, it drew authority from cases like *Grootboom* and *Madzodzo*, which involved external agents appointed by the court. The Minister and SASSA's intransigence, inaction, and non-compliance also contributed to the court's approach. The court's reasoning can be seen as consequentialist, focusing on fairness, adherence to the rule of law, and the process of administering public contracts with an impact on the realization of socio-economic rights.

[625] See Black Sash I at para 15: "*What needs to be understood, however, is that it is not this Court's standing or authority, for their own sakes, that are important. Judges hold office to serve the people, just as members of the executive and legislature do. The underlying danger to us all is that when the institutions of government established under the Constitution are undermined, the fabric of our society comes under threat. A graphic illustration would be if social grants are not paid beyond 31 March 2017*."

5.2.5. Expert Executive Oversight Model: Appointment of External Agent by Specialist Court to Oversee Departmental Functioning[626]

In the preceding section, I detailed how an invasive remedy of the appointment of a committee to oversee implementation of the CC's judgment was ordered in a case which concerned social grant payment – a matter which affected millions of beneficiaries and held wide public salience.

In this section, I discuss the systemic failure of the Department of Rural Development and Land Reform to effect land reform, an issue of equal public and electoral importance. Land reform is a truly polycentric issue, with a range of actors involved in the process, decades of systematic disenfranchisement, and a glacial bureaucracy that has failed to deliver on a number of promises.[627] The process of land reform is considered central to human dignity and is fundamental to realizing other constitutional rights.[628] There are a number of provisions in the South African Constitution that concern land reform, most of which is found in the Right to Property Section[629], which itself is the subject of heated political contestation as detailed below.

[626] Parts 5.2.5 – 5.4, pp.190-202 draw on and may bear similarity to Gaurav Mukherjee & Juha Tuovinen, *Designing Remedies for a Recalcitrant Administration* 36(4) South African Journal on Human Rights 386 (2020).
[627] See, James L Gibson, OVERCOMING HISTORICAL INJUSTICES: LAND RECONCILIATION IN SOUTH AFRICA (Cambridge University Press, 2009).
[628] Speaker of the National Assembly v Land Access Movement of South Africa [2019] ZACC 10; 2019 JDR 0548 (CC); 2019 (5) BCLR 619 (CC) at para 65
[629] See, sections 25 (4): For the purposes of this section—
(a) *the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;*
and
(b) property is not limited to land.
(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

The definition of 'public interest' for the purposes of expropriation includes land reform. The need to redress patterns of racial disenfranchisement from land is echoed in subsequent provisions, including the need to promote equitable access to land (within available resources). The Constitution also includes an enabling provision for legislative redress of tenure insecurity resulting from 'past racially discriminatory laws or practices', as well as restitution or redress in cases where a person or community had been dispossessed of property due to such practices. The slow pace of land reform has been a contentious political issue – one that has led to fissures within the ANC and has catalyzed the emergence of newer, radical political and parliamentary alternatives like the EEF. It has been a central pivot around which recent public discourse around the legitimacy of the negotiated transition and of the broader project of constitutional transformation has occurred.[630] The time was ripe for an institutionally embedded actor like the CC to pick up on the idea of a 'broken promise' and use it as one of its central justifications for the imposition of a strong remedy like the one we see in *Mwelase*.

Land reservation and segregation had formed the core of apartheid rule in South Africa.[631] Several provisions in the Final Constitution were meant to address the issue, but it continues to be a very emotive issue in the public imagination, with the majority of land-holding continuing to be in the hands of white farmers. Latest reports[632] that people of European descent own 72% of the total farms and agricultural holdings while only making up about 9% of the total population. A white paper issued[633] in 1997 on land reform policy suggested three varieties: (1) land restitution, (2) land redistribution and (3) land tenure reform.

[630] Theunis Roux, Constitutional Populism in South Africa', in Martin Krygie, Wojciech Sadurski Adam Czarnota (eds.), ANTI-CONSTITUTIONAL POPULISM 99 (Cambridge University Press, Cambridge, 2022).
[631] Juanita Pienaar & Jason Brickhill, *Land*, in Michael Bishop and Stu Woolman (eds.), Constitutional Law of South Africa 11-33 (Juta Press, 2013).
[632] The Department of Rural Development and Land Reform, *Land Audit Report Phase II: Private Land Ownership By Race, Gender And Nationality* (November 2017), available at https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf.

[633] Department of Land Affairs, *White Paper On South African Land Policy*, April 1997, available at http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf.

The Mwelase case was concerned with government practices aimed at 1 and 2. In its recent report on state party compliance with the ICESCR, even the United Nations Committee on Economic, Social and Cultural Rights, noted with concern that[634]:

> *"…despite its efforts to ensure land redistribution (and restitution for traditional communities expropriated since 1913), the State party remains significantly below the targets it has set for itself in that regard and that land concentration has in fact increased as white commercial farmers have ceded their farms. It is also concerned that, owing to poor post-settlement support and lack of training in particular, many beneficiaries of land redistribution have failed to improve their livelihoods. It is further concerned that women own only 13 per cent of agricultural land and that they still face discrimination in access to land, owing to traditional inheritance practices. The Committee recommends that the State party accelerate the implementation of the land redistribution and restitution policies and provide the beneficiaries with adequate support to productively use the land and improve their livelihoods."*

Recently, there has been a sustained debate about the failed project of land reform, with political parties like the EEF calling for expropriation of white-owned lands without compensation, and even the government has currently introduced a bill for expropriating land without compensation, which is now calling for public comments. The public debate surrounding the expropriation question also had critics point to the experience of such radical, short-sighted land reform in the early 2000s in Zimbabwe[635], caution against the potential of such a disruptive move to be in violation of international law. Others have argued that it would discourage foreign investment in the country[636], had the potential to threaten food security and negatively affect economic activity and job creation.

The 2019 judgment of the CC came in the midst of this very heated political moment, with the lead claimant, Mr. Bhekindlela Mwelase, having died on 7 November 2018.[637] He did

[634] United Nations Committee on Economic, Social and Cultural Rights, Concluding Observations on the Initial Report of South Africa, UN doc. E/C.12/ZAF/CO/1 (29 November 2018) (paras 61 and 62).
[635] Bekezela Phakathi, *Don't compare SA's land reform to Zimbabwe's, says ad hoc committee*, Business Day, 5 December 2019, available at https://www.businesslive.co.za/bd/national/2019-12-05-dont-compare-sas-land-reform-to-zimbabwes-says-ad-hoc-committee/.
[636] Abdul Hamid Kwarteng & Thomas Prehi Botchway, State Responsibility and the Question of Expropriation: A Preliminary to the Land Expropriation without Compensation Policy in South Africa, 12 Journal of Policy & Law 98 (2019).
[637] Bongani Mthethwa, *Hilton College land decision too late for claimant*, TimesLive 29 May 2019, available at https://www.timeslive.co.za/news/south-africa/2019-05-29-hilton-college-land-decision-too-late-for-claimant/.

not live to see long enough to see the outcome in *Bhekindlela Mwelase v. Director-General for the Department of Rural Development and Land Reform*[638], where the CC validated a wide-ranging set of remedies granted by the land claims court which could have profound implications for the separation of powers in the future remedial jurisprudence of the Court. In Mwelase, the CC was seized with a matter that originated in land reform/restitution proceedings an issue which has captured the public imagination like no other. Added to this was the fact that Irene *Grootboom*, the named claimant in what is arguably the most celebrated of socioeconomic rights cases before the CC[639], died without penniless, and more notably, without a house.

5.2.5.1. Mwelase: Land Claims Court

The legal proceeding in this case was an appeal from the Land Claims Court (LCC)[640], which issued a verdict designating a Special Master for Labour Tenants to assist the Department of Rural Development and Land Reform (DLR) in managing the land claims of labour tenants.[641] The particular case of Mwelase was initiated by a group of claimants with an objective to secure property rights for a land area known as the Hilton College in Kwa-Zulu Natal. As stipulated by the Land Reform (Labour Tenants) Act of 1996, the privilege to possess land could only come to fruition through a comprehensive set of procedures that were fundamentally reliant on the effective execution of departmental activities and processes.[642]

[638] (CCT 232/18) [2019] ZACC 30 (hereinafter Mwelase CC).
[639] Grootboom v. City of Johannesburg (Grootboom).
[640] Mwelase v Director-General for the Department of Rural Development and Land Reform 2017 (4) SA 422 (LCC) (per Ncube AJ) (Mwelase LCC).
[641] Mwelase CC at para 3 (per Cameron J).
[642] Mwelase CC at para 10.

The LCC highlighted that the process had been significantly ignored, data had not been adequately managed, nor could it be provided, applicants had either passed away or relocated due to extraordinary delays, and documents had been misplaced, instigating the reinitiating of the claims procedure.[643] Acknowledging the magnitude and character of the issue, and emphasizing its 'supplementary authorities essential or reasonably related to the execution of its duties, including the capacity to grant provisional orders and injunctions', the court confirmed the assignment of a Special Master for Labour Tenants.[644] The presiding Judge Ncube justified that the Special Master's directive would be defined and would function as a representative of the court to facilitate the Department in processing and adjudicating land claims as per the Act.[645] The Special Master would bear the responsibility of formulating an execution strategy containing a series of distinctly outlined components. The fundamental purpose of the Special Master would be to guarantee efficiency and continuity, offer expertise, and maintain a degree of autonomy from the Department.

[643] Mwelase LCC at paras 5-7.

[644] The Land Claims Court further identified infringements of several segments of the Constitution, including section 195 pertaining to specific principles of public administration, section 33 that protects the right to administrative actions that are legal, reasonable, and procedurally just. It also highlighted breaches of section 237, which mandates the diligent and prompt execution of all constitutional responsibilities.

[645] The elements of the plan, which would then be approved by the LCC, were (Mwelase LCC, para 38, emphasis mine):

a) "an assessment of total number of claims lodged to date, and the number which have not yet been processed and finalized, make a plan which would contain an assessment of claims lodged to date, and the number which have not yet been processed and finalized, available human resources to process such claims, the devising of labour tenant claim resolution targets, determination of the budget necessary during each financial year for carrying out the Implementation Plan, coordination plans to ensure rapid adjudication or arbitration of unresolved claims, as well as a residual power to plan for any other matters which the special master may consider relevant

b) an assessment of the skill pool and other infrastructure required for processing labour tenant claims, and to what extent such skill pool and infrastructure is available within the Department of Rural Development and Land Reform,

c) devising of targets, on a year to year basis, for the resolution of pending labour tenant claims, either by agreement or by referring the claim to the Court,

d) a determination of the budget necessary during each financial year for carrying out the Implementation Plan, including both the Department's operating costs for processing claims and the amounts required to fund awards made pursuant to applications in terms of section 16 of the LTA,

e) plans for co-ordination with the Land Claims Court to ensure the rapid adjudication or arbitration of unresolved claims referred to the Court in terms of section 18(7) read with sections 19 to 25 of the LTA; and

f) any other matters which the special master may consider relevant."

5.2.5.2. The Supreme Court of Appeal

An appeal against the decision from the Land Claims Court (LCC) was directed to the Supreme Court of Appeal, given the LCC's equivalent standing to the High Court according to the Land Reform (Labour Tenants) Act, 1996.[646] The appeal court quickly nullified the initial decision based on six reasons.[647] Firstly, it regarded the nomination of the Special Master as a 'textbook case of judicial overreach'[648], thereby violating the doctrine of separation of powers. Secondly, it warned that the appointment would necessitate a significant surge in the Department's budget, alongside considerable redistributions within budget allocations.[649] Thirdly, the court pointed out that South African law neither provides for a special master role nor dictates rules to govern such a position. Fourthly, it asserted that section 32(3)(b) of the Restitution Act, under which the LCC was established, only authorizes informal or inquisitorial proceedings by the court and does not provide sufficient authority for the appointment of a special master. The fifth ground was that the LCC had not questioned why the Senior Manager, appointed during the preliminary stages of the case by a Negotiation Order, could not adequately address inefficiencies and how the Special Master would expedite or enhance the settlement of claims.[650]

[646] Section 29 of the Labour Tenants Act (LTA) provides that the Land Claims Court—
"*shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power to grant interlocutory orders and interdicts, and shall have all such powers in relation to matters falling within its jurisdiction as are possessed by a provincial division of the Supreme Court having jurisdiction in civil proceedings at the place where the affected land is situated, including the powers of such a division in relation to any contempt of the Court*."
[647] Mwelase v Director-General for the Department of Rural Development and Land Reform [2018] ZASCA 105; 2019 (2) SA 81 (SCA) (Schippers JA; Leach JA, Seriti JA and Willis JA concurring; Mocumie JA dissenting) (Mwelase SCA).
[648] Mwelase SCA at para 51, borrowing the phrase from Mogoeng CJ in Economic Freedom Fighters & others v Speaker of the National Assembly & another 2018 (2) SA 571 (CC); [2017] ZACC 47 at para 223.
[649] Mwelase SCA at para 6.
[650] Mwelase SCA at para 44,45.

The sixth argument was that the Special Master would assume current government department functions, which would result in additional costs for the Department, along with uncertainty over potential disagreements regarding budgetary priorities.[651] Lastly, the referees referenced in section 38 of the Superior Courts Act 10 of 2013, and sections 21 and 28C of the Restitution Act, were determined not to be analogous to the Special Master since their powers are strictly limited and agreed upon by both parties. The court also sought to distinguish this case, given the mandate of the Special Master, from the independent panel of experts overseeing remedy implementation in Black Sash.

It's crucial to note, however, the dissenting opinion of Justice Mocumie. He argued that the majority's considerations did not lean towards justice and equity, given the social realities of labor tenants, the scope of the LCC's powers, the specificity of our judicial methods in interpreting transformative legislations, and the ever-present oversight powers of our courts. This would frame the institution of a Special Master in a manner making it compatible, specific, and appropriate to this context. The justice further warned against meddling with LCC's orders, a court endowed with special powers, expertise, and experience.[652]

5.2.5.3. The Constitutional Court Reverses the SCA's Decision

Justice Edwin Cameron, who once wrote that 'litigation is not the solution to all problems of social justice,'[653] reinstated the order of the LCC on his last day in office. [654] The Constitutional Court heavily relied on the specialized nature of the Court, its expansive remedial powers, and the Department's evident systemic failure to meaningfully process land claims. The Court

[651] Mwelase SCA at para 48,49.
[652] Mwelase SCA at para 70.
[653] Edwin Cameron, *A South African Perspective on the Judicial Development of Socio-Economic Rights*, in Liora Lazarus, Christopher McCrudden, and Nigel Bowles (eds.) REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 338 (Hart Publishing 2014).
[654] Mwelase CC: "… showed failing institutional functionality of an extensive and sustained degree. That cried out for remedy"

maintained that the Land Claims Court had always defined the scope of the Special Master's mandate and held control over its role in remedy formulation. [655]At all stages, the Court was determined to identify the Department's culpability that necessitated the LCC's action. [656] The issue's prominence in the national consciousness also significantly influenced the Court's reasoning.[657] The currently appointed Special Master, having extensive experience in land matters, reportedly shows promising progress based on a consensus with the Department in processing land claims.[658]

In 2006, Geoff Budlender had noted that a court would make a supervisory order where the process of complying with the constitution has taken so long that it is 'inadvisable for the court to assume' that the order will be carried out promptly.[659] This is precisely what occurred in this case, with the Court being very mindful of the sociopolitical conditions in which the judgment was delivered and the salience of land reform in the minds of the broader public. The Court also equilibrates to ensure that the value of the right to speedy administrative justice was vindicated. The apartheid history of South Africa is also of importance here, since the lack of housing in the urban township areas of Johannesburg is a direct result of the inability of farmers who were sharecroppers on white-owned land to acquire any property thereon despite having

[655] Mwelase CC at 59.
[656] Mwelase CC at 40.: "*The Department has manifested and sustained what has seemed to be obstinate misapprehension of its statutory duties. It has shown unresponsiveness plus a refusal to account to those dependent on its cooperation for the realisation of their land claims and associated constitutional rights. And, despite repeated promises, plans and undertakings, it has displayed a patent incapacity or inability to get the job done*"
[657] Mwelase CC at 41: "*South Africans have been waiting for more than 25 years for equitable land reform. More accurately, they have been waiting for centuries before. The Department's failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform. It is not the Constitution, nor the courts, nor the laws of the country that are at fault in this. It is the institutional incapacity of the Department to do what the statute and the Constitution require of it that lies at the heart of this colossal crisis*."
[658] Just Us Under a Tree, *Interview with Michael Bishop (LRC)*, advocate for the petitioners, Podcast, Special (Episode 1: Mwelase w/ Adv Michael Bishop) (2019), available at https://soundcloud.com/103241152/2019-special-episode-1.
[659] Geoff Budlender, *Remedying Breaches of the Constitution*, in Jonathan Klaaren (ed.), A DELICATE BALANCE: THE PLACE OF THE JUDICIARY IN A CONSTITUTIONAL DEMOCRACY: PROCEEDINGS OF A SYMPOSIUM TO MARK THE RETIREMENT OF ARTHUR CHASKALSON, FORMER CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA 85 (SiberInk, 2006).

lived on it for many decades. Therefore, while the Mwelase case did not directly implicate a socioeconomic right, it is fit for inclusion due to the ideas of indivisibility as well as the ways in which it advances the remedial jurisprudence of the CC.

5.3. Factors Influencing the Grant of Complex Remedies in South Africa

However, there are factors other than the nature of the delict which influence the outcome. Some of these are constitutive features of the kinds of delicts I have previously discussed. Here are some of them:

Scale and Severity of the Violation: The severity and scale of the violation is a relevant factor when considering a complex remedy. This can be further disaggregated into further elements such as the importance of the right involved and practical concerns like 'the number of people impacted by the order and whether the delay would result in discomfort, death, or something intermediate.'[660] The significance of delay resulting in serious harm, as in the case with death row inmates in *Sibiya*, should not be overlooked. For instance, in *Black Sash III*, the Court issued a supervisory order due to concerns about the implications of non-compliance with its directives to redo the tender process, primarily focusing on maintaining the rule of law in tender procurement procedures and ensuring the continuous disbursement of social grants upon which millions relied.[661] This logic was further applied in *AllPay 2*, where the Court suspended its invalidity order conditional upon the successful re-conduction of the flawed tender process. In

[660] Geoff Budlender and Kent Roach, *Mandatory Relief And Supervisory Jurisdiction: When Is It Appropriate, Just And Equitable?* 122 South African Law Journal 325, 333 (2005).
[661] Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development & Others [2018] ZACC 36 (CC) ('Black Sash III').

both instances, the dignity and welfare of millions of social payment recipients hung in the balance, thereby heightening the Court's responsibility in its remedial orders.[662]

Clarity of Remedial Steps- The clarity of the steps required to remedy a certain problem is a relevant consideration in granting a supervisory order. Social rights cases involving positive governmental obligations are characterized by the variety of means in which those obligations can be met. Complex remedies can consolidate diverse stakeholders in dialogue to determine the optimal course of action among a multitude of alternatives. It's crucial to emphasize that supervisory orders aim to 1) outline future remedial steps, and 2) assure compliance, and how these two factors interplay would depend on the unique context. Referring to early cases, the South African body of socio-economic rights case law suggests that this was the basis for the reporting requirement (and an implicit retention of supervisory jurisdiction) in the High Court order in *Grootboom*.[663] Recent cases, with their call for greater clarity (potentially achieved by broader stakeholder consultation) on possible remedial steps, have led the Court to demand meaningful engagement in eviction cases. In contrast, the clarity of the remedial steps in *Black Sash*, thanks to the assistance of external bodies like the named applicants, led the Court to retain supervisory jurisdiction, given the potential for introducing new considerations at each stage (a typical polycentric problem) and the shadow of non-compliance.[664]

Conduct of Government Institutions & Officials– The behavior of government and its officials is a key consideration when granting complex remedies. One of the key elements

[662] See AllPay and the order passed in the "*interest of beneficiaries in the uninterrupted payment of social grants, especially that of children*".
[663] Grootboom v Oostenberg Municipality & Others 280 2000 (3) BCLR 277 (C).
[664] Black Sash Trust v Minister of Social Development & Others [2017] ZACC 8, 2017 (3) SA 335.

shaping the creation of the Special Master solution by the Court in Mwelase was the systemic, rather than personal, failure at the core of the Department's inability to process labour tenants' claims. Justice Cameron articulated what seems to be a cohesive standard capable of directing future claimants in demonstrating 'institutional functionality failure of a substantial and prolonged nature' that 'demands remedy.'[665] He further pointed out that the fundamental issue at stake is *institutional*, not *personal*, thereby tempering the LCC's exercise of its discretionary powers.[666] It's crucial to note that the Supreme Court of Appeal's dismissal of the contempt of court[667] claim against the Minister of Rural Development and Land Reform was upheld in the *Mwelase* appeal.[668] *Mwelase* thus diverges from a recent trend in case law of imposing personal costs against public officials, as seen in *Black Sash* against the Minister of Social Development and the seizure of state assets as a reprimand evident in *Linkside*.[669] It remains uncertain how this standard will apply in future litigation, but it's likely that involving public officials as parties to lawsuits in cases of systemic failure will persist, with determinations made on a case-by-case basis.

Extent of diffusion of powers in cooperative government - One recurring challenge in dispersed systems of cooperative government, as in South Africa, is accurately identifying the authority accountable for a particular action.[670] The government is structured as national,

[665] Mwelase CC, at para 69.
[666] Id.
[667] It is curious that in a previous case, Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality [2014] ZASCA 209 para 35, contempt of court is described as a 'blunt instrument […] to address and resolve complex social problems […] and courts should look to orders that secure on-going oversight of the implementation of the order'.
[668] Mwelase CC, at para 77.
[669] Linkside v Minister for Basic Education [2015] ZAECGHC 36.
[670] Stu Woolman & Theunis Roux, *Co-operative government & intergovernmental relations* in Stu Woolman & Michael Bishop (eds.) CONSTITUTIONAL LAW OF SOUTH AFRICA 14-6 (Juta, 2013) (Woolman & Roux, *Co-operative government & intergovernmental relations*).

provincial, and local spheres that are 'distinct, interdependent and interconnected,'[671] with 'a clear hierarchy running from national government to provincial government to local government.'[672] However, perplexingly, the responsibility for public service provision, like housing or sanitation, is primarily determined at the City level with supplementary contributions from provincial and national governments.[673] In contrast, areas like land reform and social grant provision are managed by a central authority. This results in a concentration of responsibility, power, and competency at a national level and reduced levels of dispersion. This is a predictor of the Court's willingness to utilize complex remedies. In *Black Sash*, the inertia, incompetence, and 'extraordinary conduct' of a single federal government agency, SASSA, incited a 'national crisis' that prompted the Court to issue its invasive remedy.[674] The same occurred in *Mwelase* and *Madzodzo*, where autonomous government departments and their ministers were held accountable for their transgressions. Hence, the clearer the identification of the government department or the delict source, the higher the likelihood of an order of an invasive nature. A guiding principle of this sort may align with our intuitions about higher courts' deference to local governance institutions. Yet, it risks favoring certain categories as deserving potent judicial intervention into disputes whose origin can be traced to federal, rather than provincial, government departments.

Institutional Fit & Epistemic Superiority – A consistent theme when adjudicating questions requiring expertise is the epistemic uncertainty inherent in complex social issues that lie at the

[671] See Constitution of South Africa, 1996, section 40.
[672] Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development 1999 (11) BCLR 1229 (T) para 2. Woolman & Roux, *Co-operative government & intergovernmental relations*, at 14–10 note that the 'apparent autonomy and independence' of the local government sphere is 'relative and limited by unequivocally expressed constitutional restraints. Its status is, to a large extent, that of a junior partner in the trilogy of spheres that make up the government of the country'.
[673] Grootboom, paras 39–40, quoted in Woolman & Roux, *Co-operative government & intergovernmental relations*.
[674] Black Sash I, para 1 and para 51.

heart of social rights claims. This reveals itself in two ways. First, superior appellate judicial bodies like the Constitutional Court typically refrain from fact-finding, delegating such tasks to lower courts. Second, epistemic uncertainty often constrains extensive judicial orders due to courts' lack of proficiency in technical subjects.[675] These factors function concurrently in the endorsement of the LCC's ruling in *Mwelase*. By identifying the power endowed to the LCC to 'deliver any order that is fair and equitable,' and analogizing it with its power to invalidate a statute on constitutional grounds, Justice Cameron likely sought to restrict the future application of a remedy as intrusive as the Special Master. The judge emphasized that the power 'isn't an invitation to judicial arrogance' but rather 'a mandate to administer practical justice, as capably and modestly, as the situation necessitates, and it would be improper to downplay the scope of these remedial powers.' Interestingly, Justice Cameron ascribes the LCC's remedial power to the provision enabling it to 'conduct any part of any proceedings on an informal or inquisitorial basis,'[676] instead of connecting it to section 172 of the Constitution, or to the alleged governmental failure to make a decision as outlined in section 6(2)(g) of the Promotion of Administrative Justice Act, 2000. This acknowledges the LCC's epistemic superiority and is indicative of a *diagonal separation of judicial competence*, which respects the relative expertise of some specialized courts in remedying complex issues, and concurrently limits the potential future application of an invasive remedy – unless specifically ordered by a specialist court dealing solely with a certain issue (regardless of its ties to South Africa's apartheid history).

[675] Jeff King, JUDGING SOCIAL RIGHTS 107 (Cambridge University Press, 2012).
[676] See section 32(3)(b), Restitution of Land Rights Amendment Act 84 of 1995.

5.4. Conclusion: Nurturing Complex Remedies in South Africa

This chapter has outlined the emergence, issues and prospects for complex remedies in South Africa. The jurisdiction has been a leader across the world in terms of the kinds of strong remedial action its courts have granted. The chapter has also argued that three phases are distinguishable in the Constitutional Court's social rights remedies jurisprudence. The first was where the Court saw itself as a partner to the ANC's developmental and redistributive agenda. In this first decade following the passage of the 1996 Constitution, the court's decisions marked by deference to governmental decision-making and an awareness of its position as a newly established court. The second phase lasted roughly for a decade thereafter, where the Court introduced a range of proceduralized remedies, which may be partially explained by criticisms from academia and practice circles on its reluctance to hold government accountable and the use of reasonableness as avoidance. The current phases has been characterized by a series of complex remedial orders where the Court has sought to bring experts, civil society, and government in dialogue in some cases, and has appointed experts to fully take over government departments in others. The future of complex remedies in South Africa will hinge on how the ANC performs in delivering on its promises of reforming access to social goods like education, healthcare, housing to make it more accessible, and how the court responds in case it does not.

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6. Complex Remedies in Kenyan Social Rights Litigation

6.1. Introduction

This chapter concerns the use of complex remedies in social rights litigation in Kenya. Kenya is a country that still feels the afterlife of its colonial past, in spite of its independence in 1963. It is a jurisdiction marked by a propensity for strong executive presidential figures, facilitated by post-colonial constitutional forms like the Lancaster House constitutions.[677] Ethnic affiliations among the political elite play a central role in defining the nature of its clientelist politics, and channeling ethnic contestation through democratic means is a central challenge for its constitutional order.[678] The Kenyan Constitution, 2010 was enacted in the wake of waves of post-election political violence and aborted constitution-making processes. It marked a radical commitment to diffusing sovereign authority more equitably from the center to the peripheries.[679] Institutional arrangements were meant to divide power among branches of government, create fourth-branch institutions, and develop an architecture of previously absent rights, such as a range of civil-political and social rights. The Constitution was also meant to redress the historical injustice of the dispossession of land from the native population, facilitated by settler colonialism and exacerbated by the corrupt, clientelist post-colonial state.[680] Several failed constitution-making attempts have also influenced the current constitutional landscape, with political imperatives to address historic injustices taking

[677] Jackton Boma Ojwang, *Legislative Control of Executive Power in Africa: New Insights* VRÜ Overseas Constitution and Law / Legislative Control of Executive Power in Africa: New Insights 421 (1987); see generally, Jackton Boma Ojwang, CONSTITUTIONAL DEVELOPMENT IN KENYA: INSTITUTIONAL ADAPTATION AND SOCIAL CHANGE, NAIROBI (ACTS Press, 1990).
[678] Nic Cheeseman, Karuti Kanyinga, Gabrielle Lynch, *The political economy of Kenya: Community, clientelism, and class*, in Nic Cheeseman, et al. (eds.), THE OXFORD HANDBOOK OF KENYAN POLITICS 2 (Oxford University Press, 2020).
[679] Charles Omondi Oyaya & Nana Poku, CONSTITUTIONAL DEVELOPMENTS AND CONSTITUTION MAKING IN KENYA A QUEST FOR LEGITIMACY 7 (New York, NY : Routledge 2018).
[680] Ambreena Manji, THE STRUGGLE FOR LAND AND JUSTICE IN KENYA 10 (Boydell & Brewer, 2020).

centerstage. These political imperatives were shaped by these failed constitution-making exercises that encouraged (even if they did not empower) vulnerable communities to make demands at the next round of constitution making.

The constitutional design drew inspiration from the recently enacted South African Constitution, with a range of textual devices being inserted into the Kenyan Constitution of 2010 that were responses to a decade of South African constitutional litigation since its transition to democracy in 1994. The 2010 Constitution contained a wide range of social and economic rights[681], with the power given to the judiciary to enforce them through various remedies.[682] The enforcement record of these social rights has been slowed by inadequate resource allocation, as well as a lack of political and bureaucratic will to enforce existing obligations. [683] The relationship between the judiciary and the coordinate branches of government has also been fraught, with courts on several occasions being drawn into electoral conflict[684], and decisions on amendments to the country's institutional structures.[685]

[681] See Article 43, Constitution of Kenya, 2010**. Economic and social rights**
1. *Every person has the righta. to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;*
b. to accessible and adequate housing, and to reasonable standards of sanitation;
c. to be free from hunger, and to have adequate food of acceptable quality;
d. to clean and safe water in adequate quantities;
e. to social security; and
f. to education.
2. A person shall not be denied emergency medical treatment.
3. The State shall provide appropriate social security to persons who are unable to support themselves and their dependents."
[682] See section 23(3), Kenya Constitution, 2010, which gives courts powers to pass 'appropriate relief', including a declaration of rights; an injunction; a conservatory order; a declaration of invalidity; an order for compensation; and an order of judicial review.
[683] Committee on Economic Social & Cultural Rights, *Concluding observations on the combined second to fifth periodic reports of Kenya*, CESCR, UN Doc. E/C.12/KEN/CO of 6 April 2016.
[684] George Obulutsa & Katharine Houreld, *Kenya Supreme Court upholds Ruto's presidential victory*, Reuters, 5 September 2022, https://www.reuters.com/world/africa/kenyas-top-court-rule-disputed-presidential-election-2022-09-04/.
[685] Attorney General v Ndii & 73 others; Akech (Amicus Curiae) (Petition E016 of 2021) [2021] KESC 20 (KLR) (Civ) (9 November 2021) (also known as the Building Bridges Initiative case).

Focusing on the *Mitu-Bell* case[686], and the COVID flight monitoring case[687], the first social rights cases decided by the Supreme Court, the chapter argues that complex remedies arose in Kenyan constitutional litigation in response to structural features like limited state capacity, historical-sociological imperatives like the need to include vulnerable communities in decisions about their future and well-being, and doctrinal openings like the 2010 Constitution's non-exhaustive list of remedial actions that courts can undertake. These openings have been used by Kenyan courts despite there being textual limits on their ability to interfere with resource allocation.[688]

In contrast to some who argue that the interpretive and institutional space for complex remedies has considerably narrowed following the decision of the Supreme Court in Mitu-Bell[689], the chapter shows that the Supreme Court decision only clarifies the scope of such remedies and the proper circumstances of its application. Rather, the Court's decisional trajectory is in line with the actions of constitutional courts in newly established democracies that have to tread a fine line between conserving scarce institutional capital and confronting the government. At the same time, by restricting the involvement of civil society organizations in the process of post-judgment remedial monitoring, the Court failed to create the conditions that allow 'support structures'[690] that are key to developing local capacity for claimants, direct the future development of the law, and foster executive accountability for the faithful

[686] Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021).
[687] Law Society of Kenya v Cabinet Secretary for Health; China Southern Co. Airline Ltd (Interested Party) [2020] eKLR.
[688] See, Constitution of Kenya, 2010, section 20(3): **Application of Bill of Rights**: "…*In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles:*
… the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion."
[689] Ian Mwiti Mathenge, *A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in Mitu-Bell Welfare Society* 6 Kabarak Journal of Law & Ethics 1, 23 (2022).
[690] CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).

execution of courts' judgments. While the use of a complex remedy with the Covid flight monitoring case bodes well for the normative development of such remedies in Kenyan constitutional law, their future depends on the creative use of doctrinal gaps[691], continued linkages between claimants and civil society, and a multi-pronged mobilization mechanism.

The chapter proceeds in five parts. The first part provides an account of the emergence and entrenchment of complex remedies with an eye on constitutional history. The second part identifies the kinds of complex remedial forms seen in Kenyan constitutional litigation. The third discusses the case law where these forms can be seen. The fourth part discusses the conditions that influence the grant of these cases. The fifth part concludes the chapter with a discussion on the future of complex remedies in Kenya.

6.2. Case Selection

In the following sections, I have chosen case law from the High Courts, Court of Appeal, and the Supreme Court of Kenya that best illustrates the characteristics of a chosen complex remedial model. This is in line with the prototypical method for case selection as part of the comparative method used in this dissertation.[692] Since the dissertation uses a limited number of cases drawn from each jurisdiction, the ones selected exhibit critical characteristics of the kinds of remedial forms I have described that are often seen in a large number of cases. Therefore, these prototypical cases "serve as exemplars of other cases with similar characteristics."

[691] Theunis Roux, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005 88 (Cambridge University Press, 2013)
[692] Ran Hirschl, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 256 (Oxford University Press, 2014).

This dissertation focuses on the constitutional order of Kenya following the passage of the 2010 Constitution. Complex remedial forms in social rights cases having the three characteristics of being multi-step, multi-stakeholder, and dialogic, are seen in Kenyan constitutional litigation quite soon after the inauguration of this new legal order but are fewer in number than the other two jurisdictions studied in this dissertation. This dissertation has sought to maintain decisions from apex courts as the central unit of analysis, except with India and Kenya, where there is a discussion of high court cases since the Supreme Court in Kenya has decided two social rights cases so far since the new Kenyan Constitution came into force in 2010.

6.3. The Emergence and Entrenchment of Complex Remedies in Kenya

6.3.1. Change & Continuity in Kenya's New Constitutional Order

Kenya gained independence from British colonial rule in 1963, establishing a democratic framework that consisted of three arms of government: the legislature, the executive, and the judiciary. However, during the era of President Daniel Moi, who held power for 24 years from 1978 to 2002, the judiciary was marred by corruption, political interference, and a lack of independence.[693] This era witnessed a judiciary that often served the interests of the ruling elite rather than ensuring impartiality and justice. The enactment of the 2010 Constitution in Kenya was meant to usher in a new constitutional order and to mark a rupture from the past -

[693] Cornelia Glinz, *Kenya's New Constitution: a Transforming Document or Less than Meets the Eye?* 44(1) Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 60 (2011).

where both the constitution's text and the institutions that were meant to safeguard them[694] – were often found wanting. The 2010 Constitution's provisions on social rights, although extensive, were significantly altered during the drafting process. In Kenya's constitution-making process, the Committee of Experts (CoEK), comprised of members from academia and civil society, served as the primary technical advisory body. Concurrently, the Parliamentary Select Committee (PSCK) was tasked with deliberating and reaching a consensus on contentious issues within the proposed Constitution. Interactions between the CoEK and the PSCK exposed differing opinions that constitution-makers must navigate, often resulting in pragmatic compromises.[695] The CoEK's draft included several provisions that did not make it into the final version, primarily due to the influence of the PSCK. For example, the CoEK draft recognized the right of children to basic healthcare services and the right of persons living with disabilities to access integrated educational institutions and facilities. Section 44 of the CoEK draft also outlined measures for ensuring minority and marginalized groups' reasonable access to water, healthcare, and transport infrastructure. However, the PSCK removed these provisions from the final draft, eliminating the institutional thinking and textual details originally envisioned. Consequently, the opportunity for institutional collaboration was diminished. This underscores the need for complex remedies in Kenya, as they can facilitate intergovernmental cooperation across different levels of government. Given the institutional architecture, constitutional provisions, and historical concerns regarding state capacity, complex remedies become imperative in Kenya.

[694] Commentators point out that while there are examples of rights-safeguarding jurisprudence from the Kenyan judiciary prior to the constitutional architecture, but these are few and far between. See Yash Ghai & Paul McAuslan, PUBLIC LAW AND POLITICAL CHANGE IN KENYA 10 (New York: Oxford University Press, 1970).
[695] Grace Maingi, *The Kenyan constitutional reform process: a case study on the work of FIDA Kenya in securing women's rights*, 15 Feminist Africa 63, 69 (2011).

The devolution of power away from the center has also played a key role in the realization of social rights. The centralization of power has a long and storied history in Kenyan constitutional history – with its antecedents in asymmetric resources being devoted to settler and non-settler (native) areas[696], and the politics of ethnic clientelism and patronage networks. This resulted in vast inequalities in the quality and access to services and basic public goods between urban, semi-urban, and rural areas, while also erecting barriers to inter-governmental collaboration.[697] The constitutional arrangement envisaged in the 2010 Kenya Constitution sought to change that by dividing the country into counties and separating certain spheres of its influence and authority, as distinct and separate from the national government.[698]

Judicial independence is also a key factor in determining courts' relationship with the coordinate branches of government. Successive constitutional arrangements since Kenya's independence in 1963 failed to secure judicial independence from the executive. The issue was a central plank for the push for constitutional reform efforts in the 2000s.[699] The mechanisms for judicial independence filtered through to public perceptions as well. In 2008, when asked if they trusted the judiciary, 42% of Kenyans surveyed by Afrobarometer responded in the affirmative. This number rose to 61% of surveyed respondents who trusted the judicial system in 2011. While the number has since gone down, judges, lawyers, and activists had described the new Constitution as a "shift of paradigm", "a benchmark

[696] Yash Ghai and JWP McAuslan, PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT 3 (1970).
[697] Yash Ghai and Jill Ghai, KENYA'S CONSTITUTION: AN INSTRUMENT FOR CHANGE, (2011) 11; See, Speaker of the Senate & Another v Attorney General & 4 Others (2013) eKLR at para 168: "There is no doubt that Kenya is a diverse and unequal country. The inequalities within groups and between regions are manifested in the class structure of society, ethno-regional differences, rural-urban divides, and gender biases"
[698] Duncan Okello, *Devolution and Kenya's Socio-Economic Development: A Political Economy Inquiry and Emerging Case Law,* in Conrad M. Bosire & Wanjiru Gikonyo (eds.), ANIMATING DEVOLUTION IN KENYA: THE ROLE OF THE JUDICIARY: COMMENTARY AND ANALYSIS ON KENYA'S EMERGING DEVOLUTION JURISPRUDENCE UNDER THE NEW CONSTITUTION 13 (International Development Law Organization, Rome, Judiciary Training Institute (JTI) & Katiba Institute, Nairobi, Kenya, 2015).
[699] Makau Mutua, *Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya* 23(1) Human Rights Quarterly 96 (2001).

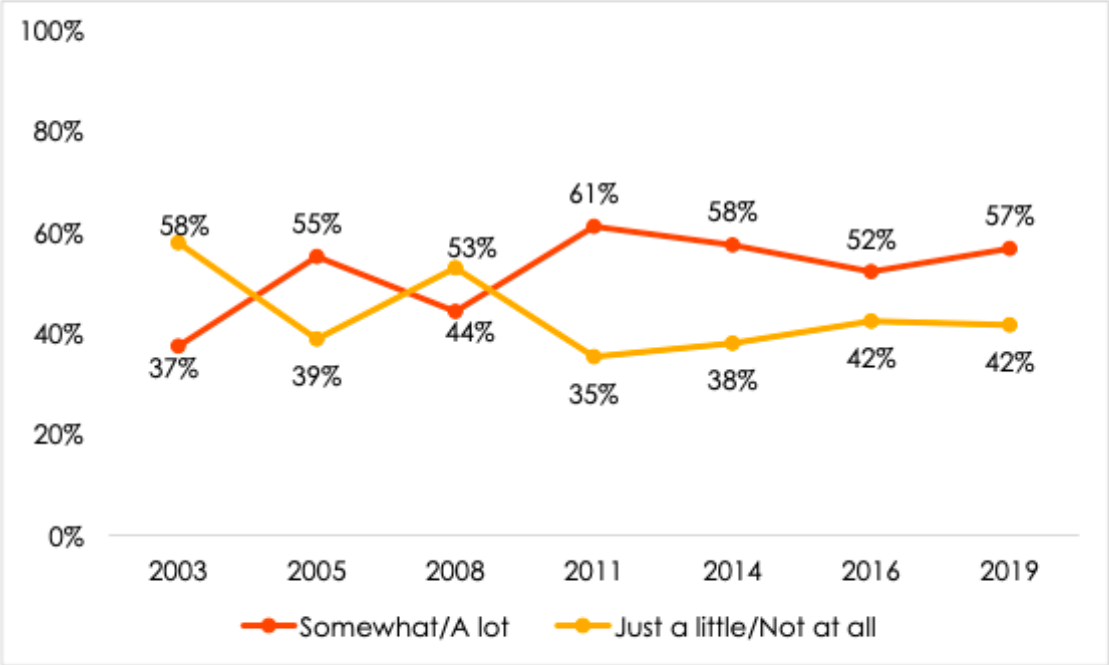
moment."[700] In the period following the enactment of the 2010 Constitution, courts began to be used especially frequently by a coalition of opposition and civil society actors for a range of civil-political rights disputes, most notably election disputes.[701] A set of new rules were also passed at the behest of then Chief Justice Willy Mutunga that also sought to knock down traditional barriers to accessing the courts. The passage of the Constitution of Kenya (Protection of Fundamental Freedoms) Practice and Procedure Rules, 2013 (the so-called Mutunga Rules) eased standing rules to facilitate access to justice to all persons approaching the courts under Article 22 of the Constitution.[702] These formal changes to the legal landscape led to a rise in popular trust in courts (see figure below). The new constitutional order, with its emphasis on erecting a supporting infrastructure beyond a simple declaration of rights, helped precipitate complex remedial forms seen in a range of cases discussed below that have mainly been used in housing rights/forced eviction disputes and cases of large scale misgovernance of public authorities.

[700]Simon Templer Kodiaga and Paul Kamau, *Most Kenyans seek – and find – justice outside formal court system,* Afrobarometer Dispatch No. 442, 16 April 2021, https://www.afrobarometer.org/wp-content/uploads/2022/02/ad442-kenyans_seek_and_find_justice_outside_formal_courts-afrobarometer_dispatch-16april21.pdf.

[701] Marie-Emmanuelle Pommerolle, *The 2017 elections and electoral (in)justice (2015–2017),* in THE OXFORD HANDBOOK OF KENYAN POLITICS 2 (Oxford University Press, 2020).

[702] Interestingly, these rules were made by the Chief Justice in the exercise of the authority conferred on him by Article 22(3) read with Article 23 as well as Article 165(3) (b) of the 2010 constitution.

Figure 2: Popular trust in courts of law | Kenya | 2003-2019



Respondents were asked: *How much do you trust each of the following, or haven't you heard enough about them to say: Courts of law?*

Figure 1. Popular Trust in Courts of Law in Kenya (2003-2019)[703]

6.3.2. The Textual Architecture of Remedies in Kenyan Constitutional Litigation

The 2010 Kenyan Constitution exemplifies a fourth-wave constitution (see Chapter 3): it provides an extensive Bill of Rights, with many provisions modelled on the ICESCR and the South African Constitution. As indicated earlier, the drafters of the 2010 Kenyan Constitution also learnt from South Africa that judicial interference in SER cases affects budget allocations, explicitly sought to limit inter-branch conflict between courts and the executive.[704] The provision is also a nod to the institutional incapacity of courts in deciding social rights cases

[703] Simon Templer Kodiaga and Paul Kamau, *Most Kenyans seek – and find – justice outside formal court system,* Afrobarometer Dispatch No. 442, 16 April 2021, https://www.afrobarometer.org/wp-content/uploads/2022/02/ad442-kenyans_seek_and_find_justice_outside_formal_courts-afrobarometer_dispatch-16april21.pdf.

[704] Article 20(3)(c), Constitution of Kenya, 2010.

and makes the case for participatory remedial forms of the kind discussed in this dissertation stronger.

The remedial powers of courts are contained under Article 23, which grants them authority to hear and determine applications pertaining to the infringement of a right or fundamental freedom in the Bill of Rights. While the provision lists declaratory, injunctive, conservatory, invalidity declarations, compensation orders and judicial review orders, what's important to note is that the list is not exhaustive and permits courts the discretion to fashion 'appropriate relief ' it deems fit in administering corrective measures. Additionally, the High Court, the primary forum for constitutional litigation, has supervisory powers over lower courts granted to it in appeal under Article 165. Under this provision, the High Court has 'broad rights-based review and remedial powers over all actions and inactions of the State'.

Let us consider each of the available remedial options for Kenyan courts. Declarations of rights are meant to set out or clarify the scope of the right without necessarily providing an attendant remedy – which is a problem in cases of SER where it is often the state that is required to do something to remedy a violation affirmatively.[705] Second, declarations of general invalidity or incompatibility with the Constitution also do not leave petitioners with a remedy. The *third* category of remedial options - damages – is potentially a potent tool for governmental accountability and victim redress. While terms and conditions for the grant of damages for SER violations in case of private conduct have been clarified in *Musembi*[706], there exists a lacuna in respect of whether and to what extent SER violations by public authorities invite the award of constitutional damages.

[705] Kent Roach, TWO TRACK REMEDIES, at 425.
[706] William Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR.

Further, the systemic nature of SER violations also implies that damages may not necessarily cover the full range of affected parties, and divert scarce resources from more complex remedies that entail positive state obligations, while also creating incentives for litigation that undermine participatory, complex remedies that take longer to implement. The *fourth* category is interdicts - which form the textual kernel for most complex remedies – and requires a party to do or refrain from doing something. Interdicts may be interim or final. What are the considerations at play when deciding whether to grant one? Kenyan courts are meant to consider the existence of a prima facie right, whether the court is of the impression that an irreparable harm would accrue to the petitioner if the interim interdict were not approved, the balance of convenience between the two parties, and whether any other remedy is present for the petitioner to access.[707] The next sections consider structural interdicts, which bear many elements of complexity as identified in this dissertation

In the 2020 case concerning the preparation of a plan to address the emerging Covid-19 situation in Kenya, the High Court in Nairobi defined a structural interdict, which has some elements of complexity as identified in this dissertation, as being recognized by Article 23 of the 2010 Constitution.[708] It stated that these orders require the violator to rectify the breach of fundamental rights under court supervision and that structural interdicts provide 'an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders.'[709]. It also identified five elements common to structural interdicts[710]:

[707] Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR; Barclays Bank of Kenya Ltd v Banking, Insurance & Finance Union (Kenya) [2019] eKLR.
[708] Law Society of Kenya v Cabinet Secretary for Health; China Southern Co. Airline Ltd (Interested Party) [2020] eKLR
[709] County Government of Kitui v Ethics & Anti-Corruption Commission (2019) eKLR.
[710] Ibid, at para 36.

- ‘The issuance of a declaration by a court identifying how the government has infringed an individual or group’s constitutional rights or otherwise failed to comply with its constitutional obligations.
- the Court mandates government compliance with constitutional responsibilities.
- Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government’s action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached.
- Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the conditional infringement and whether it brings the government into compliance with its constitutional obligations. Consequently, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several ‘check in’ hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound.’

Even though the case was decided during the pandemic, the above shows that courts consider multi-step orders to be a part of Kenyan constitutional jurisprudence. While that may be the case, the involvement of civil society and other experts in designing remedies and monitoring

judgment implementation has come under greater scrutiny and doubt. In the next section, I discuss the complex remedial models seen in Kenyan cases.

6.4. Complex Remedial Models in Kenya

The resolution of SER disputes that are polycentric and sensitive to information and expertise requires courts to act in the two modalities seen in Kenya below. The judicial role in such cases is a fraught one; and one where collaboration between parties, the government, and civil society is often crucial. The following are the kinds of complex remedial models we see in Kenyan courts:

- **Report Back to Court Model**: In this type of complex, one or more of the parties to the dispute are asked to return to the Court with further information for the judges, or to return to court to devise a final remedy pending an interim declaration. The claimants may need additional time to formulate responses to judges' queries and more time to gather evidence. This kind of model permits the fulfilment of the three functional desiderata of social rights remedies: redress, ongoing compliance, and future deterrence.[711] In the sections below, I outline how this is the most common model for complex remedies in Kenya, using two cases: the *Communications Authority Case* and the *Covid* decision.[712]
- **Expert Remedial Design:** SER cases often involve ambiguity about what the best way forward for the resolution of a legal dispute is likely to be. This is mainly because courts are

[711] Kent Roach, REMEDIES FOR HUMAN RIGHTS VIOLATIONS: A TWO-TRACK APPROACH TO SUPRA-NATIONAL AND NATIONAL LAW 2-5 (Cambridge University Press, 2021)
[712] See also Michael Mutinda Mutemi v Cabinet Secretary Ministry of Education [2015] eKLR http://kenyalaw.org/caselaw/cases/view/116213.

not institutionally well-suited to decide such disputes without inputs from the affected parties and experts. Consequently, experts come to be involved in the design of remedies. Take for example the *Muthurwa* ruling discussed in the sections below, where Yash Ghai was permitted to be joined as an 'interested party' to the eviction dispute due to his expertise along with Priscilla Nyokabi, herself a former leader in the informal settlers justice movement. Prof. Ghai, a noted constitutional law scholar who had been heavily involved with the drafting of the Kenyan Constitution, put forth in his affidavit to the High Court that the parties to the dispute be 'allowed to negotiate in order to settle the issue amicably' and that the 'Court provide a basic framework of law and policies to ensure that the basic needs of the residents of Muthurwa Estate are met and that this Court has an obligation to enforce the provisions of the Constitution to their benefit.'[713]

- **Civil Society Involvement in Monitoring Remedy**: In this kind of a remedy that has been seen in some of the housing and eviction cases in Kenya, civil society members are involved in the monitoring of remedies granted by courts. In jurisdictions like Kenya where there are low levels of political awareness and organizational capacities, and where the affected communities may not have the benefit of being politically powerful (and therefore having media attention on them), the presence of civil society can create some pressure for the governmental authorities to ensure that human rights and constitutional standards are adhered to when implementing a court-ordered remedy (usually either an agreed-upon eviction or resettlement). An example of this is seen in *Kepha Omondi Onjuro v Attorney General*[714], where the High Court at Nairobi was dealing with an eviction whose legal validity had been challenged since it had not provided adequate notice and no alternate accommodation

[713] Satrose Ayuma at para 29.
[714] [2015] eKLR

eviction. While permitting the eviction to go ahead, the Court also issued an accompanying structural interdict that required the 'full participation of stakeholders including segment committees, Pamoja Trust, the Social Economics and GeoSpatial Engineers, Muungano wa Wanavijiji as well as Commissioners from the Kenya National Commission on Human Rights'.[715] The presiding judge in the case, Justice Odunga, in another case challenging the eviction of persons from an open market in Nairobi without providing alternate accommodation, also ordered an eviction to go ahead as planned but required the presence of members of Kenya National Human Rights Commission to ensure that a number of other constitutional requirements, such as the principles of human dignity, were adhered to during the process .[716]

The next sections consider the models as seen in different cases, starting with the *Mitu-Bell Welfare Society* case on evictions and the heavy involvement of civil society in the implementation of the Court's remedy.

6.4.1. Expert Remedial Oversight Model: Evictions & the Mitu-Bell Welfare Society Cases

"They came with armed police who stood by. There is nothing we could have done. They did not tell us where to go next or where we can get our next meal,"

"There was no written notice"

- *Kepher Otieno, resident of Kyang'Ombe slum, which was demolished as part of the*

[715] Id. At para 150.
[716] *Matter of Illegal Demolition of Residential Houses and Business Premises Erected on Ngara Open Air Market Nairobi and in the Matter of Francis N. Kiboro* [2015] eKLR

same eviction drive as the one in the Mitu-Bell case [717]

In a 2020 book, the scholar Ambreena Manji recounted how the history of Kenya was marked by spatial injustice in its cities.[718] While prime parts of the city of Nairobi were inhabited primarily by white colonialists, the city's black population would only be able to inhabit designated parts and only be permitted to live in informal settlements. These settlements were often arbitrarily destroyed, motivated mainly by a desire to unleash violence and keep large parts of the population in a state of physical and psychological precarity.[719] Spatial disparities that are products of the afterlife of colonialism and historical forces are what unites the jurisdictions under study in this dissertation. What sets them apart is what came thereafter, and how the state and private parties have worked to remedy or further entrench the exclusionary practices that defined the colonial and apartheid eras.

Originally, unauthorized settlements sprang up because Africans were displaced by the arrival of European settlers. The Europeans expropriated large tracts of land around Nairobi and did not allow Africans to enter the city without a permit. Basic, temporary accommodation was only provided to those Africans – mostly men – who were formally employed. Africans were viewed as temporary sojourners in urban areas. After achieving independence in 1963, Kenya experienced a phenomenal increase in urban populations and demand for housing. This was due to several factors: continued rural-urban migration, population growth due to

[717] Muungano Net, *Thousands Left Homeless After Kyang'ombe Demolition*, 24 November 2011, https://www.muungano.net/browseblogs/2011/10/24/thousands-left-homeless-after-kyang%E2%80%99ombe-demolition
[718] Ambreena Manji, THE STRUGGLE FOR LAND AND JUSTICE IN KENYA, ch. 4 (Boydell & Brewer, 2020)
[719] Anders Ese, Kristin Ese, THE CITY MAKERS OF NAIROBI: AN AFRICAN URBAN HISTORY, xii (Routledge, 2020).

improvements in healthcare services, the expansion of city boundaries, and the relaxation of influx controls.[720]

6.4.1.1. The Airport Evictions: Jomo Kenyatta & Wilson Airport

The Mitu-Bell Case started when notices of eviction were run in local Nairobi newspapers on 15th September 2011 aimed at residents of a number of slums in and around two airports in the city – the Jomo Kenyatta Airport and the nearby privately owned, publicly accessible Wilson Airport. The residents of these slums, it was alleged, had one week to move. The petitioners – the Mitu-Bell Welfare Society, an association of residents of Mitumba village, one of the affected slums – sought and were granted a conservatory order on 22 September 2011.[721] Their living quarters had already been demolished on 19 September, three days before the expiry of the seven-day notice period.

Unlike the South African Constitution[722], there is no constitutional bar on evictions without a court order in the Kenyan legal order. While there are Eviction Guidelines[723], there is no statutory instrument that prevents evictions. There also exists legislation that permits port, railway, and airport authorities to remove any structures that obstruct their operation.[724] The

[720] Winnie Mitullah & Kivutha Kibwana, *A Tale of Two Cities: Policy, Law and Illegal Settlements in Kenya*, in Edesio Fernandes and Ann Varley (eds.), ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES 196-199 (Zed Books, 1998).
[721] Mitu Bell SC Judgment at para 56.
[722] Section 26(3), Constitution of South Africa, 1996.
[723] Land Reform Transformation Unit, *Ministry of Lands, Republic of Kenya, Eviction & Resettlement Guidelines*, 2009, https://www.refworld.org/pdfid/5b3e2eb44.pdf.
[724] See for example, Kenya Airports Authority Act, 1991, Kenya Ports Authority Act 1978, and Kenya Railways Corporation Act Cap 1978.

Ministry of Lands itself has outlined how courts are rarely involved in the removal of informal structures[725]:

There are hardly any instances where the Corporations have found it fit to apply to the High Court for orders of demolition when faced with occupation of land especially by the poor. The practice is always to use either their own officers or the provincial administration or regular police to clear the settlements.

Mitu-Bell is the first of a pair of cases on SER to be decided by the Supreme Court of Kenya in 2021, the other being *William Musembi v Moi Education Centre*[726]. The case involved land occupied by the village's residents, with their children attending school nearby at Mitumba High School. Most of them were led to believe that Scholars have noted the combination of forces such as land grabbing and irregular allotments of public lands that have led to thousands of Kenyan citizens believing incorrectly that they had title to the land.[727]

6.4.1.2. The High Court Judgment

Following to the demolitions being carried out in Mitumba village, the Mitu-Bell Welfare Society applied to the High Court at Nairobi for a declaration that the evictions that had been carried out were violative of the petitioner's right to housing. The High Court held that the evictions were orchestrated in the absence of a provision of alternate housing to the residents was in contravention of Section 43 of the Kenyan Constitution. It also was notable for the use of a complex, supervisory remedy where a civil society organization that had assisted the petitioners were asked to work with the government to formulate a plan for carrying out the

[725] Land Reform Transformation Unit, *Ministry of Lands, Republic of Kenya, Eviction & Resettlement Guidelines*, 2009, https://www.refworld.org/pdfid/5b3e2eb44.pdf.
[726] Petition No.2 of 2018 [2021] eKLR.
[727] Ambreena Manji, *The grabbed state: lawyers, politics and public land in Kenya* 50(3) Journal of Modern African Studies 467 (2012).

rest of the evictions in and around Wilson Airport[728]. The Court retained jurisdiction, and asked that the parties come back to it within 90 days with a plan for resettlement and relocation, and Pamoja Trust was to be intimately involved in the process.

6.4.1.3. Reversal by the Court of Appeals & Partial Upholding by the Supreme Court

On appeal, the Court of Appeals pushed back against the decision of the High Court, arguing that the 2010 Kenyan Constitution did not envisage structural remedies and that the High Court had erred in involving members of civil society by permitting them to suggest the final remedy and to involve them in the monitoring of the implementation of the judgment. The Court also held that the doctrine of functus officio barred the High Court from retaining jurisdiction and requiring the Pamoja Trust to oversee the eviction and ensure its compatibility with the requirements it laid out.

In 2021, the Supreme Court decided the case on appeal and held that structural, complex remedies which involved petitioners other than the parties were permitted within the bounds of the Kenyan Constitution. At the same time, it remanded the case back to the Trial Court (of first instance) to determine the remedy since it held that the eviction was in violation of a court order and the requirements of the Constitution on access to alternate housing. It said that a range of remedies was available such as "compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction (U.N Guidelines), the

[728] See Amnesty International, *We Are Like Rubbish In This Country' Forced Evictions In Nairobi, Kenya,* 2013, http://www.amnestyinternational.be/IMG/pdf/rapport_kenya.pdf

provision of alternative land for settlement".[729] The Court used a novel concept of how to conceive of encroachments onto public land (but not private land) as giving rise to a set of presumptive rights against eviction, even in case of land invasions, holding that:

"*The right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. This right derives from the principle of equitable access to land under Article 60 (1) (a) of the Constitution. Faced with an eviction on grounds of public interest, such potential evictees have a right to petition the Court for protection*" (para 152).

These holdings move forward the doctrinal complexity necessary for dealing with land and the kinds of political economy questions that irregular settlements pose. The Court stated that structural interdicts could be used in Kenyan jurisprudence under very specific circumstances (upholding the High Court position) ("*orders must be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a Constitutional or statutory mandate to enforce the order. Most importantly, the Court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters of policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no Constitutional or statutory mandate to enforce them*", para 122). The Court also said that the use of non-state parties for remedy formulation and oversight would not be permissible, holding that the High Court ought not to have involved non-state actors, who were not parties to the suit. It would be different if the order had been directed to the relevant state agencies, even if they were not parties to the suit." para 156). This indicates a pushback against the kinds of CSO participation in SA and India.

[729] Mitu Bell at para 152.

Constitutional and social change absent formal amendment is only partially reliant on judicial action: 'support structures' comprising members of the legal profession and well-organized social movements play an additional crucial role. [730] These support structures enable courts to engage with their reactive characteristic by bringing cases to court, drawing public attention to issues, and lowering coordination costs among various actors in the judicial process. Reimagining legal doctrine around constitutional remedies as one of the limbs of social change through this lens helps pay attention to the *supply side* (comprising litigants, litigant organizations, and ideation) in addition to the *demand side* (comprising courts and judges).[731] Organizations like Pamoja Trust - a non-governmental Kenyan organization that was set up in 2000 to help urban poor communities organize themselves to oppose demolition and forced evictions, and help poor, informal settler communities develop their own plans to get adequate housing and basic services. When the Trust was established, the government was supporting or permitting many "slum" demolitions and evictions. But with a decrease in these demolitions, the trust has focused more on supporting low-income communities to improve housing and basic services, working in partnership with Muungano wa Wanvijiji, the urban poor federation in Kenya.[732] This chapter has outlined several instances where CSOs have played an important role in helping challenge government actions by assisting in filing, information provision, remedial formulation, and judgment implementation oversight. As the civil society sector dedicated to urban housing and development displacement has developed, its ability to challenge the government and private in service of a 'development' agenda has deepened. This lends credence to the support structure thesis, which may be weakened in some ways with the bar on post-judgment supervision as envisaged by Mitu-Bell.

[730] CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).
[731] Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement* 36(2) Law & Soc. Inquiry 516, 520 (2011).
[732] Jane Weru, *Community federations and city upgrading: the work of Pamoja Trust and Muungano in Kenya* 16(1) Environment & Urbanization Volume 147, 150 (2004).

The *Satrose Ayuma* case[733] arose out of a series of evictions that were to take place in the heart of Nairobi in the Central Business District area. The applicants in the case were living in a set of properties known as the Muthurwa estate owned by the Kenya Railways Retirement Benefits Scheme when they discovered that the premises were to be auctioned for redevelopment. To this effect, they received eviction notices at the same time. However, even before the expiry of the 90 day period, demolitions had begun in some parts of the property, with their water supply also having been disconnected, many of their toilets demolished and the removal of the main fence of the property.[734] It is important to note that the *Muthurwa* case and *Mitu-Bell* were different in that while the latter involved an 'illegal'/unauthorized settlement[735], the residents in Satrose were tenants who paid rent, but where the landlord wished to sell the property and started eviction proceedings in collaboration with police and other local authorities prior to the elapse of the notice period.

Justice Lenaola of the Nairobi HC acknowledged that Kenya Railway and its Retirement Benefit Scheme were the registered owner of the suit property and sought to decide whether they were entitled to evict the petitioners from the Muthurwa estate, and if so, whether such eviction/threatened eviction violated or would violate their fundamental rights. The Court had to decide the perennial conflict between property rights and the housing rights of the petitioners. While elaborating on the nature, content and scope of the right to housing, the court discussed the existing international standards drawn from the ICESCR on adequate housing and evictions (and resettlement) and how parliament had failed to adopt them. It

[733] Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme
[734] Id. at para 2.
[735] Within the meaning of the Land Laws (Amendment) Act, 2016

finally held that the actions of the Kenyan Railway authorities violated the petitioners' right to housing.

The Court in this case castigated the Kenyan authorities for failing to establish a legal regime that could govern evictions that was grounded in global norms, including the UN Guidelines and those in pursuance of Kenyan ICESCR obligations. The Court spelled out that these guidelines (that have now been enacted through the Land Laws (Amendment Act) 2016[736]) would need to enhance existing protections against involuntary evictions (that at the time were drawn from case law), guarantee land tenure security, legitimize unregulated settlements, and oversee slum improvement procedures. The case is also notable for the Court, through a supervisory order, retaining jurisdiction over the case and requiring that the government come back to court to apprise it of the steps taken to put in place a comprehensive policy for evictions and resettlement. Moreover, the case was also one of the first in Kenya to order 'meaningful engagement' (of the kind primarily seen in South African eviction cases) between the affected parties on how the affected communities were to be resettled following their evictions and asked the parties to return to court after two months following engagement. The reference to meaningful engagement is an outlier and this kind of a remedial formulation has not been seen in Kenya since.

In addition to interventions by Prof. Yash Ghai and Priscilla Nyokabi, the case also saw intervention as an interested party by then Special Rapporteur on Adequate Housing Miloon Kothari, whose affidavit pointed to the lacunae in the government's lack of a policy regarding forced evictions that failed to account for principles of non-discrimination and gender

[736] See The Land Laws (Amendment) Act, 2016 No. 28 of 2016, Kenya Gazette, http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2016/LandLaws_Amendment_Act_28of2016.pdf.

equality. Kothari also stressed the importance of a comprehensive state policy that would confront the issues of forced evictions, security of tenure, legalization of informal settlements and slum upgrading and to ensure consultation with those affected at the earliest stages of planning in order to protect their right to participate in decision making.[737] With the help of organizations like the Habitat International Centre and the Housing and Land Rights Network, the residents of the neighborhood carried out a survey to determine what the pecuniary loss suffered by the residents was.[738] The amount that they determined would guide the private negotiations that the Court stated would need to be carried out between the developer and the residents to determine the quantum of compensation to be given to them (a fact that is not captured in the Court records). The *Satrose Ayuma* case shows how complex remedies may help evictees gain knowledge of their rights and help level the playing field between either the state or private parties which often bring the monopoly on violence that is (in theory) the exclusive prerogative of the state – to bear on evictees.

[737] Ayuma, at para. 46-50.
[738] Dolores Koenig, *Urban Activists and DIDR*, in Irge Satiroglu, Narae Choi (eds.) DEVELOPMENT-INDUCED DISPLACEMENT AND RESETTLEMENT: NEW PERSPECTIVES ON PERSISTING PROBLEMS (Routledge 2015)

6.4.3. Report Back to Court Model: The Covid Flight Monitoring Cases

The earliest example of a complex remedial order was in *Communications Commission of Kenya (CCK) v Royal Media Services Limited*.[739] In the case, there had been a dispute on the cancellation of the petitioner's bid to receive a Broadcast Signal Distribution (BSD) license and its subsequent award to Pan African Network Group Kenya Limited (PANG), a foreign-owned company. In the case, the Court cast doubt on the independence and impartiality of the CCK, and the way it violated the terms of the Constitution as a result. These petitions were initiated in the context of Kenya's shift from analog to digital broadcasting. The appellants, comprising local media corporations such as Royal Media Services Limited, Nation Media Group Limited, and Standard Media Group Limited, sought to draw the Court's attention to the arbitrariness and lack of reasoned decision-making by CCK in this bidding process. The remedial action sought was a nullification and redo of the entire tender process. In response, the Court's structural interdict directed the Communications Authority to evaluate the petitioners' BSD license application within a 90-day timeframe. Additionally, the order required that the CCK were to establish schedules for the digital transition in collaboration with the involved parties in the lawsuit, in view of the internationally set Analogue Switch-off Date on June 17, 2015.

In the *Law Society of Kenya* case[740], a case that originated at the height of the pandemic, the petitioners challenged the decision of government to allow flights from China following the outbreak of COVID-19, arguing that such measures threatened the constitutional right to life

[739] Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others, Petition 14 of 2014, Ruling of the Supreme Court (2014) eKLR.
[740] Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 others; China Southern Co. Airline Ltd (Interested Party) [2020] eKLR.

since the WHO had designated China as the epicenter of the COVID-19 disease. Despite this not being a social rights case, it is relevant to discuss here since it shows that Kenyan courts continue to grant complex remedial orders. By allowing flights, the Respondents exposed citizens to the threat of the deadly disease of coronavirus. On the contrary, the Respondents contended that necessary measures were in place to avert any incidences of disease outbreak and the spread. In the court's ruling, Makau, J. emphasized the necessity for a structural interdict to compel the first Respondent to present a plan of action detailing the appropriate responses towards the management and control of the outbreak of COVID-19 in the country. These two cases illustrate where courts are faced with a situation where the Court saw fit to impose complex remedies, where parties were asked to come back to it to file regular reports, thus fulfilling the normative desiderata of redress, compliance and non-repetition.

6.5. Factors Influencing the Grant of Complex Remedies in Kenya

1. Textual basis: Kenyan judges have ordered complex remedies which have involved an element of post-judgment supervision or remedial design suggestions through a reading of Kenya's constitutional remedial provisions. It is also instructive here to examine the conditions under which amicus curiae are admitted in Kenya. Rule 19 of the Supreme Court Rules, 2020[741], passed by the Chief Justice and President of the Supreme Court, also lays down criteria for admitting persons as amicus, often a part of remedial design or post judgment supervision.

[741] See **Rule 19:** Participation of friends of the Court: (1) The Court may on its own motion, or at the request of any party, permit a person with particular expertise to appear in any matter as a friend of the Court.
(2) The Court shall before admitting a person as a friend of the court, consider—
(a) proven expertise of the person;
(b) independence and impartiality of the person; or
(c) the public interest.
(3) Any fees or expenses incurred by a person appointed by the Court as a friend of the court on its own motion, shall be paid out of the Judiciary Fund, in accordance with a scale determined by the President.
(4) An application to be admitted as an amicus or a friend of the Court shall be done within 7 days upon filing of a response in any proceedings before the Court.

Subsequent decisions of the judiciary[742] have clarified certain principles that the appointment of amici should be guided by. These rules influence the design of remedies when experts are joined to proceedings of their own wish or are asked for assistance in designing remedies as seen in the cases discussed here. Kenyan judges have also sought to include the participation of parties to cases on evictions by a reading of Kenya's international obligations[743] and its principles of governance which includes a right to participation.[744]

2. Judicial awareness of structural remedies: Constitutional cultures and legal consciousness (among members of the bar and the judiciary) plays an important role in helping us understand the conditions under which structural remedies are granted. The institutional changes that were brought about to the Kenyan judiciary since 2002 shielded them from executive influence[745], and also introduced a range of training mechanisms as well as travel to other jurisdictions to see best practices.[746] Organizations like the Katiba Institute have also played an important role in providing training to judicial officers and organizing events that

[742] Attorney General v Ndii & 73 others; Akech (Amicus Curiae) (Petition E016 of 2021) [2021] KESC 20 (KLR) (Civ) (9 November 2021), which stated with reference to amicus curiae or intervenors, that "a) their role be limited to legal arguments, b) the relationship between the parties be guided by the principle of neutrality, and fidelity to the law, c) that their briefs be made timeously, d) that briefs only 'address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.', e) that in case of allegations of bias on the part of the amicus by either party, that an opportunity to be heard to be provided."

[743] The Supreme Court of Kenya in the Mitu-Bell Case distinguished between 'general principles of international law', 'treaty obligations' and 'soft law' which could be used to interpret the Constitution. It held that while the first two would form binding law for the purpose of Articles 2(5) and 2(6) of the Kenyan Constitution of 2010, the soft law could be used to interpret the Constitution. It stated that there was 'nothing wrong in a court of law making reference to the Guidelines (passed in pursuance of Article 21 of the International Covenant on Economic Social & Cultural Rights) as an interpretative tool aimed at breathing life into article 43 of the Constitution.' Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021), at para 143.

[744] See Article 10, Kenya Constitution, 2010; Republic v Cabinet Secretary Ministry of Transport and Infrastructure & 3 others ex parte Francis N. Kiboro & 198 Others [2015] eKLR, para 40.

[745] Under the 1992 constitution, the judiciary was categorized as a governmental department working under the authority of the Attorney General.

[746] See Article 172 (1)(d) Constitution of Kenya, which mandates the Judicial Service Commission (JSC) to "prepare and implement programmes for the continuing education and training of judges and judicial officers". In pursuance of this obligation, the Kenya Judiciary Academy (KJA) was established in 2008, initially by administrative action by the then Chief Justice of the Republic of Kenya and given a legal mandate to provide judicial education and training for judges and magistrates. Kenya Judicial Academy, *About Us*, https://www.kja.go.ke/?page_id=1306.

bring together academics, practitioners, and members of the bar and bench on topics like strategic litigation.[747] The Court of Appeal in Kenya overruled[748] an order of the High Court at Nairobi which had ordered a structural remedy with post-judgment supervision by a combination of the court itself and a civil society organization. It did so primarily on the grounds that structural interdicts were not envisaged within the provisions of the Constitution and there was no precedent for its use. The decision was overturned on appeal by the Supreme Court of Kenya, holding that Kenyan constitutional jurisprudence had not seen these kinds of complex remedies before. Of course, this was later overturned by the Supreme Court, but it shows how awareness of certain remedial forms through continuous judicial education can be crucial in shaping jurisprudence in Kenyan courts.

3. Likelihood of government non-compliance with order: The previous conduct of the government is a critical factor in the grant of a complex remedy. Legislative or bureaucratic inattentiveness, incompetence, or inertia may motivate courts in granting a structural remedy.[749] Legislative and bureaucratic blockage or blind spots, or burdens of inertia can also be a motivating factor in these kinds of cases.[750] Judges will be likelier to order complex remedies where they believe that principles of comity between the branches of government have been breached, often through a display of bad faith or lack of best efforts to comply with previous orders. [751] In the *Communications Commission of Kenya* case[752] - the first in the pantheon of Kenyan constitutional law to have granted structural, complex remedies, the Court

[747] Katiba Institute, *Katiba Institute, Open Society Initiative Host Litigation Course in Nairobi*, 7 November 2022, https://katibainstitute.org/katiba-institute-open-society-initiative-host-litigation-course-in-nairobi/.
[748] Mitu-Bell Welfare Society v Kenya Airports Authority (Civil Appeal No. 218 of 2014) (Court of Appeal).
[749] Kent Roach and Geoff Budlender, *Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable* 122 South African Law Journal 325 (2005).
[750] Rosalind Dixon, *The Core Case for Weak-Form Judicial Review* 38 (6) Cardozo Law Review 2208, 2209 (2018).
[751] Gaurav Mukherjee & Juha Tuovinen, *Designing remedies for a recalcitrant administration*, 36(4) South African Journal on Human Rights 386 (2020).
[752] SC Petition No.14 of 2014.

was motivated by the fact that the state authority had already ruled in favour of the Pan African Network Group Kenya Limited, a decision that the Court said was motivated by CCK's lack of independence and that there was a likelihood of non-compliance due to a looming deadline for digital migration. Similarly, in *Kepha Omondi Onjuro*[753], in which the Court ordered the eviction of certain slum-dwellers be carried in the presence of civil society members, its primary concern was with non-compliance with international human rights standards in the process of evicting.

4. Scale of the Problem: Where a large class of petitioners may be affected by a government act or omission, courts resort to consequentialist categories of reasoning in granting complex, structural orders. This becomes especially heightened in instances where vulnerable groups may be adversely affected by a continuing breach of a government obligation. For example, the Constitutional Court of South Africa ordered a reconduct of the tender process to be overseen by an expert panel for finding a suitable vendor for fulfilling social grant payment obligations.[754] A key reason was the fact that millions were dependent upon the uninterrupted payment of the grants as recounted in the previous chapters.[755] In the four Kenyan cases relating to social rights where complex remedies had been granted[756], there were large groups of persons and petitioners involved and who would be harmed if a complex, collaborative remedy was not granted.

[753] [2015] eKLR
[754] Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC).
[755] Id., at para 33.
[756] Mitu-Bell (2012 HC, 2016 CA, 2021 SC), Kepha Omondi Onjuro v Attorney General [2015] eKLR , Matter of Illegal Demolition of Residential Houses and Business Premises Erected on Ngara Open Air Market Nairobi and in the Matter of Francis N. Kiboro & 198 other [2015] eKLR; Satrose Ayuma v The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme (Petition 65 of 2010) [2011] eKLR.

5. Clarity of remedial steps: When courts are unsure about the remedy which is necessary to address a systemic problem, it is likelier to issue a structural order wherein it invites parties to engage in dialogue to devise the remedy. This speaks to epistemic risks which courts undertake when deciding social rights cases – where the social situation in question is so complex that the best way forward is to ask for more information or order parties to confer among themselves to devise a way ahead. In Kenya, complex remedies have largely been used in the case of evictions/housing claims as well as in cases relating to administrative dysfunction.[757] In the former sets of cases, complex remedies have performed the task of forcing local authorities to produce and enact plans for alternate accommodation for evictees while also creating the conditions for stakeholder engagement in formulating remedies, supervising judgments, and ensuring compliance with international human rights standards for a range of state actions. In *Satrose Ayuma,*[758] the impending construction of a mall after the completion of the demolition of the petitioner's residential premises left the court with no clear options going forward. The settlements were in violation of existing laws and no clear plan for rehabilitation or resettlement had been put forth. The High Court as a result resorted to collaborative directions for the resolution of the case and ordered that a programme of eviction be designed in collaboration between the managing trustees of the Kenya Railways Staff Retirement Benefits Scheme and the petitioners within 21 days of the order.

6. Personal conduct of government officials and systemic nature of the violation: The personal conduct of government officials is a factor that usually militates against the grant of a complex remedy. In *Mwelase*, the majority judgment justified the invasive remedy of appointing a Special Master by pointing to the 'failing institutional functionality of an extensive

[757] Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.
[758] Satrose Ayuma & 11 Others V Registered Trustees Of The Kenya Railways Staff Retirement Benefits Scheme & 2 others [2011] eKLR

and sustained degree' that 'cried out for remedy'.[759] This implied that the failure was *institutional*, and not *personal* in nature. Cases involving social rights usually implicate coordination across several government officials and departments. As such, it is difficult to pin the blame for a violation on a discrete official or group of officials. If that were to be the case, courts would usually opt for a more traditional remedial order that may include contempt proceedings or damages against the concerned official.[760] In the housing cases as well as the *Communication Authority* case, there was evidence of systemic failures that led to the Court ordering complex remedial actions.

7. Extent of diffusion of powers in cooperative government: Courts in Kenya may consider the allocation of power between different levels of government when deciding on remedies. The obligations that arise out of social rights are generally hyper-localized, with duty bearers being present at the level of city, provincial and territorial levels. In some cases, this makes the task of locating the appropriate authority difficult, with further complexity being introduced if the fulfilment of a local government obligation is contingent upon the release of funds from the federal government. Therefore, there is no predictable relationship between the diffusion of powers in federal systems of governance and the likelihood of a structural remedy being granted. It is argued that in cases where the government obligation can be traced to a federal authority (as opposed to a more local authority), there is a higher likelihood of a structural order.[761] While this may be true in South Africa, it is difficult to give this assertation at a normative thrust across jurisdictions. In Kenya, the constitutional reform processes since 2010 have sought to devolve greater power away from the Central government toward county

[759] *Mwelase*, at para 69.
[760] Damages against individual government officials has been described as a 'blunt tool' to ensure compliance with the government's rights obligations (Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality [2014] ZASCA 209; 2015 (2) SA 413 (SCA) at para 35) , but may be used in combination with other remedial forms.
[761] Mukherjee & Tuovinen, *Designing remedies for a recalcitrant administration*.

governments.[762] Article 6(2) of the 2010 Constitution lays out that 'governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation'[763] However, it has not worked well in practice, with legislation like the County Wards (Equitable Development) Act, and County Early Childhood Education Bill being stuck in the Senate without being considered by the National Assembly.[764] These developments pose normative challenges since decision-making is best left to authorities at the most localized level due to the epistemic expertise that it brings[765]. Complex remedies usually also serve to catalyze interaction and problem solving across levels of government, and future remedial interventions in Kenya that have elements of complexity would do well to create the conditions for greater inter-governmental cooperation.

8. Institutional Fit and Epistemic Superiority: In cases where a specialist court has ordered a structural remedy, appellate courts may be slow to interfere with such a finding, primarily because of the epistemic superiority of the specialist court. This assumes relevance in legal systems where there may be tribunals or specialist courts that are staffed with members that have specialist legal knowledge. A structural remedy, if within the power of such an institution to grant, should be left intact at the appellate judicial level.[766] Take for instance, the issue of determining the validity of title to the land on which the applicants were evicted from in Moi Educational Trust[767], the Court declined to decide the issue, leaving it to the epistemic expertise of the National Land Commission. The Kenyan Government has taken steps to set up Environment and Land Courts that are envisaged in Article 162(2)(b) of the 2010 through the

[762] Yash Pal Ghai, *Fortunes of Devolved Government*, in TEN YEARS ON: ASSESSING THE PERFORMANCE OF THE KENYAN CONSTITUTION, Katiba Institute, 2022.
[763] Article 6(2), Kenya Const 2010.
[764] See James Thuo Gathii & Harrison Mbori Otieno, *Assessing Kenya's Cooperative Model of Devolution: A Situation-Specific Analysis*, 46 Federal Law Review 595 (2018).
[765] Gaurav Mukherjee, *Democratic Experimentalism in Comparative Constitutional Social Rights Remedies* 2 Milan Law Review 196 (2020).
[766] Mukherjee & Tuovinen, *Designing remedies for a recalcitrant administration.*
[767] 2021 eKLR, at para 50-51.

Environment and Land Courts Act, 2011. A majority of forced evictions and the attendant denial of the right to housing and alternate accommodation occur due to disputes over whether the occupiers had title to the land, and appellate courts would do well to defer to their expertise and decisions.

6.6. Conclusion: Discursive and Legal Argumentative Space for Social Rights Support Structures in Kenya

Complex remedies broadly respond to a specific set of institutional and empirical problems. They emerge across various jurisdictions as noted in the scholarship on comparative constitutional studies in the United States in the wake of Brown v Board. Complex remedies also experienced a resurgence alongside post-Soviet, end-of-history constitution-making.[768] As noted in the dissertation, South Africa and Kenya represent third and fourth-wave social rights constitutionalism. Complex remedies involving a range of stakeholders aside from the affected parties began to be handed down by the judiciary first in the *Communications Commission of Kenya* case when a contract for digital signal conversion was awarded to a foreign company which did not fulfil the auction criteria, leading the High Court in Nairobi to order a re-conduct of the process.[769] The High Court supervised the entire process with the parties being required to file regular reports. Such a decision which directly took on a government authority – going to the extent of ordering the supervision of a complex tender process – was unheard of, and showed the extent to which three processes had been key to the institutional reform of the judiciary into an actor capable of mounting resistance to government decisions.

The first was the mobilization of judicial support networks, including members of the bar, the Law Society of Kenya, and civil society, which directly affected the capacity of the judiciary to mount resistance. Litigation permitted courts (especially the High Courts) to develop a

[768] Kent Roach, REMEDIES FOR HUMAN RIGHTS VIOLATIONS: A TWO-TRACK APPROACH TO SUPRA-NATIONAL AND NATIONAL LAW 6 (Cambridge University Press, 2021).
[769] Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.

broad idea of the circumstances under which complex remedies could legitimately be deployed without the risk of backlash from the executive. Social and legal mobilization enables courts to gain experience and confidence in adjudicating disputes that have the potential to step on governmental toes.[770] While much of the literature on Kenya has focused on electoral disputes, this chapter argues that SER disputes present courts with a 'low-stakes, moderate-visibility, high public legitimacy' opportunity to establish and maintain judicial authority and legitimacy without necessarily inviting political backlash.

The second related process is the judicial facilitation of the support structures necessary for enacting social change.[771] In comparison, the Kenyan civil society space is not as well-organized as the one in India and South Africa. In these jurisdictions, social movements play a key role in the advancement of constitutional social rights.[772] Organizations like the People's Union for Civil Liberties and Alternate Law Forum[773] in India, SERI[774] and LRC[775] often use the device of strategic litigation to advance socially transformative causes. Repeat players[776] like Pamoja Trust, Hakijimi Trust, the Katiba Institute and other CSOs regularly litigate before the High Court and have managed to carve out a space for themselves and make themselves known to the judiciary.[777] This has helped create and sustain linkages between the bar, civil society, and the bench – a factor that helps advance progressive social and legal

[770] Rosalind Dixon, RESPONSIVE JUDICIAL REVIEW 171 (Oxford University Press, 2023).
[771] CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE, x (1998).
[772] Frank W. Munger, Scott L. Cummings, and Louise G. Trubek, *Mobilizing Law for Justice In Asia: A Comparative Approach* 31 Wisconsin International Law Journal 353 (2013).
[773] For a socio-legal study of the organization's tactics, see Arvind Narrain & Arun Thiruvengadam, *Social Justice Lawyering and the Meaning of Indian Constitutionalism: A Case Study of the Alternative Law Forum* 31 Wisconsin International Law Journal 525 (2013).
[774] Jackie Dugard, F*orging space for pro-poor change: The use of strategic litigation by the Socio-Economic Rights Institution of South Africa (SERI) to advance equality* 52(2) Verfassung und Recht in Übersee 132 (2019).
[775] Jason Brickhill and Meghan Finn, *The ethics and politics of public interest litigation*, in Jason Brickhill (ed.), PUBLIC INTEREST LITIGATION IN SOUTH AFRICA (Juta, 2013).
[776] Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change* 9 Law & Society Review 95, 124 (1994).
[777] Jacob Mwathi Mati, NEOLIBERALISM AND THE FORMS OF CIVIL SOCIETY IN KENYA AND SOUTH AFRICA (2010).

causes.[778] James Thuo Gathii, in his assessment of the implementation of the 2010 Constitution, also argues that "a highly energized civil society movement, which includes activist lawyers and individuals who have been at the forefront in monitoring the implementation of the Constitution and testing its contours in Court".[779]

The third pathway has been driven by the personalities in charge at the helm of the judiciary who have invested in professionalization and training, motivated by the mobilization of opposition-oriented actors. While SER disputes present courts with lower stakes than election disputes, judicial support networks, civil society, the media spotlight, and pro-opposition actors put the judiciary under intense scrutiny. To survive, courts need to show signs of independence. SER disputes where courts grant complex remedies enable courts to invite the government and stakeholders into a conversation to problem solve and, in some cases, ensure courts can oversee the implementation of their remedies. These three processes combine to provide some explanatory power behind the rise of judicial resistance and the ability of courts to deploy complex remedies.

Constitutions are meant to often embody an expressive and material rupture from the past. In Kenya's case, the 2010 Constitution signified break from cycles of competitive authoritarianism and electoral violence along existing ethnic cleavages. The courts, which so often had been instrumentalities of government, began to gain greater independence since a range of institutional and personnel changes since the 2010 period. The 2010 Constitution also installed a capacious structure of justiciable social rights with now a substantial volume of litigation. However, the period since 2010 has also seen a rise in the number of people living

[778] Charles R. Epp, *Implementing the Rights Revolution: Repeat Players and the Interpreting of Diffuse Legal Messages* 71 Law and Contemporary Problems 41 (2008).
[779] James Thuo Gathii, *Assessing the Constitution of Kenya 2010 five years later*, in Tom Ginsburg & Aziz Huq (eds.), ASSESSING CONSTITUTIONAL PERFORMANCE 337 (Cambridge University Press, 2016)

in absolute poverty[780] exacerbated by the pandemic. It continues to be among the most unequal countries in the world. These same courts that had been institutionally inert, in the period since then, have been responsive in the face of legislative blind spots and the burdens of inertia[781] created by parliamentary dysfunction.[782] In a year that the Supreme Court decided the vital BBI case[783] and electoral disputes between two political opponents[784], it would also decide its two first SER cases: *Moi Educational Trust* and *Mitu-Bell*.

These decisions pushed the doctrinal needle forward, holding in the first case, that SERs required non-intervention even by private parties and that constitutional damages would accrue as a result. In *Mitu-Bell*, it held that the evictions, which are discussed in detail in earlier parts of this chapter, were conducted in violation of constitutional and international human rights standards. The pair of decisions therefore are crucial building blocks for a more robust, sophisticated jurisprudence on SER, but suffer from two key weaknesses. The first is that it does not create the conditions for greater involvement of civil society – a crucial element in the support structures that are necessary for informal kinds of constitutionally induced social change. The second is that they both failed to develop doctrine in a way that is mindful of inter-institutional dynamics and how courts can facilitate, catalyze and antagonize governments into developing institutional structures that help realise social rights.[785]

These two decisions handed down before the election and BBI judgments show that courts have limited institutional capital and try not to breach the 'tolerance interval' that governments

[780] Development Initiative, *Socio-economic impact of COVID-19 in Kenya: Background paper*, June 2020, https://devinit.org/resources/socioeconomic-impacts-covid-19-kenya/#downloads .
[781] Rosalind Dixon, RESPONSIVE JUDICIAL REVIEW, passim (Oxford University Press, 2023)
[782] BBC News Article – find source.
[783] Petition No. 12 of 2021 (consolidated with Petitions 11 & 13 of 2021 – Building Bridges Initiative)
[784] Dickens Olewe, *Kenya election 2022: Supreme Court confirms William Ruto's victory against Raila Odinga*, BBC News, 5 September 2022, https://www.bbc.com/news/world-africa-62785434.
[785] Gaurav Mukherjee, *The Supreme Court of India and the Inter-Institutional Dynamics of Legislated Social Rights* 53(4) Verfassung und Recht in Übersee 411 (2021).

have toward compliance with court decisions.[786] The two SC decisions helped develop legal doctrine by extending non-interference obligations in respect of SER to private actors[787] and articulating the concept of a proprietary interest in public land despite an unauthorized settlement[788] . This idea will no doubt be useful in the struggle against forced evictions[789] (in the absence of a provision like s.26(3) of the South African Constitution, which bars evictions absent a court order). The Supreme Court – delivering its verdicts on the final day of the outgoing David Maraga, seemed to be hemmed in by the stark differences between the approaches of the High Court and the Court of Appeal in the two cases. In reconciling the two, it sought to strike a middle ground that did not close off entirely the use of structural remedies, but delineated the conditions of their use.

However, its strictures about the involvement of CSOs in post-judgment supervision may weaken accountability structures and erode the authority of the court in cases of violations of its orders. The future of SER litigation in Kenya will depend on the willing nexus between the CSOs in its major cities, their ability to bring cases, and how they can be involved in the litigation. Complex remedies can also catalyze legislative action, as seen in *Satrose Ayuma*, where the Court directed the National Assembly to enact legislation[790] to regulate evictions and align it with international human rights standards. The Supreme Court has also had to deal with a marked difference in the approaches to remedies across tiers of the judiciary (not unlike the case in SA), but in its approach has succeeded in creating a legal discursive space where there is room for making arguments about the efficacy of complex remedies. The next

[786] Lee Epstein, et. al., *The role of constitutional courts in the establishment and maintenance of democratic systems of government.* 35 Law Soc. Rev 117 (2001).
[787] William Musembi 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR.
[788]Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021).
[789] Ambreena Manji, *Land Title and Evictions in the Supreme Court of Kenya*, The Elephant, July 23, 2021, https://www.theelephant.info/op-eds/2021/07/23/land-title-and-evictions-in-the-supreme-court-of-kenya/.
[790] See the Land Laws (Amendment Act), 2016, inserting sections 156A-I that now regulate evictions and settlements on public and private lands.

comparative chapter considers the prospects for complex remedies in light of the three jurisdictions, covering the kinds of remedies seen and the factors influencing their grant.

7. The Prospects of Complex Remedies: Comparative Reflections

This dissertation aimed to understand better the phenomenon of complex remedies in social rights litigation. The form that such remedies assume in the countries under study originated in civil rights and social action litigation in the United States in the 1960s.[791] These forms have come under desuetude at the federal level and are now seen mainly in constitutional litigation at the state level in its country of origin.[792] In the United States, these remedial forms were characterized mainly by three features:

- the retention of the courts' jurisdiction pending satisfactory resolution (assessed by a range of empirical indicators),
- the requirement of filing status reports by the parties (usually state institutions and occasional civil society members), and the
- appointment of an expert to advise the parties and the court on the ways forward (usually in the position of a special master or receiver).

Remedies of this kind were primarily used in school desegregation,[793] school financing equality and equity,[794] police reform,[795] and prison system reform.[796] Despite a downturn in their use at the federal level in the United States, these remedial forms were revived in many countries in the so-called Global South, especially in India, South Africa, and more recently in Kenya.

The first part of the chapter is descriptive and analytic. It outlines the models for complex remedies across jurisdictions. There are broadly three kinds of complex remedies: a) the consensual remedial formulation model, b) the expert remedial involvement, c) the report back to court model, and d) post-judgment monitoring. While the 'report back to court' is the most

[791] Mark Tushnet, *Public Law Litigation and the Ambiguities of Brown* 61 Fordham Law Review 23 (1992).
[792] Kent Roach, TWO TRACK REMEDIES, at 359; Mark Tushnet, WEAK COURTS, STRONG RIGHTS 249 (Princeton: Princeton University Press, 2004).
[793] See for example, Cooper v. Aaron, 358 US 1 (1958).
[794] Milliken v. Bradley II, 433 US 267 (1977); Missouri v. Jenkins, 110 S.Ct. 1651 (1990).
[795] Rizzo v. Goode, 423 US 362 (1976) (where the US Supreme Court reversed a trial judge ordering the City of Philadelphia to submit a plan for police reform after finding patterns of persistent misconduct).
[796] Hutto v. Finney, 437 US 678 (1978); Brown v. Plata, 131 S.Ct. 1910 (2010).

common model for a complex remedy across the countries studied, it is marked by the variance in the way experts become involved in the litigation at the behest of parties or the insistence of the court, the stages in which they get involved and the roles they perform in the judicial process. The consensual remedial formulation[797] model is seen only in South Africa, and the third part of the chapter offers some explanations for why that may be.

The second part of the chapter is explanatory and analytic. It unpacks the factors influencing when complex remedies are granted. It shows how the central features in a social rights dispute govern how judges approach the grant or denial of a complex remedial form. The features are a) structural constitutional considerations like the vertical and horizontal separation of powers, b) the nature of the social rights dispute, c) the nature of social rights law and the judicial process.

The third part of the chapter is normative. It covers the strengths and weaknesses of the approaches of the jurisdictions with attention to four factors: a) compatibility with the principle of the separation of powers, b) demonstrable impact on the realization of the claimed social right, c) the presence or absence of backlash from the coordinate branches, and d) sustainability of the remedial form and its ability to guide future cases.

[797] Also known as 'meaningful engagement' in South Africa.

7.1. Types of Complex Remedies Across Jurisdictions

Four kinds of complex remedial forms are seen in the three jurisdictions.

7.1.1. Report Back to Court Model

In this type of complex remedy, parties must report back to court with more information that can help the court arrive at a final decision, or are required to take steps in pursuance of an interim order. The South African *Blue Moonlight* case represents a notable success of this model, where the absence of an emergency housing policy of the City of Johannesburg glaringly excluded those rendered homeless due to evictions from private lands. This exclusion was constitutionally impermissible and the iterative remedy ensured that the policy was brought in line with constitutional standards while also ensuring that the applicants were not left without alternate accommodation pending the change in policy. Similarly, in the *Swaraj Abhiyan* case on employment guarantee rights at the Supreme Court of India, the iterative remedy helped ensure that state and national governments overcame the difficulties associated with federalism and released the workers' dues on time. Across the three jurisdictions under study, this is the most common type of complex remedy, with experts often being involved at these stages to assist courts in their information-gathering exercises. Since courts are bound by the facts of the case before them and the written and oral submissions, polycentric SER disputes that are information and expertise sensitive pose a genuine challenge for courts.

The power of this kind of remedy lies in its use of the usual mechanisms of the litigation process to ensure restitution, equilibration, and non-repetition. This model also acknowledges the possibility of remedial failure, the need for iteration and the benefits of trying solutions to see

what fits. The jurisdictions under study often suffer from executive inattentiveness, incompetence, or intransigence, as well as legislative blockages and burdens of inertia. One of the many implications of these features is that despite the textual presence of a range of duties on states, government authorities neglect to devise enabling laws or policy. Reporting back to court as part of a complex remedy can bring such an issue into focus and ensure that the resultant policy is legally sound.

7.1.2. Expert Remedial Design Model

Actors beyond the parties to the case have been involved in a number of ways in the formulation of remedies, including suggesting the kinds of remedies that the court should devise where the way forward is not clear, where government dysfunction in a department has taken on such a nature and degree so as to invite judicial attention, or where experts are required to both take over the functioning of a government department while also devising a way out of the problem.

In South Africa, a Special Master was appointed when the Department of Land Reform was unable to process land tenure reform applications in due time,[798] while the Constitutional Court also approved the creation of a committee of experts to oversee and implement its own remedy of re-conduct of the tender process by SASSA, the social security agency.[799] In the Right to Food cases, India's Supreme Court set up a separate commissionerate to oversee the implementation of the Court's remedy of ensuring the steady disbursal of food scheme entitlements under the Integrated Child Development Scheme and the streamlining of food ration delivery.[800] These kinds of involvement have been seen less in Kenya since the Court of

[798] See Mwelase CC.
[799] See Black Sash I & II.
[800] See PUCL v Union of India (Order dated 12.07.2003).

Appeal judgment in *Mitu-Bell* in 2016. Yet, the 41 High Courts stations across the country display uneven variance, with some cases, especially as they pertain to the Right to Housing and slum demolitions, having this sort of remedy. Most notably, it has been parties like the Pamoja Trust and the Katiba Institute, and government bodies like the Kenya Human Rights Commission, that have been joined as external parties to help oversee evictions, all at the insistence of the court, and not the parties.

These experts may join the case as intervenors of their own initiative (as in the out-of-school children case), be appointed by the court (as in the *Black Sash* case), be part of the judicial process at the request of the applicant (as seen in the *Mitu-Bell* case). These experts often have specialized knowledge that courts can use to offset their lack of expertise or information, while also performing a crucial role in monitoring the implementation of a remedy and addressing the judiciary's incapacity to oversee their judgments being enforced. The involvement of these experts is usually not foreseen by the constitutional social rights provisions which give rise to the dispute nor by the operationalizing legislation. The experts' involvement is usually sought by the applicant in the disputes to respond to an institutional pathology like executive intransigence or inattention, or by the court when there is an expertise deficit or where the best remedy may not be clear.

7.1.3. Consensual remedial formulation Model

Consensual remedial formulation, where parties to a dispute deliberate and arrive at solutions to their disputes and is central to the protection of these rights in South Africa, as it is seen as a key mechanism for ensuring that the government engages with affected communities and takes into account their perspectives in decision-making processes. The remedy in this model is formulated through discussions between stakeholders both inside and out of courtrooms. In

this model, the parties themselves negotiate a remedy that is assessed by the court for compliance with a set of substantive and procedural preconditions that are rooted in constitutional provisions. This is termed meaningful engagement in South Africa, and is defined as a "participatory process through which affected parties are consulted and given an opportunity to participate in decision-making processes that affect their rights and interests."[801]The success of this model is dependent on a certain level of trust between parties and on their ability to come to an agreement. Its instability as a remedial form lies in the uncertainty of what happens in case they are unable to, for factors ranging from historic and contemporary animus between the parties, to conflictual forms of engagement that prevents consensus formation.

This approach differs from settlements recorded in judgments. Recorded settlements are reached between parties based on negotiations and the judiciary does not lay down any procedural or substantive bounds for the process of negotiating, or the final settlement. With meaningful engagement, the Constitutional Court has laid certain procedural minima that should guide deliberation between parties.

In India, this approach has been used by the High Court of Delhi, in two cases involving the demolition of slum clusters. Here the Court asked parties to the case to engage meaningfully with one another in order to find a way to resolve the dispute, provide inputs for reformulation of the underlying policy document, and decide on the way forward.[802] The parties were ordered to report back on the results of the engagement. However, disappointingly, the same route has

[801] Sandra Liebenberg, *Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law* 32:4 Nordic Journal of Human Rights 312 (2014).
[802] Sudama Singh & Others vs Government Of Delhi & Anr. on 11 February, 2010, https://indiankanoon.org/doc/39539866/ (last visited Apr 18, 2022).; Ajay Maken & Ors. vs Union Of India & Ors. on 18 March, 2019, https://indiankanoon.org/doc/159570569/.

not been followed in recent cases, even in the Supreme Court, with evictions routinely approved without due notice or the provision of alternate accommodation.[803]

While this approach has been shown to enhance the legitimacy of government decision-making, increase the transparency of the decision-making process, and improve the quality of outcomes for affected communities, it suffers from a lack of normative force and a set of factors that have been previously identified that are beyond the full control of the judiciary and the petitioners, like the cross-class support that the issue at stake enjoys and the previous relationship between the petitioners and the government, that makes it an uneasy choice for litigants who may be unpopular.[804]

7.1.4. Expert Remedial Implementation Monitoring Model

In the jurisdictions under study, courts operate under conditions of chronic state incapacity[805] and varying degrees of legislative and bureaucratic inattention to issues of public provisioning of access to goods like housing, healthcare and education. *Counter-democratic* institutions[806], also described as part of the 'guarantor branch'[807] such as human rights commissions, are often weak in these jurisdictions and faced with low levels of democratic responsiveness. Consequently, it falls to external actors, drawn primarily from civil society (but in some cases prominent advocates or civil servants) to oversee the implementation of court orders.

[803] M.C. Mehta v. Union of India (Writ Petition(s)(Civil) No(s). 13029/1985) (Judgment dated 31 August 2020) < https://www.livelaw.in/pdf_upload/pdf_upload-380869.pdf>
[804] See for example the failure of engagement in a case concerning refugee resettlement from temporary shelters in Mamba v Minister.
[805] I draw on the commonly accepted definition of state capacity in the literature which emphasizes the gap between government policy and outcomes as a measure: See Thomas Brambor, Agustín Goenaga , Johannes Lindvall , and Jan Teorell, *The Lay of the Land: Information Capacity and the Modern State* 53(2) Comparative Political Studies 175(2020).
[806] Pierre Rosanvallon, COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST, passim (Cambridge University Press, 2010).
[807] See Tarunabh Khaitan, *Guarantor Institutions* 16 Asian Journal of Comparative Law 40 (2021).

In South Africa, organizations like Section 27 or the LRC, when they are not litigating strategically and aren't the petitioners in SER cases themselves, have been involved in the monitoring of court remedies, much like the role that Pamoja Trust or the Katiba Institute have played in Kenya. In India, advocates like Prashant Bhushan, who has a long record of litigating public interest causes, and civil servants like Harsh Mander, have been part of remedial litigation oversight. In addition, public bodies like the Delhi Human Rights Commission, have also been part of eviction drives to ensure that constitutional and human rights standards are adhered to. However, civil society monitoring of social rights remedies has been on the decline, and this may have something to do with the broader constriction of the space in which civil society operates in India. Action of the kind where civil society or external actors oversee judgment implementation has been more difficult in Kenya since the judgment of the Court of Appeal and the Supreme Court in 2016 and 2021, respectively. Yet, this dissertation has argued that the *Mitu-Bell* judgment in 2022 from the Supreme Court has narrowly specified the cases in which civil society can be involved to oversee the implementation of judicial remedies and future case law will guide the ways in which their involvement will be reduced or expanded.

7.2. Factors Informing the Grant of Complex Remedies Across India, South Africa, and Kenya

Complex remedial forms across the thesis' jurisdictions arise at a specific moment in their socio-political histories. It is not accidental that they occur after the 'end-of-history' moment. In the late 1990s, networks of actors in the legal industrial complex – judges, lawyers, and civil society created webs of productive interaction, resulting in learning and mimesis. This dissertation has shown how India, South Africa, and Kenya represent three different ways of

codifying social rights. The way in which SER was (or wasn't) codified in these constitutions created legal and discursive spaces where the judiciary could innovate and develop remedies in keeping with the need of the hour.

The past conduct of the government is a general guiding factor across jurisdictions for the grant of a complex remedy. Courts and their judges realize that complex remedies often step on domains that are zealously guarded by the coordinate branches and therefore if governments have a persistent record of inattention, incompetence or noncompliance with previous orders of the court, the grant of a complex remedy is higher. In *Swaraj Abhiyan*, the Supreme Court's grant of a complex remedy cited the central government's failure to remedy the issue of leakage and corruption in the employment guarantee scheme that had been challenged – and which had led to delays in payments to beneficiaries. In *Mwelase*, the Constitutional Court of South Africa referred to the inability of the Department of Land Reform to timeously process land title applications under the Land Act 1996 while granting the remedy of the Special Master taking over the functioning of the Department in so far as it pertained to this function. The conduct of government as a whole, as well as the personal conduct of government officials are relevant considerations for the grant of a complex remedy. In cases where it is the personal conduct of a minister or a particular official that has caused the violation of the social right, courts will be unlikely to grant a complex remedy. Instead, it will opt to award damages against the official or hold them in contempt for violating a remedial order.[808] For a complex remedy to be awarded, the issue has to be systemic in nature.

[808] See the contempt proceedings filed against the Minister of Social Development in AllPay 2.

The central contribution of this dissertation is an account of the conditions under which complex remedies are granted in the three jurisdictions under study. I provide a comparative account of the most important factors guiding the grant of complex remedies, split into structural constitutional considerations, considerations on the social rights law and the rules of the judicial process, and considerations on the nature of the social rights dispute.

7.2.1. Structural Constitutional Considerations

a) The constitutional structure of the government: Scholarship on social rights has generally tended to focus on the horizontal separation of powers as a crucial factor influencing the realization of social rights.[809] However, this dissertation has shown how federalism, or the vertical division of power and responsibility, poses a challenge for the realization of social rights, and is a feature of all the jurisdictions under study to varying degrees. Despite a degree of devolution to sub-national units of political organization in Kenya and South Africa, they remain unitary states, unlike India, which is formally federal. The application of complex structural remedies involving social and economic rights in federal systems poses significant challenges, particularly in the context of the division of powers between different levels of legislative and executive branches. This is evident in the experiences of India, South Africa, and Kenya, where the principle of separation of powers, democratic legitimacy, and effectiveness of the remedy are key factors affecting the implementation of such remedies.

[809] See for example, David Bilchitz, *Towards a defensible relationship between the content of socio- economic rights and the separation of powers: conflation or separation?*, in David Bilchitz and David Landau, THE EVOLUTION OF THE SEPARATION OF POWERS BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH 57 (Edward Elgar, 2018).

In India, the constitutional framework provides for a federal structure with a division of powers between the Union and the States. This division of powers affects the implementation of complex structural remedies, particularly with respect to the implementation of socio-economic rights. In *Swaraj Abhiyan*, the Court ordered various levels of government to coordinate to release of funds that were due to beneficiaries of a national employment guarantee scheme.

Similarly, in South Africa, the constitutional framework draws on the German model of devolving power to subnational units. It provides for a mix of unitary and federal structures with a division of powers between the national, provincial, and local governments.[810] This division of powers affects the implementation of complex structural remedies, particularly with respect to the implementation of socio-economic rights. This is clearly visible in a case like Treatment Action Campaign v. Minister of Health, where the Constitutional Court of South Africa ordered the government to provide antiretroviral treatment to all people living with HIV. However, the implementation of this remedy was hindered by the lack of cooperation between the national and provincial governments, despite the remedy of unconstitutionality being a strong one that carried normative weight.

In Kenya, the constitutional framework provides for a centralized structure with a division of powers between the national and county governments. The 2010 Constitution aspired to achieve an institutional framework dedicated to devolving power toward the peripheries and to sub-national governments by granting devolved fiscal, political and administrative powers to 47 counties. For example, national and county governments hold overlapping powers and functions in relation to the governance of health[811], and in case of their conflict, it is the national law that

[810] Heinz Klug, *Co-operative Government in South Africa's Post-Apartheid Constitutions: Embracing the German Model?* 33(4) Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 432 (2000).
[811] James Thuo Gathii & Harrison Mbori Otieno, *Assessing Kenya's Cooperative Model of Devolution: A Situation-Specific Analysis*, 46 Federal Law Review 595, 601 (2018).

prevails.[812] The preceding example is just one instance of many that clearly shows that this process of devolution has not been entirely successful and greater devolution remains an iterative goal. This division of powers affects the implementation of complex structural remedies, particularly with respect to the implementation of socio-economic rights. For example, in the case of *Centre for Rights Education and Awareness v. Attorney General*[813], the High Court of Kenya ordered the government to provide free primary education to all children in Kenya. However, the implementation of this remedy was hindered by the lack of cooperation between the national and county governments.

In a federal system, the different levels of government are accountable to the people, and the implementation of complex structural remedies must be consistent with the democratic principles of accountability, transparency, and participation. If the remedy is perceived as being imposed by the judiciary without the involvement of the people or their elected representatives, it may lack democratic legitimacy and face resistance from the public.

7.2.2. Nature of the Judiciary and the Judicial Role

a) Judicial Remedial powers and the rules of the judicial process*:* Judges are more comfortable ordering complex remedies in the presence of expansive remedial powers granted to courts in

[812] See Article 191(2), Constitution of Kenya, 2010.
[813] Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR.

the constitution. The constitutions of Kenya[814], South Africa[815], and India[816] all enshrine wide remedial powers to address rights violations, and all of them have residuary powers which vest them with wide discretion to fashion a range of remedies. Interestingly, Kenya's Constitution spells out in most detail which kinds of remedies may be granted for violations of rights in the Bill of Rights, and reflects anxieties about the expansion of judicial power in the fourth wave of constitutionalization.

Judges also find it easier to grant complex remedies when the jurisdiction's procedural law permits remedial complexity. Indian judges, in cases where they have seen it fit to order complex remedies, have done so by drawing authority from their residual powers to do 'complete justice' under the provisions of the Constitution, an article of the document that grants residuary powers to judges. Neither the Supreme Court Rules, 2013 nor the Supreme Court of India Handbook on Practice and Procedure and Office Procedure [817] contains references to or disbarment from complex remedial forms. Both Kenya and South Africa have a considerable set of rules for litigating in the public interest, for a relaxation of standing rules, and for the joining of intervenors and amicus curiae. Therefore, procedural rules that permit the joining of parties at stages of the judicial proceeding are important and influence whether complex remedies can be granted or not. However, for post-judgment monitoring, the common law doctrine of functus officio will be a point of contestation and argument in regard to the participation of CSOs at the behest of the Court.

[814] See section 23(3), Kenya Constitution, 2010, which gives courts powers to pass 'appropriate relief', including a declaration of rights; an injunction; a conservatory order; a declaration of invalidity; an order for compensation; and an order of judicial review.

[815] Articles 172 of the Constitution of South Africa, 1996 grant the Constitutional Court, the High Courts, and the Supreme Court of Appeal to grant declarations of invalidity, and then suspend them in case authorities wish. The inherent powers of the courts to shape the common law in the interests of justice is also provided in section 173. Note however that in the Constitutional Court has stressed the importance of forging 'innovative remedies' for rights violations. See Fose v Minister of Safety and Security CCT14/96) [1997] ZACC 6).

[816] Articles 32 and 226 of the Indian Constitution grant the High Courts and the Supreme Court the powers to deliver certain kinds of writs in response to fundamental rights violations.

[817] Supreme Court of India, *Handbook on Practice & Procedure and Office Procedure*, https://main.sci.gov.in/sites/default/files/practice.pdf_0.pdf.

b) ***Judicial awareness of structural remedies***: It is important that judges are aware of the availability of complex remedies within their jurisdiction. In cases where they are often not explicitly mentioned or have been used in the past, they may often require to be innovatively used (and in certain cases created) within doctrinal legal bounds. This can be a function of judicial education, the participation of judicial officers in networks of judges, their training in judicial best practices across jurisdictions, as well as the research support that they receive. Judicial training across all levels of the judiciary is also a key factor that influences the exposure and awareness of complex remedies.

Two contrasting examples from South Africa and Kenya are instructive. Scholars have noted the important role that judicial clerks, who are often drawn from the international student body, perform in South Africa, assisting with research and writing for the judges of the CC.[818] South African Constitutional Court judges also regularly participate in judicial training network events. Organizations like the International Commission of Jurists and the South African Judicial Education Institute hold trainings to educate judges across all levels of courts, especially on socioeconomic rights adjudication.[819] It then is not surprising that South African judges are often the most savvy, within their jurisdiction, at being aware of judicial innovations like complex remedies that have found popularity in other jurisdictions like the US and India. However, judicial clerks in Kenya are usually appointed through informal means, and are not as well-trained and well-resourced as their South African counterparts.[820] The relatively dampened reception of complex remedies by the Kenyan judiciary is therefore partially

[818] Jason Brickhill, *Strategic Litigation In South Africa: Understanding And Evaluating Impact* D.Phil Thesis, Oxford University 2021, https://ora.ox.ac.uk/objects/uuid:e7be10e6-c511-40b1-8126-df3b3b229b5b.
[819] International Commission of Jurists, *South Africa: ICJ and SAJEI Complete Training Programme on Socio-Economic Rights for Judicial Officers*, 12 December 2019, https://www.icj.org/south-africa-icj-and-sajei-complete-training-programme-on-socio-economic-rights-for-judicial-officers-2/.
[820] Interview with Walter Ochieng, practitioner at Kenyan High Court, Nairobi (on file with author).

explicable in this way, especially when judges in cases like Moi Educational Trust declared that complex remedial forms are alien to the Kenyan judicial system. However, there is evidence to indicate that organizations like the Katiba Institute have, in the past, held trainings for judicial officers on remedies with leading academics like Kent Roach.[821] Judicial training and awareness are therefore key to the promotion of complex remedial forms and their grant.

c) ***Institutional Fit and Epistemic Superiority:*** Appellate and superior courts will be slow to interfere with complex remedies that have been granted by specialized courts that have an element of epistemic superiority over the higher court. Since SER disputes are polycentric and information and expertise-sensitive, courts in South Africa (that have specialized courts that deal with, for example, land reform) are seen to interfere less with their judgments. Judicial deference to epistemic superiority is primarily seen in remedies granted by specialized courts, such as the Land Claims Court in South Africa.

In Mwelase, the Constitutional Court of South Africa refused to set aside an order of the Land Claims Court that had set up the Special Master to take over the functioning of the Land Reform Department. In *Daniels v Scribante*[822], the Court also examined the order of the Land Claims Court when it came to an order that required a private land owner and the share-cropper/tenant on it to deliberate on the way forward on their dispute over carrying out improvements to the tenement by the tenant without the explicit permission of the landowner. By bowing to the decision of the Land Claims Court, the CC nodded to the fact that the lower court that specialized in land claims had greater experience and expertise to deal with the issue.

[821] Katiba Institute, *Conference Program for International Program on Interpreting and Shaping a Transformative Constitution*, 2014, http://www.katibainstitute.org/images/Programme%20for%20the%20international%20conference%20on%20interpreting%20and%20shaping%20a%20transformative%20constitution.pdf.
[822] Daniels v Scribante and Another (CCT50/16) [2017] ZACC 13.

Therefore, a complex remedy is less likely to be interfered with or modified by an appellate court if it considers the specialized court to be possessing epistemic advantages over it. This deference is seen despite the possibility of these cases imposing considerable costs on government departments. There is an additional dimension of this feature that is seen in cases that involve medical expertise, where the South African Constitutional Court has upheld decisions on the right to health when they have been decided by High Courts, as in the Treatment Action decision where there was considerable controversy regarding the underlying scientific evidence. The Constitutional Court upheld the decision of the Pretoria High Court which had held the non-extension of the availability of nevirapine beyond a few pilot sites to be an unreasonable decision within the meaning of the South African constitution. While this issue has not come up explicitly in India and Kenya, the Supreme Court of Kenya in the *Moi Educational Centre* case[823] referred two issues concerning the validity of land title in the case (where the central concern was the social rights obligations of private actors), back to the National Land Commission, quasi-judicial body, for consideration.

[823] William Musembi v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR.

7.2.3. Nature of SER disputes

a) ***Polycentricity***: The polycentric nature of disputes involving social and economic rights raises important questions about the role of judges in granting complex, structural judicial orders for social rights violations. In countries like India, South Africa, and Kenya, the interplay between social, economic, and political factors often creates multiple and competing centres of power, which can make it challenging for judges to effectively address social rights violations through judicial means. In India, for example, the constitutional protection of social and economic rights is often complicated by the interplay between federal and state governments, as well as the influence of private actors in fields like healthcare and education. This has resulted in a fragmented and sometimes inconsistent approach to social rights protection, which has challenged the ability of judges to effectively address systemic violations. For example, in the *Swaraj Abhiyan* case, the Supreme Court of India struggled to effectively remedy widespread violations of employment guarantee rights, due to the lack of coordination between different levels of government. In order for the remedy to be effective, the Court had to join the state governments who had been persistent violators and had failed to set up fund disbursal mechanisms. In South Africa, the situation is similarly complex, as the protection of social and economic rights is shaped by the legacy of apartheid and the ongoing effects of economic inequality. In this context, the courts have played a critical role in advancing social rights protection. However, the polycentric nature of social rights disputes in South Africa has also meant that courts must navigate complex webs of power, including the influence of private actors, NGOs, and traditional leaders. In Kenya, the situation is similarly challenging, as the protection of social and economic rights is shaped by historical legacies of colonialism and ongoing struggles for political and economic power. For example,

in the case of the *William Yatich Sitetalia v. Baringo Country Council*[824], the High Court of Kenya had to grapple with the conflicting interests of different ethnic and cultural groups in relation to the protection of land rights, which are closely linked to social and economic rights. The polycentric nature of social rights disputes in India, South Africa, and Kenya has important implications for the ability of judges to grant effective remedies for violations of these rights. The polycentricity of social rights disputes can result in the fragmentation and undermining of judicial power, as judges must navigate complex webs of power and navigate competing interests.[825] This can result in a reduction in the effectiveness of judicial remedies, as judges may lack the institutional and political support necessary to enforce their decisions. However, these features can provide opportunities for judges to use their power creatively and innovatively to advance social rights protection while building networks of actors who are committed to advancing social rights protection.

b) ***Scale of the problem***: The degree of harm suffered by petitioners plays a key role in judges deciding whether to grant complex remedial orders or not. The extent of vulnerability of the petitioners, the number of petitioners affected by the dispute, and the kind of right and the petitioners' dependence upon it are important factors. In *Swaraj Abhiyan*[826], the Supreme Court of India, while granting a complex, systemic remedy – noted that thousands of workers in rural regions in India were being denied wages due to governmental intransigence at fund disbursal. It noted that most of them were heavily reliant on the rural employment guarantee

[824] William Yatich Sitetalia, William Arap Ngasia et al. v. Baringo Country Council, High Court, Judgment dated 19 April 2002, Civil Case No. 183 of 2000 (unreported). The case was appealed to the African Commission the African Commission on Human and Peoples' Rights and resulted in the Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya African Commission on Human Rights, comm no 276/2003, available at: http://www.achpr.org/english/Decision_Communication/Kenya/Comm.%20276-03.pdf

[825] Jeff King, The Pervasiveness of Polycentricity.

[826] Swaraj Abhiyan (I), (2016) 7 SCC 498, dated 11.05.2016; Swaraj Abhiyan (II), (2016) AIR SC 2953, dated 13.05.2016; Swaraj Abhiyan (III), (2016) 7 SCC 544, dated 13.05.2016; Swaraj Abhiyan (IV), dated 13.05.2016; Swaraj Abhiyan (V), dated 21.07.2017.

scheme in question for their daily bread and that a complex order that would oversee implementation was necessary in order to ensure that the funds were released to the states by the Central government in a timely manner. In South Africa, the Constitutional Court in its early decade often struggled with articulating standards for evaluating when doctrinal thresholds for complex remedial action would be triggered when it comes to consequential decisions.[827] It denied requests from petitioners in *TAC* and from the South African Human Rights Commission in *Grootboom* to retain jurisdiction – for reasons of inter-branch comity in the former and in the latter, the ability of petitioners to free-ride on the immediate nature of the rights of children (who were pleaded as parties through their parents). More recently, the Constitutional Court was moved to grant a complex remedy by the possibility of millions of South Africans losing access to social security grants as a result of SASSA, the country's social security agency, failing to award a tender to a private party.[828]

7.2.4. Nature of Social Rights Law

a) Textual basis: The ability of judges to order complex remedies is influenced by the substantive law governing SER: their formulation in constitutions, enabling legislation, and standards drawn from international human rights treaties. Structural remedial orders are granted when there is a textual basis for such grant. The remedial powers of courts are usually to be found in the rules of the court, or within the constitutional text. In some cases, judges have sought authority for their power to pass structural remedies in a holistic, structural

[827] Theunis Roux & Rosalind Dixon, *Marking Constitutional Transitions: The Problem of Transformation in Constitutional Design*, in Tom Ginsburg & Aziz Z. Huq (eds.), FROM PARCHMENT TO PRACTICE IMPLEMENTING NEW CONSTITUTIONS (Cambridge University Press, 2020).
[828] AllPay 1 & 2.

reading of the rights provisions in the constitution[829], or in courts' residuary powers.[830] In the absence of an explicit textual basis, courts have been persuaded to pass such orders if the legal system in question permits the consideration and/or application of foreign, international, or comparative law, and if they are convinced that the situation requires a structural remedy.[831] Alternately, in certain jurisdictions where a textual basis was missing, the remedial powers of the Court have been considered to be a non-exhaustive list and courts were able to craft a structural remedy where it was specific, appropriate, clear, and effective.[832]

Substantive SER: The presence of constitutionalized SER has a mixed influence on the grant of complex remedies. Substantively, India, South Africa, and Kenya represent three different waves of constitutionalization of SER, as indicated in Chapter 3 of this dissertation. Until the mid-2000s, India did not have a set of constitutionally recognized SER, nor legislation to operationalize it. Judges and litigants had to make do with doctrinal innovations to declare substantive SER within the purview of the Indian Constitution's omnibus right-to-life provision. Consequently, litigation and remedies did not take complex forms in India till the mid-2000s despite litigants seeking detailed orders in SER since the 1980s.[833] Yet, as the Right to Food litigation shows, the lack of an enabling legislation for the right and its non-constitutionalization allowed the Supreme Court of India to deploy its broad remedial powers in an expansive way to craft unprecedently expansive remedies. Contrast this with South

[829] Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR (Supreme Court).
[830] For example, the series of orders in the Right to Food litigation (Peoples Union for Civil Liberties v Union of India Writ Petition (Civil) 196 of 2001), the Supreme Court of India had its genesis in the power of the Court to issue what is known as a 'continuing mandamus', the authority for which is derived from a structural reading of Part III (fundamental rights) of the Constitution and its residuary power to do 'complete justice' in n.20 above.
[831] Bhekindlela Mwelase v Director-General for the Department of Rural Development and Land Reform [2019] ZACC 30.
[832] Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR.
[833] Arun Thirvengadam, Characterizing SER in India,

Africa's 1996 Final Constitution provided a set of programmatic[834] SER that invited judicial enforcement in a robust way.

In the initial phases of social rights litigation in South Africa, these programmatic provisions with their internal qualifications (progressive realization, within available resources) permitted the judiciary to be deferential to courts. It is only when there were systematic failures that courts began to use their remedial powers to grant remedies that were complex in nature. Therefore, the same constitutional provisions on social rights in South Africa at first constrained and then facilitated recourse to complex remedies – all without formal textual change. This points toward the importance of constitutional text and drafting of social rights provisions, but up to a point, where a range of other related factors – like vertical separation of powers (federalism / decentralization), courts' relationship to the coordinate branches, their institutional capital, and the breadth of their remedial powers – come into play. In Kenya, where there are programmatic social rights like South Africa, judicial power is explicitly curbed when it comes to social rights provisions: courts cannot interfere with a budgetary allocation on the basis that they would come to a different conclusion.[835]

Public Participation Rights: The constitutional recognition of public participation rights influences the grant of a complex remedial order. Judges feel more comfortable ordering participatory remedial orders or interim participatory processes leading to a final order. This can happen in two ways. The first is an *indirect* route where executive decisions on social rights matters are subjected to review on administrative law grounds, where public participation,

[834] As opposed to individualized. For more on this, see Chap. 4.
[835] See Article 20(3)(c), Constitution of Kenya, 2010.

especially of affected constituents, is usually required prior to a decision that affects them.[836] In the meaningful engagement cases from South Africa, the affected parties put forward an argument that evictions occurring from structures that violated building safety standards should attract the provisions of the Promotion of Administrative Justice Act, 2000, which has hearing or public inquiry procedures in terms of the right to just administrative action. The court declined to root the participatory engagement remedy in these statutory terms, yet similar arguments have been raised in subsequent cases involving evictions. In the absence of such participation, courts may order a participatory remedy where affected stakeholders can provide their inputs. The meaningful engagement requirement and the necessity for public participation of stakeholders prior to evictions found in the South African Constitutional Court has found reception in scattered High Courts judgements in India, but has yet to be used by the Supreme Court.

The *direct* use of public participation rights as an authority for granting complex remedies is seen in Kenya. Take for instance the case of evictions and resettlement in Kenya, where courts have held that affected parties have a right to be heard when deciding cases on evictions and when designing plans for resettlement or the provision of alternate accommodation.[837]Therefore, the presence of public participation rights in Kenya's pantheon constitutional values has enabled its deployment by courts to design remedies where

[836] Sandra Liebenberg, *Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'* 12(1) African Human Rights Law Journal 1, 18 (2012).
[837] Public participation is a national value and principle of governance. See Article 10, Kenya Constitution and Republic v Cabinet Secretary Ministry of Transport and Infrastructure & 3 others ex parte Francis N. Kiboro & 198 Others [2015] eKLR, para 40: "*Article 10 of the Constitution binds all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution; enact, apply or interpret any law; make or implement any public policy decision, to national values and principles of governance which include participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability and sustainable development*."

Receptiveness to International Human Rights Law: International human rights instruments which spell out substantive or procedural standards on social rights influence the grant of a complex remedy. Their influence depends formal factors like the formal status of international human rights law in the jurisdiction's legal system and informal ones like judicial openness to applying these norms. India and South Africa are dualist countries, requiring enabling legislation for international law to be considered part of its laws.[838] Courts in South Africa are required to consider international law in deciding cases, but not to apply it, where judges are granted discretion.[839] Similarly, in India, arguments have often been advanced and relief sought based on standards drawn from international human rights – with mixed records. The South African Constitutional Court firmly dismissed the notion put forth in *Grootboom* and *Treatment Action Campaign*, which relied on the CESCR General Comments 3 and 14. Based on these general comments, advocates for the petitioners had argued that the economic, social, and cultural rights safeguarded by sections 26 and 27 of the South African Constitution (including the right to accessible housing, healthcare, adequate sustenance, water, and social security) imposed a fundamental duty upon the State to provide a minimum threshold of such necessities. However, the Court declared that sections 26 and 27 did not confer upon individuals the explicit entitlement to receive the State's direct provision of the bare minimum essential levels of the aforementioned goods and services. South Africa only ratified the ICESCR in 2015, and has not explicitly located its remedial jurisprudence in international human rights norms, despite there being several similarities.[840] In Kenya, there is a much stronger influence of international human rights norms since Kenya is formally a monist

[838] See Article 231, South Africa Constitution, which provides that any international agreement becomes law in the country after approval by both houses of parliament and when it is enacted into law by national legislation (unless it is self-executing).
[839] See Article 39 (1) (b), South Africa Constitution, which provides for the consideration of international human rights norms when interpreting the Bill of Rights.
[840] Marius Pieterse, *Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience* 26(4) Human Rights Quarterly 892, 904 (2004).

country[841] and Kenyan courts, in social rights disputes, have frequently drawn on international standards to guide the design of remedies.[842]

7.3. The Future Directions of Complex Remedies

This section charts the future of complex remedies and evaluates them on three identified metrics: a) compatibility with the principle of the separation of powers, b) the presence or absence of backlash from the coordinate branches, and c) sustainability of the remedial form and its ability to guide future cases.

7.3.1. Compatibility with the separation of powers

While complex remedies pose a challenge for the separation of powers, some of the kinds discussed in this dissertation are more compatible with the principle. Indian courts' use of the report back to court model has been largely successful in the cases discussed. With the ascent of an aggrandized executive branch that has come into constant conflict with the judiciary, Indian courts will likely keep using this model in social rights cases, despite its struggle to act in a timely manner when evictions have occurred in recent years.[843] The use of this kind of remedial form would allow Indian courts to safeguard their limited institutional capital while ensuring that parties return to the judiciary to inform them of their progress in handling a systemic issue that led to the violation. Courts following the expert remedial design model are also unlikely to greatly disturb the separation of powers, since experts acting to design a remedy

[841] See section 2(5), Kenya Constitution, 2010.
[842] See
[843] See Rishika Sahgal, *The Supreme Court's Eviction Order Ignores the Rights of Jhuggi Dwellers*, Indian Constitutional Law & Philosophy, 5 September 2020 https://indconlawphil.wordpress.com/2020/09/05/guest-post-the-supreme-courts-eviction-order-ignores-the-rights-of-jhuggi-dwellers/ .

usually aid judges when the remedy is unclear (like in the school dropouts case in India), or where there has been a pattern of persistent non-compliance (such as in Black Sash and AllPay). Expert remedial oversight of the implementation of a judgment is the model where courts are most likely to affect almost any kind of formulation of the separation of powers principle. This is because the judiciary is meant to be a reactive branch of government, the ambit of whose power ends with the disposition of a dispute. Post-judgment monitoring of compliance can upset this general idea. Yet, their use in the three jurisdictions under study has been on rare occasions, and have been in areas where there is a high likelihood of non-compliance, while also being in fields which have popular salience (such as starvation deaths in India, the payment of social security in South Africa, and urban evictions in Kenya). The kind of remedy of a special master taking over the entirety of the Department of Land Reform as a result of the Constitutional Court's confirmation of the Land Claims Court's order puts by far the greatest strain on the separation of powers. Yet Cameron J, in his majority opinion, stresses that there had been repeated breaches of the principle of institutional comity and that the decision to issue this remedy had not been taken lightly.

7.3.2. Executive or Legislative Backlash

The remedial forms under study have all invited backlash in the jurisdictions under study, primarily due to the holdings of unconstitutionality in some of the cases. Courts face minimal backlash when they act to facilitate dialogue among government departments, the applicants, and civil society. For example, in the out of school children case, the Government of the State of Karnataka welcomed the setting up of a committee to deliberate on the best way forward to reduce school dropouts. Governments are often sensitive to the electoral salience of issues to

the public, and do not wish to be seen as opposing the enforcement of social rights. This was true of the Mwelase case, where the appointment of the Special Master by the Land Claims Court was appealed by the national government, but after the confirmation of the order by the Constitutional Court, there was no opposition to the order. Such a reaction (or the lack thereof) may signify the reluctance of the African National Congress to appear to be opposed to the project of land tenure reform, which is a central plank of the remediation of the historic injustice of apartheid. In the Right to Food litigation in 2002 and 2003, where the Supreme Court of India set up an unprecedented institutional structure to monitor remedial implementation, the National Democratic Alliance, led by the Bharatiya Janata Party, did not want to appear to be antagonistic to the reform of the food security regime in India. Their concerns had become especially heightened since the principal opposition Congress party had declared their intention to make food security a central plank of their manifesto for the upcoming 2004 national elections. Therefore, backlash to a remedial form that appears to radically impinge upon the separation of powers principle can be tempered by the salience of the issue to the broader public and the institutional position, as well as the de facto and de jure independence of courts relative to the coordinate branches of government. However, governments also can be conscious of court decisions interfering with carefully laid down budgetary priorities or issue areas. The adverse reaction of the Minister of the Interior in South Africa to the *Blue Moonlight* decision instantiates this point, where the Court's decision to extend the state's obligations to provide alternate emergency accommodation to those evicted from private premises in Johannesburg would likely have resulted in an increased fiscal burden on the city. This dissertation has also how courts often help identify the bearers of social obligations and facilitate coordination between layers of government, and in the cases discussed here, there had been no backlash from the coordinate branches when acting in such a modality.

7.3.3. *Sustainability of the remedial form*

The return to court model is the most sustainable remedial form of the ones under study. Not only does the model permit courts to seek more information from parties, but it also allows them to declare a particular act or omission of the government to be non-compliant with their existing obligations. Thereafter, governments can modify their policy to be in line with the holdings of the court. Expert remedial design represents a sustainable form since courts usually adopt this when there is a lack of clarity on the steps needed to solve a problem. Consensual remedial formulation of the kind seen in meaningful engagement in South Africa represents yet another sustainable remedial form since parties can be brought together under judicially set substantive and procedural boundaries to arrive at a solution. Post-judgment monitoring of remedies by civil society presents a relatively unsustainable remedial form, especially in Kenya where their involvement has been constricted by the *Mitu-Bell* decision. Similarly, even in India, there have been no decisions following the Right to Food cases where such expansive remedies involving post-judgment monitoring has been ordered, pointing to the unique constellation of social, legal, and political conditions that came together to lead to the decision. It is also unlikely that court-appointed experts who take over an entire government department, of the kind in Mwelase, will be seen with greater frequency in the jurisdictions under study.

CONCLUSION

This dissertation provided an account of the rise, the current practice, and the prospects for complex remedies in India, South Africa, and Kenya. It outlined four kinds of remedial models in the jurisdictions: return to court, expert remedial design, consensual remedial formulation, and expert remedial implementation monitoring. I have argued that complex remedies help engage with the open texture of social rights provisions, the textual architecture of courts' remedial powers, the idiosyncratic nature of social rights disputes, as well as a range of structural constitutional considerations like democratic legitimacy and the separation of powers. Complex remedies also allow courts to deal with remedial failure and fulfil the restitutive, equilibration, and non-repetition desiderata for the design of social rights remedies. The dissertation also provided an account of the factors influencing the grant of complex remedies across the three jurisdictions. It showed how particularly salient considerations like the scale of the problem, the vertical division of power between federal and sub-national governments, and the substantive and procedural law on social rights and the judicial process, respectively, play out over the three jurisdictions under study.

Complex remedial forms are instrumental when courts act in a non-prescriptive, facilitative role, bringing a range of stakeholders, including government departments, experts, and members of civil society, into dialogue with each other during the judicial process and thereafter during remedial implementation. They not only dial down the heat of inter-branch conflict, but also help courts address their institutional weaknesses of not being experts closest to the social rights dispute, of not having the power to enforce their decisions, and their lack of democratic responsiveness and its attendant legitimacy. Complex remedies also permit courts

to foster the rights advocacy support structures (comprising members of civil society, members of the political elite, and social movements) crucial to persistent judicial attention to rights questions. They also represent a means to ensure discursive governmental accountability.[844]

Complex remedies are of particular salience in jurisdictions where courts have a fraught relationship with the coordinate branches of government, where aggressive, top-down remedies can be seen as a challenge to the ruling parties and invite legislative or executive backlash. Through participatory, dialogic remedial forms, courts can assist governments in identifying duty bearers for fulfilling social rights and fostering interaction between stakeholders on the best ways forward.

Complex remedies, however, must contend with a range of issues to remain sustainable. In particular, many of the remedies discussed in this dissertation in Chapters 4, 5, and 6 have privileged expertise of certain kinds over others and have done little to ensure deliberative equality between stakeholders. These remedies also need to be foregrounded in a broader recognition that judicial action is often an imperfect measure to ensure rights fulfilment, and can only be one avenue of several kinds of broader social, political, and legal mobilization. In short: the legislature and executive should act to respect, protect, and fulfil social rights even in the absence of judicial action.

The three jurisdictions under study here have divergent political dynamics that will calibrate the relationship between the judiciary, government, and support structures in the coming years. As discussed in Chapter 7, some remedial forms have greater compatibility with the separation of powers principle and are likely to invite lower levels of backlash from the coordinate branches of government. With an electorally weakened African National Congress in South

[844] Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14 Law & Ethics of Human Rights 49 (2020).

Africa, partly due to rampant corruption and failure to deliver basic public services to citizens, the Constitutional Court will likely face increased litigation to force governmental accountability for social rights violations. Courts might also be drawn into lawfare conflicts between political parties on sensitive issues, like the modalities of land redistribution without compensation[845] and the emerging questions around how to best address state capture and corruption in state and state-owned public enterprises, especially under the leadership of Chief Justice Zond (who will be in the position till 2030).[846] How South African courts approach these questions will be critical to the future use of complex remedies for social rights violations.

In Kenya, the Supreme Court has played an increasingly important role in the country's political life, deciding the validity of its recently concluded presidential elections, while also striking down an extensive bi-partisan restructuring of several key state institutions as violative of the constitution's implicit limits on its amendment.[847] Much of the social rights litigation occurs, however, at the High Courts, and courts across the three levels (High Court, the Court of Appeal, and the Supreme Court) have not always aligned in their views, including on complex remedies' use of civil society to monitor remedies. Whether and how the Supreme Court calibrates its approach to complex remedies to dial down the heat of inter-branch conflict under the leadership of Chief Justice Koome (who will be in the position till 2031), while also managing disagreement on these issues between the High Courts and the Court of Appeal, will be key to the future of complex remedies in Kenya.

Under the leadership of Chief Justice DY Chandrachud (who will be in the position till 2025), the Supreme Court of India has shown a measure of renewed resolve to confront India's right-

[845] Heinz Klug, *Decolonisation, compensation, and constitutionalism: land, wealth and the sustainability of constitutionalism in post-apartheid South Africa* 34 South African Journal on Human Rights 469 (2018).
[846] Helen Acton, *The Legal and Political Implications of a Judicial Review of the Zondo Commission's Findings*, 25 April 2022, Africa Portal Briefing Paper, https://africaportal.org/publication/the-legal-and-political-implications-of-a-judicial-review-of-the-zondo-commissions-findings/.
[847] Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022).

wing, Hindu nationalist government that has restructured the social state in the nine years that it has been in power.[848] This refashioning of the architecture of social constitutionalism away from a rights-based to one that is located in ideas of charity and state largesse has narrowed the scope for judicial involvement. Consequently, remedial forms of the kind seen in large-scale litigation like the Right to Food case are unlikely to be replicated in the years to come. While the Delhi High Court has been progressive in adopting participatory forms of social rights remedies like meaningful engagement in eviction cases, this has yet to diffuse to other High Courts. In the last few years, India has also witnessed a radical constriction of the space in which civil society and social movements operate. This narrowing has adversely affected the support structures that are so crucial for sustained rights-action. Consequently, the future use of complex remedies in India will hinge on the broader political and social dynamics in the country, one that will no doubt be influenced by the upcoming federal elections in 2024.

While complex remedies can help manage several of the concerns around judicial involvement in enforcing social rights, they must remain one of several avenues of mobilization to ensure social rights and the dignity of human beings. Judicial intervention of these kinds can do little to alleviate exacerbating global economic inequality and disturb the political economy that undergirds unequal access to social goods emerges. Yet, as imperfect as complex remedies are as a tool for sustainable systemic social change, they remain a potent force for courts to be in the kinds of juris-generative[849] conversations with the coordinate branches that are central to legally bound social transformation.

[848] Gaurav Mukherjee & Arun Thiruvengadam, *Social Rights in India: The Diminishing Impact of International Human Rights Norms and The Controlling Influence of Domestic Factors*, in Mila Versteeg & Neha Jain (eds.) OXFORD HANDBOOK ON COMPARATIVE HUMAN RIGHTS LAW (Oxford University Press, forthcoming 2024).
[849] David Singh Grewal and Jedediah Purdy, *The Original Theory of Constitutionalism* 127(1) Yale Law Journal 666, 688 (2018).

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