

Constitutionalism of the Global South

**The Activist Tribunals of India,
South Africa, and Colombia**

Edited by Daniel Bonilla Maldonado

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CONSTITUTIONALISM OF THE GLOBAL SOUTH

The Indian Supreme Court, the South African Constitutional Court, and the Colombian Constitutional Court have been among the most important and creative courts in the Global South. In Asia, Africa, and Latin America, these courts are widely seen as activist tribunals that have contributed (or attempted to contribute) to the structural transformation of the public and private spheres of their countries. The cases issued by these three courts are gradually creating what can be called a constitutionalism of the Global South. This book addresses in a direct and detailed way the jurisprudence of these three Courts on three key topics: access to justice, cultural diversity, and socioeconomic rights. This volume is a valuable contribution to the discussion about the contours and structure of contemporary constitutionalism. It makes explicit that this discussion has interlocutors both in the Global South and in the Global North, while showing the common discourse between them and the important differences in how they interpret and solve key constitutional problems.

Daniel Bonilla Maldonado is Distinguished Leitner Center Visiting Professor at Fordham Law School and Associate Professor of Law at the Universidad de los Andes in Bogotá, Colombia. He received his JSD and LLM from Yale Law School. He has been a visiting professor or lecturer at a number of institutions, including Yale Law School, Oñati International Institute for the Sociology of Law, Fordham Law School, University of Texas School of Law, Georgia State University College of Law, and Universidad Nacional de Colombia. His recent publications include *La función social de la propiedad* (2013); *Democracia, derecho y economía de mercado* (2010); and *Teoría del derecho y transplantes jurídicos* (2009). He is the recipient of a Fulbright Fellowship and several awards for distinctions in teaching.

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OF INDIA, SOUTH AFRICA,
AND COLOMBIA

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Daniel Bonilla Maldonado

Fordham University School of Law

and

Universidad de los Andes, School of Law



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To my father

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Contributors

Catherine Albertyn University of the Witwatersrand School of Law, Johannesburg, South Africa

Libardo José Ariza Universidad de los Andes School of Law, Bogotá, Colombia

Bipin Aspatwar Advocate before the Supreme Court of India, New Delhi, India

David Bilchitz University of Johannesburg School of Law, Johannesburg, South Africa

Daniel Bonilla Maldonado Fordham Law School, New York, New York, and Universidad de los Andes School of Law, Bogotá, Colombia

Jackie Dugard Socio-Economic Rights Institute of South Africa, University of the Witwatersrand, School of Law, Johannesburg, South Africa

Menaka Guruswamy Advocate before the Supreme Court of India, New Delhi, India

Manuel Iturralde Universidad de los Andes, School of Law, Bogotá, Colombia

Gurpreet Mahajan Center for Political Studies, Jawaharlal Nehru University, New Delhi, India

Shylashri Shankar Centre for Policy Research, New Delhi, India

Introduction

Toward a Constitutionalism of the Global South

Daniel Bonilla Maldonado

THE GRAMMAR OF MODERN CONSTITUTIONALISM DETERMINES the structure and limits of key components of contemporary legal and political discourse. This grammar constitutes an important part of our legal and political imagination. It determines what questions we ask about our polities, as well as the range of possible answers to these questions. This grammar consists of a series of rules and principles about the appropriate use of concepts like *people*, *self-government*, *citizen*, *rights*, *equality*, *autonomy*, *nation*, and *popular sovereignty*.¹ Queries about the normative relationship among state, nation, and cultural diversity; the criteria that should be used to determine the legitimacy of the state; the individuals who can be considered members of the polity; the distinctions and limits between the private and public spheres; and the differences between autonomous and heteronomous political communities make sense to us because they emerge from the rules and principles of modern constitutionalism. Responses to these questions are certainly diverse. Different traditions of interpretation in modern constitutionalism – liberalism, communitarianism, and nationalism, among others – compete to control the way these concepts are understood and put into practice.² Yet these questions and answers

1 See James Tully, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 62–79 (Cambridge University Press 1997).

2 See *id.* at 36.

cannot violate the conceptual borders established by modern constitutionalism. If they do, they would be considered unintelligible, irrelevant, or useless. Today, for example, it would be difficult to accept the relevancy of a question about the relationship between the legitimacy of the state and the divine character of the king. It would also be very difficult to consider valuable the idea that the fundamental rights of citizens should be a function of race or gender. The secular character of modern constitutionalism – as well as its egalitarian impulse – would sweep these issues to the margins of the legal and political discourse.

The origins of modern constitutionalism can be linked to the works of a relatively small group of philosophers.³ Thomas Hobbes, John Locke, Jean-Jacques Rousseau, Montesquieu, Immanuel Kant, and John Stuart Mill, among others, have contributed to the creation of the basic rules and principles that govern modern constitutionalism. These authors are ineludible references for understanding central political and legal issues of the modern and contemporary polities. Issues like the relationship between consent and legitimacy, law and politics, will and reason, the individual and the state, and freedom and diversity cannot be understood without exploring the works of these political theorists. Modern constitutionalism's contractualism, individualism, and rationalism, for example, are connected to one or several of these authors. A genealogy of modern political and legal imagination cannot be complete without examining the works of these thinkers.

The fundamental rules and principles of modern constitutionalism articulated by these authors are (and have been) continuously interpreted and reinterpreted. For these norms to provide specific conceptual tools for understanding, evaluating, and solving contemporary states' basic challenges, they have to be given more specific meaning. Yet the number of authoritative interpreters of this grammar is relatively small. Only a few institutions – such as the Supreme Court of the United

³ See *id.* at 42, 59–60, 79–80; Charles Howard McIlwain, *CONSTITUTIONALISM ANCIENT AND MODERN* 3–24 (Cornell University Press 1940).

States, the European Court of Human Rights, and the German Constitutional Court – are considered paradigmatic operators and enforcers of modern constitutionalism's basic rules and principles.⁴ These legal institutions are the ones that determine the paradigmatic use of modern constitutionalism's basic norms.⁵ They are the ones responsible for defining and solving key contemporary political and legal problems by giving specific content to modern constitutionalism's rules and principles. The answers that these institutions give to questions like “What are the limits of judicial review?” “What is the meaning of the principle of separation of powers?” “Are social and economic rights mere political aspirations?” “How should cultural minorities be recognized and accommodated?” “Can security trump individual rights?” and “What are the rights of immigrants?” are considered by most legal communities to fundamentally enable the connection of modern constitutionalism to the realities of contemporary polities. Their answers to these questions usually become inevitable references for other legal and political institutions around the world. The jurisprudence of these institutions is widely read and quoted by scholars and legal institutions all over the globe.

⁴ In 2003, the *International Journal of Constitutional Law* published a symposium issue on constitutional borrowing. The articles published in this volume mainly analyze cases about borrowing *from* Western courts (U.S., German, French, for example) or Constitutions. The overwhelming majority of the cases explored are those of non-Western institutions borrowing from Western institutions. See D. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 INT'L J. CONST. L. 181–95 (2003); Lee Epstein and Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196–223 (2003); Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT'L J. CONST. L. 224–43 (2003); Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244–68 (2003); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269–95 (2003); Kim Lane Schepppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models*, 1 INT'L J. CONST. L. 296–324 (2003).

⁵ See generally 1 INT'L J. CONST. L. 181–324 (2003) (analyzing various aspects of constitutional borrowing while overwhelmingly limiting the analyses to borrowings *from* Western institutions).

Likewise, the work of major contemporary political philosophers like John Rawls, Robert Nozick, and Charles Taylor, to name only a few, is also considered authoritative for comprehending, transforming, and updating the basic components of modern constitutionalism. Their work brings up to date and sometimes transforms the grammar of modern constitutionalism. Rawls's "original position" and "the veil of ignorance," for example, have been fundamental to discussions about the foundations of a modern liberal polity.⁶ His "overlapping consensus" has been key for thinking about how to accommodate diversity and make decisions about the norms that should govern a pluralistic polity.⁷ Nozick's defense of a minimal state as a way of protecting autonomy has been crucial for imagining the structure that a state should have in order to protect one of modern constitutionalism's most important values.⁸ The history of the modern self offered by Taylor has notoriously contributed to the understanding of the ways in which we think about the subject in general, and the legal subject in particular.⁹ Of course, beneath this first level of authoritative and well-recognized interpreters are several other levels of institutional and scholarly interpreters of modern constitutionalism. Countless other scholars and institutions interpret and use the language of modern constitutionalism. The number of publications on political theory and constitutional law is enormous all over the world; likewise, a great number of institutions around the globe use modern constitutionalism to understand and address key political issues in their polities. Yet most of them occupy a lower-tier position in the dialogue that aims to give content to and use modern constitutionalism. The politics of constitutional legal and political knowledge has an unwritten but firmly entrenched hierarchy.

6 See John Rawls, *A THEORY OF JUSTICE* 15–24 (Harvard University Press 1999).

7 See *id.* at 387–88.

8 See generally Robert Nozick, *ANARCHY, STATE, AND UTOPIA* (Basic Books 1974) (arguing in favor of a minimal state for the best protection of individual rights).

9 See generally Charles Taylor, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (Harvard University Press 1989) (inquiring into the nature of identity and humanity in the modern West).

In this hierarchy, the scholarship and legal products created by the Global South¹⁰ occupy a particularly low level. It is extraordinary to hear the name of a scholar or a legal institution from the Global South in this dialogue. The jurisprudence of a Global South court is very seldom mentioned by the specialized literature when discussing the meaning of key concepts of modern constitutionalism. It is very rare to see a course on comparative constitutional law in a North American or Western European university that includes a section about the constitutional law of a country in the Global South.

There are many reasons for this lack. First, the law of the countries of the Global South, historically, has been considered a secondary component of one of the major legal traditions of the world.¹¹ The majority of the legal systems of the Global South, the argument goes, reproduce or derive from continental European or Anglo-American law.¹² Latin America is a weak member of the civil tradition (French, German, Spanish, and Italian law, in particular),¹³ Africa is a young and naïve participant in the Anglo-American or civil law tradition;¹⁴ Eastern Europe uses a mixture of obsolete socialist law and recent imports from Anglo-American or Western European Law,¹⁵ and the majority of law in present-day Asia is a reproduction of the law of the colonial powers that

10 I use the words “Global South” and “Global North” as less pejorative synonyms of the words “developing countries” and “developed countries,” respectively.

11 See Boaventura de Sousa Santos, *Three Metaphors for a New Conception of Law: The Frontier, the Baroque and the South*, 29 L. SOC'Y REV. 569, 579–82 (1995); Mark van Hoecke and Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L COMP. L.Q. 495, 498–99 (1998).

12 See de Sousa Santos, *supra* note 11, at 579–82; Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 10–12 (1997); van Hoecke and Warrington, *supra* note 11, at 498–99.

13 See Jorge L. Esquivel, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425, 427–28 (1997); Jorge L. Esquivel, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 42 (2003); Jorge L. Esquivel, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 94–95 (2008).

14 See Kwame Nkrumah, *LAW IN AFRICA*, 6 AFR. L.J. 103, 105 (1962).

15 See René David and J. E. Brierley, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY*, 222–24 (2nd ed., Simon and Schuster 1978).

dominated the region politically.¹⁶ Certainly, this official law coexists in many cases with one or more “native” legal systems. Nevertheless, native law is subordinated to the official law of foreign origin or else it is of inferior quality. At the same time, the dominant dialogue is colored by an assumption that the level of effectiveness of the law in the Global South is generally very low. The law is not a central instrument for social control in this region of the world, the thinking goes. Other kinds of norms – moral and political, for example – maintain order and social cohesion. From this perspective, the social, economic, and political underdevelopment of these regions of the world is directly related to the underdevelopment of their legal systems.

It does not seem very useful, therefore, to study this weak academic production, which reflects on a set of norms that are merely rules on paper and subproducts of other legal traditions. From this perspective, the law of the Global South – or rather its inefficiency and lack of originality – can be of interest to sociologists, anthropologists, and law professors interested in issues of social justice and the reforms needed to achieve it.¹⁷ These social scientists, legal academics, and activists may find an interesting object of study in the social norms that effectively

16 This inherited or imported law from the colonial cities coexists with the religious legal traditions in many countries in the region, Islamic or Buddhist ones in particular. See Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 806–08 (2004).

17 See Brian Z. Tamanaha, “The Primacy of Society and the Failures of Law and Development,” p. 6, St. John’s University Legal Studies Research Paper Series, Paper No. 09-0172 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406999; Jorge L. Esquirol, *Writing the Law of Latin America*, 40 GEO. WASH. INT’L L. REV. 693, 706, 731 (2009). It is interesting to contrast this argument with the fact that, in other fields, such as literature and art, the production of the South is considered relevant and valuable. Literature and art departments in the United States and Europe, for example, usually offer courses on Latin American, Asian, and African literature or art. The faculties of these departments often include professors from the South or those specialized in the artistic production of the South. In the same way, the work of authors like Gabriel Garcia Marquez, J. M. Coetzee, and Gao Xingjian has contributed to the creation of the grammar of contemporary literature. It would be important to explore the reasons that explain the “universality” of Southern art and the marginality of Southern law.

regulate the lives of those living in the region. Similarly, trying to explain and evaluate the weakness of the law in the countries of the Global South, as well as proposing and implementing reforms to solve the problems facing them, can be a fertile field of research and action for the academia of the Global North. For legal academia in the North, the attractive object of study in the Global South is not the law itself, or even the local academic production examining it, but rather the failure of law in the region.¹⁸

Second, the view that Global South countries' law is merely an iteration of other legal communities' legal production has been consolidated by the influence that U.S. law and the U.S. legal academy have had in the region in recent decades.¹⁹ The impact of U.S. legal rules and scholarship during the past decades has been notable. Several countries in the region, for example, have imported the U.S. accusatory criminal system,²⁰ and several others have imported U.S.-inspired neoclassical liberal labor laws aimed to increase the flexibility of labor markets.²¹ Additionally, the U.S.

18 See Esquirol, *id.*

19 See John Henry Merryman and Rogelio Pérez-Perdomo, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 57, 60 (Stanford University Press 2007); R. Daniel Kelemen and Eric C. Sibbitt, *The Globalization of American Law*, 58 INT'L ORGANIZATION 103, 103–36; John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline, and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 484–89 (1977); Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 203, 203–52 (D. Trubek and A. Santos eds., Cambridge University Press 2006).

20 See Pilar Domingo and Rachel Sieder, *Rule of Law*, in *LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* 1 (Pilar Domingo and Rachel Sieder eds., Institute of Latin American Studies 2001) (Eng.); Andrés Torres, “From Inquisitorial to Accusatory: Colombia and Guatemala’s Legal Transition,” p. 2, Law and Justice in the Americas Working Paper Series, Paper No. 4 (2007), available at <http://lawdigitalcommons.bc.edu/ljawps/4>.

21 See María Victoria Murillo, *Partisanship amidst Convergence: The Politics of Labor Reform in Latin America*, 37 COMPARATIVE POLITICS 441, 441–43; Graciela Bensusán, “La efectividad de la legislación laboral en América Latina, Instituto de Estudios Laborales,” pp. 13–22, Organización Internacional del Trabajo (2007), available at <http://www.ilo.org/public/spanish/bureau/inst/download/dp18107.pdf>.

legal education model has been extremely influential in many Asian, Latin American, Eastern European, and African countries.²² The work of legal scholars such as Ronald Dworkin, Laurence Tribe, and Cass Sunstein has become familiar to an important number of Global South law students and professors.²³ The influence of U.S. schools of thought like law and economics or law and development is strong in many law schools in the Global South. As a result, the Global North academy tends to assume there is little of value in the law of the Global South. To understand and evaluate the accusatory criminal system or liberal political and legal theory, the thinking goes, it is not necessary to look to the South. To formulate the normative criteria that should guide the transformation of law schools, it is not useful to explore the experiences of law schools in the South. To attain these aims, it is thought necessary only to focus on the academic production and legal practice of the United States – it is, after all, the original font of the doctrine and theory that has nourished the changes in the law of Global South countries during the past decades.

Third, the indifference of the Global North academy toward the law of the Global South is related to the formalism of the Global South.²⁴ The idea that law is a closed, complete, coherent, and univocal system has controlled the way in which an important part of the law in the Global South is thought about and practiced.²⁵ A significant part of Latin

22 See Haim Sandberg, *Legal Colonialism – Americanization of Legal Education in Israel*, 10(2) GLOBAL JURIST, (Topics), article 6.

23 See Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 447 (2003); Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994); Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in *LEGAL CULTURE AND THE LEGAL PROFESSION* 137 (Lawrence M. Friedman and Harry N. Scheiber eds., Westview Press 1996).

24 See Carlos Peña González, “Characteristics and Challenges in Latin American Legal Education,” Conference of International Legal Educators 1, 1–3 (2000), available at <http://www.aals.org/2000international/>.

25 See Carlos Santiago Nino, INTRODUCCIÓN AL ANÁLISIS DEL DERECHO 36–37 (Astrea 1984) (Arg.).

American,²⁶ African,²⁷ Asian,²⁸ and Eastern Europe²⁹ legal academia is still dominated by various forms of legal formalism. The formalist concept of law is certainly not very illuminating or useful. Many academics from the Global South have argued so.³⁰ Its descriptive and normative weaknesses are well known: The mechanical theory of adjudication that it promotes does not describe the way in which judges really decide cases. In practice, syllogism is only one of the many tools that judges use to adjudicate. The distance between concepts, norms, and facts has to be bridged by judges' wills. There is no natural connection between the concepts and mandates of law and social reality. The supposed univocity of most legal norms defended by legal formalism contrasts with the ambiguity and vagueness that characterize many of these norms. The supposed coherence of the legal system is in tension with the contradictions found in contemporary legal systems. As a way of understanding law, formalism is analogous to the classical legal thought that predominated during the second half of the nineteenth century and first decades of the twentieth

26 See Merryman and Pérez-Perdomo, *supra* note 19, at 66.

27 See generally Martin Chanock, *THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 1902–1936: FEAR, FAVOUR AND PREJUDICE* (Cambridge University Press 2001); Samuel C. Nolutshungu, *Constitutionalism in Africa: Some Conclusions*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley eds., Oxford University Press 1993).

28 See generally *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA* (Tom Ginsburg and Albert H. Y. Chen eds., Routledge 2009); Tom Ginsburg, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 42 (Cambridge University Press 2003).

29 See, for example, Marcin Matczak, *Judicial Formalism and Judicial Reform: An Example of Central and Eastern Europe* (July 25, 2007) (unpublished paper presented at the annual meeting of the Law and Society Association, Berlin, Germany, describing the persistence of formalist-inflected adjudication in Poland).

30 See generally Carlos Santiago Nino, *ÉTICA Y DERECHOS HUMANOS* (Astrea 2003) (Arg.); Eugenio Bulygin, *EL POSITIVISMO JURÍDICO* (Fontamara 2006) (Mex.); Carlos Alchourrón and Eugenio Bulygin, *INTRODUCCIÓN A LA METODOLOGÍA DE LAS CIENCIAS JURÍDICAS Y SOCIALES* (Astrea 1974) (Arg.); Boaventura de Sousa Santos, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* (Cambridge University Press 2002).

in the United States.³¹ This is a theoretical view that was radically debilitated by the attack mounted against it by legal realism.³² For a significant part of the U.S. legal academy, therefore, the legal systems of the Global South are only useful to study or illustrate the failure of law.³³ The law of the Global South countries, it is thought, is not a useful object of study if the aim is to understand the central issues of contemporary legal theory, doctrine, and practice.

Fourth, the academic communities in the North are more robust than the academic communities in the South. The quantity and quality of academic products³⁴ are much higher in law schools in the North than in the South. Similarly, the levels of academic rigor and criticism are much higher in the former than in the latter region of the world. The number of books and specialized journals produced in the legal academia of the North, as well as their richness and complexity, is much greater than

31 See, for example, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (articulating the antiformalist bases for which legal realism came to be known).

32 See, for example, John Dewey, *Logical Method and the Law*, 10 CORNELL L.Q. 17 (1924); Karl Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 HARVARD L. REV. 1222 (1931). See also NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (Brian Leiter ed., Oxford University Press 2007); Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?* 16 LEGAL THEORY 111 (2010).

33 See generally Jorge L. Esquirol, *Fictions of Latin American Law (Part 1)*, 1997 UTAH L. REV. 425 (1997) (exploring how the failure of law has been used to understand Latin American law and highlighting the antiformalist strains in Latin American law). It is interesting to note the parallels between the failure of law argument and the birth and early development of some social sciences, like anthropology. Two arguments are of special importance in this context: On the one hand, the idea that the only valuable local knowledge is the one that can be translated into the categories of the “universal” knowledge – that is, the knowledge produced in the center. On the other hand, the thought that there is a difference between the space where knowledge is produced – the center – and the space where fieldwork is done – the periphery.

34 This introduction understands academic products as those created by nonclinical professors, as well as those generated by legal clinics. There are remarkable differences between an article published in an academic journal and some of the typical products of the clinics – a lawsuit or report on human rights, for example. However, I simply want to note in this chapter that both products are the result of intellectual work generated in a law school.

the number produced in the South, for example. Similarly, although the dynamics and rhythms of production and publication have been established and standardized in the North, they are just beginning to be structured and disseminated in the South. The number and type of products generated each academic year, the stability of specialized journals, and the institutional quality control recognized by the academic community, among others, are issues that are just beginning to be discussed or internalized in many of the academic communities of the Global South.

Fifth, the closed and parochial character of the U.S. legal academy, along with the selective openness of most of Western Europe's legal academy, discourages any dialogue with the legal institutions of the Global South.³⁵ Despite the evident strengths of U.S. law schools, for example, in matters like the quality and number of publications, qualified human resources, and available economic resources, these institutions tend to see law as a fundamentally *national* phenomenon. Law schools that emphasize educating students for the practice of law do not find much value in comparative law. Young professionals do not need to know foreign legal norms, doctrine, or theory to practice competently. The more "academic" law schools seem to believe that the most important objects of study can be found in the U.S. legal community. Foreign legal systems and doctrine produced in other polities are not very attractive to U.S. law professors. Western Europe's legal academy might be viewed as more open to comparative law. Even there, however, the legal systems considered valuable to the comparative enterprise tend to be located in Europe or North America. Global South scholars or legal systems are seldom invited to the dialogue on comparative law.

These five arguments not only explain the marginal position that Global South scholars and legal institutions occupy in the interpretation, use, and transformation of modern constitutionalism but also serve as the source of a set of unstated background assumptions that govern

³⁵ See Ugo Mattei, *An Opportunity Not to Be Missed: The Future of Comparative Law in The United States*, 48 AM. J. COMP. L. 712 (1998).

the production, circulation, and use of legal knowledge. Generally, these assumptions remain implicit: They are not often discussed openly among legal scholars and other legal operators like judges or practitioners. However, they firmly govern the relationship between the legal communities in the Global North and South. They determine, among other things, the dialogue about the interpretation and use of the grammar of modern constitutionalism. The first assumption that these five arguments generate is what I would like to call the argument of the “production well.” This states that the only context for the production of knowledge is the legal academia in the North. The intellectual production of the South is considered to be a weak reproduction of the knowledge generated in the North, a form of diffusion, or a mere local application of the same. It is argued that while legal academia and institutions in the North create original academic products, legal academia and institutions in the South only articulate products derived from other sources. Although the former opens up new descriptive, critical, and normative paths, the latter follows the routes already opened by the epistemological communities of the Global North.

Second, the arguments presented above generate what I call the assumption of “protected geographical indication.” This indicates that all knowledge produced in the North is worthy of respect and recognition *per se*, given the context from which it emerges. Even before it has been read or evaluated, the mere origin of the academic product generates positive qualifications. As a wine from Burgundy is considered to be a good wine, an article written in English by an American professor and published in a legal journal at a university in North America is considered to be of good quality, even before being read. Legal knowledge generated in the South is only legitimate when academics from the North have given it their approval. Legal products from the South are marked (negatively) by their origin. This seal can only be lifted when representatives from the production well of legitimate legal knowledge believe that it should be. The positive qualification of an academic product from the South on the part of Southern academics is, at best, an indication of its

quality. Professors from the North, however, must confirm this characterization. The assumption of the production well is analytically distinguishable from the assumption of the protected geographical indication; in practice, however, the two assumptions are intertwined.

Third, the five arguments outlined above produce what I call the specific assumption of the “effective operator.” This unstated background assumption indicates that academics and legal institutions from the North are much better trained to make effective and legitimate use of legal knowledge than are academics and legal institutions from the South. The use of academic products, in this view, has ethical consequences. To ignore or violate the rules guiding the use of legal knowledge questions the moral values that the academic community shares, may adversely affect third parties, and threatens the legitimacy of intellectual products. To illustrate this assumption, it might be useful to appeal to clinical legal education. The “effective operator” assumption is particularly thorny in the clinical legal setting. Clinical projects have an explicit political role, in that they usually involve and directly affect vulnerable groups. Thus, the improper use of legal knowledge will have negative consequences for clients of these clinics, as well as for the legitimacy of the projects themselves. Clinical professors in the North have the academic know-how³⁶ to make proper use of the academic products created. Similarly, they have access to networks and spaces of power to make effective use of this knowledge. On the other hand, the inexperience, lack of knowledge, or ingenuousness of clinical professors in the South with respect to the use of legal knowledge, it is thought, can lead clinical projects to ruin. Again, professors from the North must make the key decisions on the use of the knowledge that is created in or relevant to these clinical projects.

The foregoing factors explain the marginal place the Global South occupies in the discussion about the content and structure of law and the

36 This academic know-how includes familiarity with and use of the ethical rules that should guide the use of legal knowledge.

rules that govern the exchanges between Global North and Global South legal communities. These factors have two dimensions: one that illuminates and one that obscures reality. On the one hand, they describe and properly characterize one part of the reality of legal academic communities of the Global South and North. It is true, for example, that many sectors of the Global South legal academy have tended to reproduce and not to create legal knowledge.³⁷ Many of the legal norms that are issued, the doctrines that interpret them, and the theories that substantiate, evaluate, or contextualize them are a local application of knowledge created in foreign legal communities. Similarly, it is true that legal formalism has controlled part of the Global South's legal conscience and that this is a poor concept of law. Many Global South legal scholars have argued so.³⁸ Finally, it is also correct to say that a good part of the Global North legal academy is centered on itself and is not very interested in what happens beyond its borders, particularly if crossing these borders takes it to a legal system of the Global South.³⁹

However, on the other hand, these arguments are questionable both from a descriptive point of view and from a normative standpoint. These arguments, along with the three assumptions they generate, homogenize a reality that is full of shades and hues. Thus, first, these general arguments ignore the heterogeneity of legal academic communities. There is no doubt that, overall, the law schools of the Global North, in North America particularly, have built stronger academic communities than those in the Global South. Nevertheless, there are internal weaknesses

37 See generally *DERECHO Y SOCIEDAD EN AMÉRICA LATINA: UN DEBATE SOBRE LOS ESTUDIOS JURÍDICOS CRÍTICOS* (César Rodríguez and Mauricio García eds., ILSA 2002) (Col.).

38 See generally Carlos Santiago Nino, *ÉTICA Y DERECHOS HUMANOS* (Astrea 2003) (Arg.); Eugenio Bulygin, *EL POSITIVISMO JURÍDICO* (Astrea 2006) (Mex.); Carlos Alchourrón and Eugenio Bulygin, *INTRODUCCIÓN A LA METODOLOGÍA DE LAS CIENCIAS JURÍDICAS Y SOCIALES* (Astrea 1974) (Arg.); Boaventura de Sousa Santos, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* (Cambridge University Press 2002).

39 See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal System*, 45 *AM. J. COMP. L.* 5, 7 (1997).

in both contexts, as well as nuances and exceptions to the rules noted in each. Legal academia in the North offers a wide range of schools, with varying levels of quality. For example, a law school located at the top of the various rankings that exist in the United States, Canada, or United Kingdom is not the same thing as a school in the middle of such rankings, or one at the bottom.⁴⁰ The differences are even more important when comparing the strengths and weaknesses of schools in the top tier with those in the second and third tiers of the hierarchy in the United States. The contrasts in the quality of the academic products generated, as well as the financial resources available, are notable in many cases. The strength of journals published, the wealth of libraries, the number and quality of exchanges with academics from other parts of the world, and the conferences offered vary markedly between these schools. Finally, these arguments and rules obscure the fact that, even in good law schools, there are professors who are not academically strong or that the quality of the academic products written by any given professor varies, sometimes significantly. In sum, the arguments of the well of production, protected designation of origin, and effective operator ignore the

40 The two best-known publications in which law schools in the United States are classified are *U.S. News* and *Lawschool 100*. See *Best Law Schools*, U.S. News AND WORLD REPORT, available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools> (last accessed Feb. 2, 2012). For Canadian law school rankings, see *Ranking Canada's Law Schools*, MACLEANS.CA, available at <http://www2.macleans.ca/2009/09/16/ranking-canada%20%80%99s-law-schools/> (last accessed Feb. 2, 2012). For rankings of law schools in the United Kingdom, see *University Guide 2011: Law*, THE GUARDIAN, available at <http://www.guardian.co.uk/education/table/2010/jun/04/university-guide-law> (last accessed Feb. 2, 2012). Law schools have criticized these classifications from various perspectives. Law school administrators and professors argue, for example, that the criteria used by *U.S. News* to rank law schools are vague, irrelevant, or incomplete. I agree with these critiques. However, for the purposes of this introduction, they are useful for showing the overall differences within legal academia in the United States. I would say that many in the U.S. legal community agree in that there are notable differences between the first fifteen law schools and the last fifteen law schools in the top one hundred schools, or between first-tier law schools and third-tier law schools. Yet even these broad differences are obscured by the arguments of the production well, protected geographical indication, and effective operator.

differences in the quality of law schools. These arguments invalidate this diversity and identify “professor” and “quality academic product” with the law schools of the Global North, and with schools in the United States in particular.

Similarly, it is important to note that these arguments eliminate a priori differences within the academic communities of the Global South. A Brazilian, Colombian, or Chilean “garage”⁴¹ law school is not the same thing as the law school at the University of the Witwatersrand, the law school of the National University of Taiwan, and the National Law School at the University of India, Bangalore. There are salient differences in the quality of professors and academic products, as well as in the economic resources at their disposal. It is true that the role still given to the legal academic in many parts of the Global South is the systematization of the legal order and that the production generated by this objective often leaves much to be desired.⁴² However, within the law schools

41 “Garage universities” are those whose primary goal is the profit of their founders and whose standards of quality are very low. Generally, their infrastructure is very poor.

42 A portion of legal academia in Latin America, Africa, Asia, and Eastern Europe, therefore, continues to believe that the work of an academic should be to define the content of the principles and rules that constitute the legal system, as well as how to resolve their inconsistencies. Hence, in many of these law schools, the treatise is considered to be the product *par excellence* of law professors. In the best of cases, the basic units of the national legal systems of the Global South are judiciously systematized in this type of academic product. Nevertheless, in most cases, these academic products are nothing more than glosses to the law. In these texts, the professor of law repeats the content of legal norms in different wording and makes comments that are more or less marginal to guiding professional practice or morally evaluating the contents of the law. The weak products of parts of the legal academia in the Global South can be partially explained by the fact that the professionalization of the legal academy is a very recent event in most of the region. Historically, judges and practitioners have constituted law faculties in most of the Global South. These part-time law professors, although many times incredibly competent and committed to teaching and writing, can only dedicate a few hours in the morning or at night to their academic endeavors. Likewise, the weaknesses of legal academia in the Global South are related to the weaknesses of the university system in many of the region’s countries. The economic resources received by the public university system have never been very high and have recently declined in many of them.

of the Global South are nodes that meet high academic standards and that distance themselves radically from the various formalist traditions found in the countries where they are located. In Latin America we can mention, for example, research groups within the law schools of the Fundação Getúlio Vargas and University of São Paulo in Brazil, the University of the Andes and the National University in Colombia, Mexico Autonomous Institute of Technology and the National Autonomous University of Mexico, and Catholic University and Diego Portales University in Chile;⁴³ in Africa, nodes in the law schools at the University of Cape Town and University of the Witwatersrand in South Africa, American University–Cairo in Egypt, and the University of Nairobi in Kenya; in Asia, groups of scholars within the law schools at the National University of Taiwan, the National University of Seoul, and the University of Delhi; and in Eastern Europe, networks of academics within the law schools of the University of Eastern Europe and Warsaw University. Similarly, there are legal intellectuals cases whose production is of the highest quality. Consider, for example, Carlos Santiago Nino, Albie Sachs, and Upendra Baxi.

These universities and scholars have often been engines of innovative research projects and legal publications. They have also explicitly and continuously criticized legal formalism and the epistemological dependence that weakens many of the region's legal communities.⁴⁴ But these

43 The University of São Paulo, University of the Andes, Catholic University, and National Autonomous University of Mexico are among the ten best universities in Latin America. See *World's Best Universities: Latin America*, U.S. NEWS AND WORLD REPORT, available at <http://www.USnews.com/education/worlds-best-universities-rankings/best-universities-in-latin-america> (last accessed Jan. 17, 2012).

44 Of course, the legal products created by these (and other) universities are not formulated in a vacuum. They are nourished by preexistent legal concepts and practices – many of which were not locally created. Yet this is the case with the creation of all legal knowledge. The contributions of U.S. legal liberalism, for example, are nourished by the European liberal tradition. Locke, Mill, and Kant are key figures in the work of authors like John Rawls and Ronald Dworkin. Equally, many of the contributions of critical legal studies are based on the oeuvre of European authors like Marx and Gramsci. New legal knowledge, as with all knowledge, is created only on the edges of

examples, purely declarative, simply illustrate the general argument. They are not meant to weigh and evaluate the totality of legal academia in the Global North and South. They are only intended to demonstrate the weakness of the argument that homogenizes legal academia in the Global South at a low level and the academia of the Global North at a higher one.

These factors and rules also ignore the fact that the Global South has indeed formulated rich and valuable rules, theories, and doctrines. The jurisprudence of the Colombian Constitutional Court on social and economic rights,⁴⁵ the Brazilian doctrine of the social function of property,⁴⁶ and the contributions of Latin American lawyers like Álvaro Álvarez and Carlos Calvo to the creation of international law⁴⁷ and Mexican labor law are just a few examples of complex legal products created in the region. The jurisprudence of the South African Constitutional Court on the use of comparative and international law for interpreting the South African Constitution and the Indian Supreme Court's public interest litigation movement are two other examples of innovative legal products created in the Global South. Finally, the contributions to the history of international law and the law of the sea by R. P. Anand, the rich and complex Islamic legal tradition of countries like Egypt and Pakistan, the scholarship on duties and the rights of people written by African legal academics, and the intersections among Buddhism,

the discipline, and it is based on the preexisting conceptual structure. To understand the process through which legal knowledge is produced in the South, it is key to understand the process through which legal academic elites have been created recently in the region. An important number of the members of these elites have studied in universities in the Global North and, thus, have knowledge of both the local and global legal academic contexts.

45 See generally Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 539 (2004).

46 See generally Alexandre dos Santos Cunha, *The Social Function of Property in Brazilian Law*, 80 FORDHAM L. REV. 1171 (2011).

47 See generally Liliana Obregón, *Noted for the Dissent: The International Life of Álvaro Álvarez*, 19 LEIDEN J. INT'L L. 983 (2006).

Hinduism, and law illustrate the multifaceted and valuable contributions of the Global South to law.

The foregoing arguments and rules also obscure the fact that legal formalism has not been the only concept of law present in the many legal communities that exist in the Global South.⁴⁸ The concepts of law offered by legal positivism,⁴⁹ the free school of law,⁵⁰ and contemporary sociology of law,⁵¹ among others, have also been a part of Latin American legal consciousness. In many Asian countries, a Confucian concept of law has been influential.⁵² In North Africa, the legal imagination has been shaped, partially, by an Islamic concept of law. Within the Global South academy, there is a great diversity of views working to understand, evaluate, and transform legal phenomena. Finally, it is important to indicate that, within the Global North legal academy, there are indeed some sectors interested in the law created by other political communities. The Global Law Programs or the Comparative or Transnational Law Centers of universities like New York University,⁵³ Yale,⁵⁴ Harvard,⁵⁵

48 See Alexandra Huneeus et al., *Introduction*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 3, 3–5 (Alexandra Huneeus et al., eds., Cambridge University Press 2010).

49 See generally Carlos Santiago Nino, INTRODUCCIÓN AL ANÁLISIS DEL DERECHO (Astrea 1984) (Arg.); Genaro Carrión, NOTAS SOBRE DERECHO Y LENGUAJE (1965) (Arg.).

50 See generally Diego López Medina, TEORÍA IMPURA DEL DERECHO (Legis 2004) (Col.).

51 See Marcelo Gomes Justo and Helena Singer, *Sociology of Law in Brazil: A Critical Approach*, AM. SOCIOLOGIST (Summer 2001), at 10–25.

52 See Werner Menski, *Comparative Law in Global Context*, in THE LEGAL SYSTEMS OF ASIA AND AFRICA 531–34 (Cambridge University Press 2006).

53 Hauser Global Law School Program, Institute for International Law and Justice, Center for Human Rights and Global Justice, Center on Law and Security, Global Public Service Law Project, Jean Monnet Center for International and Regional Economic Law and Justice, Project on Transitional Justice.

54 China Law Center, Global Constitutionalism Seminar, Center for International Human Rights, Latin America Annual Seminar, Middle East Legal Studies Seminar, Honesty and Trust Project (Eastern Europe), and Yale Center for the Study of Globalization.

55 East Asian Legal Studies Program, European Law Research Center, Human Rights Program, International Center for Criminal Justice, Islamic Legal Studies Program, Program on International Financial Systems, International Law Library.

Georgetown,⁵⁶ Michigan,⁵⁷ Cornell,⁵⁸ Duke,⁵⁹ Virginia,⁶⁰ Columbia,⁶¹ and Texas⁶² show the interest that already exists in such a field.⁶³ The increasing number of European comparative and transnational law journals also makes explicit the interest in some Western European quarters for what happens beyond its borders.⁶⁴

Nonetheless, the conversation about modern law, and particularly about modern constitutionalism, is still too centered in the Global North. The number of participants in this conversation should be increased, the doors of the places where this dialogue takes place should be opened to more Southern interlocutors, and the default attitude toward the law of the Global South should be changed. Of course, I am not arguing that the legal products of the legal Global South should be valued *because of*

56 Center for Transnational Legal Studies, London Summer Program, Asian Law and Policy Studies, Center for the Advancement of the Rule of the Law in the Americas (CAROLA), Georgetown Human Rights Institute, Institute of International Economic Law, Program on International Business and Economic Law.

57 Center for International and Comparative Law, Program in Refugee and Asylum Law, Program for Cambodian Law and Development, European Legal Studies Program, Chinese Legal Studies, Japanese Legal Studies Program, South Africa and Geneva Externship Programs.

58 Berger International Legal Studies Program, Clarke Center for International and Comparative Legal Studies, Clarke Program in East Asian Law and Culture, Mori, Hamada and Matsumoto Faculty Exchange, Clarke Middle East Legal Studies Fund.

59 The Global Law Workshop and Center for International and Comparative Law.

60 Center for National Security Law, Center for Oceans Law and Policy, International Human Rights Law Clinic, Immigration Law Program.

61 Center for Contract and Economic Organization, Center for Chinese Legal Studies, Center for Japanese Legal Studies, Center for Korean Legal Studies, European Legal Studies Center, Center for Global Legal Problems, Human Rights Institute, Parker School for Foreign and Comparative Law, International Moot Court.

62 Immigration Clinic, Transnational Worker Rights Clinic, Center for Human Rights, Institute for Transnational Law, International Moot Court Competitions, Lozano Long Institute for Latin America Studies.

63 For a general analysis of the best programs in international law, see Denisse Romero, “Top Ten International Law Schools in the U.S.A.” MACQUIL.COM GLOBAL PORTAL (Oct. 5, 2010), available at <http://www.macquil.com/articles/topintlaw.php>.

64 *International and Comparative Law Quarterly*, *Electronic Journal of Comparative Law*, and *European Journal of Legal Studies* are prime examples of this tendency.

their origin. This would promote an inverted application of the assumptions of the production well and protected geographical indication that I presented above. This would also obscure the deficiencies and shortcomings of the law of the Global South. Nor am I arguing in favor of a paternalistic attitude toward the law of the Global South. I am not arguing that Global South legal scholars and legal products should a priori be considered valuable participants in the conversation. Each legal product should be evaluated on its own terms to determine its originality and worth. However, I do argue that a mindset that closes the door to all Global South legal materials or that opens it for paternalistic reasons is unjustifiable. There is no good reason for this kind of epistemic arrogance.

1 Three Courts from the Global South

The Indian Supreme Court, the South African Constitutional Court, and the Colombian Constitutional Court have been among the most important and creative courts in the Global South. These Courts are widely seen in Asia, Africa, and Latin America as activist tribunals that have contributed (or attempted to contribute) to the structural transformation of the public and private spheres of their countries.⁶⁵ These Courts' jurisprudence has dealt with problems that are important for and frequent in all contemporary liberal democracies. Issues about the interpretation and protection of civil and political rights, for example, have been addressed regularly by these three Courts' case law.⁶⁶ Yet these

65 See Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 529–75, 649–91 (2004); Lynn Berat, *The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?*, 3 INT'L J. CONST. L. 39 (2005); Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476 (2003).

66 See, for example, June 26, 2009, Sentencia C-417 /09, M.P. Juan Carlos Henao Pérez (Col.) (freedom of speech); Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597 (India) (limits to government's restrictions to personal liberties); Minister of Home Affairs and Another v. Fourie and Another, 2005 ZACC 19; 2006 (3) BCLR 355; 2006

Courts' jurisprudence has also dealt with problems that are specific to or have special importance in the Global South, and the Courts have done so through original and imaginative legal theories and political strategies. Issues related to political violence, poverty, and the consolidation of the rule of law have been an important part of these Courts' jurisprudence. These Courts, for example, have decided cases about the rights of internally displaced people,⁶⁷ how to recognize and accommodate adversary religious minorities,⁶⁸ the justiciability of social and economic rights in contexts with high levels of poverty,⁶⁹ and the limits that Congress has for amending the Constitution in innovative and appealing ways.⁷⁰

The jurisprudence of these three Courts certainly moves within and is supported by modern constitutionalism's basic rules and principles. These Courts use and comply with modern constitutionalism's grammar. Consequently, as happens with all courts, many of the cases that they decide are doctrinally unimportant – they merely reiterate standard

(1) SA 524 (S. Afr.) (gay rights); Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others, 2005 ZACC 20; 2006 (3) BCLR 355; 2006 (1) SA 524 (S. Afr.) (gay rights).

67 See Corte Constitucional [C.C.] [Constitutional Court], January 22, 2004, Sentencia T-025/04, M.P. Manuel José Cepeda Espinosa.

68 In the Indian context, see M. H. Quraishi v. State of Bihar, A.I.R. 1958 S.C. 731; Abdul Jalil and Others v. State of Uttar Pradesh and Others on February 14, 1984, A.I.R. 1984 S.C. 882; Commissioner of Police and Others v. Acharya J. Avadhuta and Another on March 11, 2004, A.I.R. 2004 S.C. 2984. See also Gurpreet Mahajan, *Indian Exceptionalism or Indian Model: Negotiating Cultural Diversity and Minority Rights in a Democratic Nation-State*, in MULTICULTURALISM IN ASIA 1–20 (Will Kymlicka and Baogang He eds., Oxford University Press 2005).

69 In the South African context, see Soobramoney v. Minister of Health (Kwazulu-Natal) 1997 ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); Government of the Republic of South Africa and Others v. Grootboom and Others 2000 ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC); Minister of Health and Others v. Treatment Action Campaign and Others (No 1) 2002 ZACC 16; 2002 (5) SA 703 (CC); 2002 (10) BCLR 1075 (CC); Khosa and Others v. Minister of Social Development and Others, Mahlaule and Another v. Minister of Social Development 2004 ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

70 See Kesavananda Bharati v. State of Kerala, 4 S.C.C. 225 (India) (1973).

interpretations of rules and principles. In many of these cases, furthermore, these three Courts replicate arguments offered by the jurisprudence of the dominant institutional and academic interpreters of modern constitutionalism, such as the Supreme Court of the United States and the European Court of Human Rights.⁷¹ However, some of the interpretations offered by these Courts present modern constitutionalism's basic components in a new light, or at least rearrange them in novel ways. The jurisprudence of these three Courts, therefore, has something to contribute to the ongoing global conversation on constitutionalism. It might be worthwhile to examine and criticize the jurisprudence of these three Courts. Constitutional law scholars and other participants in this dialogue would discover, for example, interesting ways of interpreting the principle of separation of powers,⁷² appealing forms of interpreting

71 The Colombian Constitutional Court, for example, has used the U.S. and European case law and literature on balancing. See Corte Constitucional [C.C.] [Constitutional Court], September 26, 1995, Sentencia T-425/95, M.P. Eduardo Vargas Muñoz; C.C., May 9, 1996, Sentencia T-198/96, M.P. Abelardo Gómez Restrepo; C.C., September 18, 1997, Sentencia C-448/97, M.P. Alejandro Martínez Caballero; C.C., September 25, 1997, Sentencia C-475/97, M.P. Eduardo Cifuentes Muñoz; C.C., May 20, 1998, Sentencia SU-225/98, M.P. Eduardo Cifuentes Muñoz; C.C., October 20, 1998, Sentencia T-588/98, M.P. Eduardo Cifuentes Muñoz; C.C., December 16, 1998, Sentencia T-801/98, M.P. Eduardo Cifuentes Muñoz; C.C., October 6, 1999, Sentencia C-741/99, M.P. Fabio Morón Díaz; C.C., February 9, 2000, Sentencia C-110/00, M.P. Antonio Barrera Carbonell; C.C., March 29, 2000, Sentencia C-371/00, M.P. Carlos Gaviria Díaz; C.C., April 25, 2001, Sentencia C-648/01, M.P. Jaime Araújo Rentería; C.C., April 10, 2004, Sentencia T-1031/01, M.P. Rodrigo Escobar Gil; C.C., December 5, 2001, Sentencia C-1287/01, Marco Gerardo Monroy Cabra; C.C., October 29, 2002, Sentencia C-916/02, M.P. Manuel José Cepeda Espinosa; C.C., August 9, 2005, Sentencia C-818/05, M.P. Rodrigo Escobar Gil; C.C., August 10, 2005, Sentencia C-822/05, M.P. Manuel José Cepeda Espinosa; C.C., September 7, 2005, Sentencia T-933/05, M.P. Rodrigo Escobar Gil; C.C., May 10, 2006, Sentencia C-355/06, M.P. Jaime Araújo Rentería; C.C., March 21, 2007, Sentencia C-210/07, M.P. Marco Gerardo Monroy Cabra.

72 See, for example, the cases in which the Colombian Constitutional Court has used the unconstitutional state of affairs doctrine. See Corte Constitucional [C.C.] [Constitutional Court], November 20, 1997, Sentencia SU-599/97, M.P. Jorge Aranga Mejía; C.C., March 5, 1998, Sentencia T-068/98, M.P. Alejandro Martínez Caballero; C.C., May 26, 1998, Sentencia SU-250/98, M.P. Alejandro Martínez Caballero; C.C., September 23, 1998, Sentencia T-153/98, M.P. Eduardo Cifuentes Muñoz; C.C., January 22, 2004, Sentencia T-025/04, M.P. Manuel José Cepeda Espinosa.

the practical consequences of connecting social and economic rights with the principle of human dignity,⁷³ and powerful strategies to allow poor individuals access to justice.⁷⁴

This exercise would generate some benefits. On the one hand, interpreters might use some of the tools formulated by these Courts, in appropriate circumstances, to understand or attempt to solve legal and political issues within their polities. On the other hand, it might allow interpreters to understand their own constitutional systems more clearly or in a new light. In many cases, legal transplants are not possible. A functionalist approach to comparative law might not be useful in certain cases.⁷⁵ There might be substantial differences between legal systems; the political, economic, and cultural context might be too dissimilar; or the legal institutions of one country might be interpreted by other countries as morally or politically questionable.⁷⁶ However, by comparing our constitutional system to those of others, we might be able to refine the

73 See, for example, the Colombian Constitutional Court cases about the vital minimum and the principle of dignity. See Corte Constitucional [C.C.] [Constitutional Court], January 16, 1995, Sentencia T-005/95, M.P. Eduardo Cifuentes Muñoz; C.C., January 23, 1995, Sentencia T-015/95, M.P. Hernando Herrera Vergara; C.C., March 30, 1995, Sentencia T-144/95, M.P. Eduardo Cifuentes Muñoz; C.C., May 8, 1995, Sentencia T-198/95, M.P. Alejandro Martínez Caballero; C.C., October 4, 1996, Sentencia T-500/96, M.P. Antonio Barrera Carbonell; C.C., June 4, 1998, Sentencia T-284/98, M.P. Fabio Morón; C.C., February 4, 1999, Sentencia SU-062/99, M.P. Vladimiro Naranjo Mesa.

74 See, for example, People's Union for Democratic Rights v. Union of India, 3 S.C.C. 235 (India) (1982). Regarding the public interest litigation movement in India, see generally Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 1985 THIRD WORLD LEGAL STUD. 107, 107–22; (1985); K. G. Balakrishnan, Chief Justice of India, Address on the Growth of Public Interest Litigation in India, Singapore Academy of Law, Fifteenth Annual Lecture (Oct. 8, 2008), 1–23; R. Sudarshan, *Courts and Social Transformation in India*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR 154–67 (Roberto Gargarella et al. eds., Ashgate 2006).

75 See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

76 See James Whitman, *The Neo-Romantic Turn*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 312 (Pierre Legrand and Roderick Munday eds., Cambridge University Press 2003).

understanding of who we are.⁷⁷ Through understanding the other, we might be able to better comprehend our own legal and political community. The “other” can be a mirror in which we can find a more accurate image of ourselves. A precise understanding of the other’s constitutional arrangements might be useful to comprehend our own constitutional institutions.

Colombia, India, and South Africa are very different countries. It might be argued, then, that to compare their highest courts would not be useful; the exercise would not render many profits. The “cases” under examination would run parallel to each other, not intersecting at any point. Geographically, economically, and culturally, there are important dissimilarities among these countries. For one, they are located on three different continents. The size and importance of their economies vary widely. Colombia’s gross domestic product (GDP) in 2010 was nearly US\$288.2 billion,⁷⁸ India’s was over US\$1.7 trillion,⁷⁹ and South Africa’s was about US\$363.7 billion.⁸⁰ In Colombia, the majority of the population is Spanish speaking⁸¹ and Catholic,⁸² whereas in India, the majority of the population speaks Hindi and professes Hinduism.⁸³ In South Africa, Zulu is the most common language spoken at home but English is the dominant language in government and the media.⁸⁴ Christianity is

77 See Paul Kahn, *Judging Judicial Review: Marbury in the Modern Era: Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677 (2003).

78 The World Bank, “Data by Country,” available at <http://data.worldbank.org/country> (last accessed Feb. 12, 2012).

79 *Id.*

80 *Id.*

81 CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 10 (Spanish is the official language of the country).

82 See U.S. Department of State, “2005 Report on International Religious Freedom: Colombia,” available at <http://www.state.gov/j/drl/rls/irf/2005/51632.htm> (last accessed Feb. 12, 2012).

83 Government of India, “Census Data 2001: Religious Composition,” available at http://censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx (last accessed Feb. 12, 2002).

84 Statistics South Africa, “Census in Brief: Census 2001,” available at <http://www.statssa.gov.za/census01/html/C2001CensusBrief.asp> at 14 (last accessed Feb. 12, 2012). The

the dominant religion in South Africa.⁸⁵ Colombia's legal system, moreover, belongs to the civil law tradition,⁸⁶ India's to the common law tradition,⁸⁷ and South Africa's is a mixture of the civil law and common law traditions.⁸⁸ The institutional and contextual differences among these three countries are certainly many.

The three countries, however, have some important similarities. All three are liberal democracies in the process of consolidation, their levels of inequality are some of the highest in the world, their history has been marked by political violence, and their cultural diversity is notable. Likewise, these three countries have legitimate and activist constitutional or supreme courts that have addressed these political, economic, and cultural issues in rich and complex ways. In these three countries, the constitutional courts have played an important role in the protection of the rule of law and the realization of individuals' constitutional rights.

The constitutions of Colombia, South Africa, and India are structured around liberal democratic values.⁸⁹ The idea that human beings are autonomous and equal individuals is central to these constitutions. The worth of all persons is a function of their humanity. Human dignity is a fundamental value in these three countries' legal systems.⁹⁰ These constitutions also contain a wide Bill of Rights that includes civil and political rights, social and economic rights, and collective rights.⁹¹ All

South African Constitution recognizes eleven official languages. S. AFR. CONST. art. 6(1).

85 See U.S. Department of State, "2005 Report on International Religious Freedom: South Africa," available at <http://www.state.gov/j/drl/rls/irf/2005/51496.htm> (last accessed Feb. 12, 2012).

86 See Merryman and Pérez-Perdomo, *supra* note 19, at 141.

87 Law Library of Congress, "Introduction to India's Legal System," available at <http://www.loc.gov/law/help/india.php> (last accessed Feb. 12, 2012).

88 Oxford LibGuides – South African Law, available at <http://ox.libguides.com/content.php?pid=167351&sid=1410025>.

89 See David Bilchitz, Constitutionalism, the Global South, and Economic Justice, *Chapter 1*, in this volume.

90 See S. AFR. CONST., Act 108 of 1996, s. 10; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 1; INDIA CONST. art. 21.

91 See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] title II; INDIA CONST. pts. III–IV; S. AFR. CONST. ch. II.

these rights are understood as fundamental tools for the protection of autonomy and equality. The constitutional frameworks of these three countries also include the principle of separation of powers and a system of checks and balances that limit the power that can be concentrated in each branch of government. Additionally, the constitutions of Colombia, India, and South Africa are committed to democracy, and therefore to the idea that the government should be held accountable through multi-party, open, and regularly organized elections. Finally, the constitutions of these three countries establish that economic relations should be organized in the form of a market economy.

The constitutional commitment to liberal democracy has not yet been completely realized in Colombia, India, or South Africa. Political violence has created serious obstacles to its consolidation. In Colombia, the armed conflict between leftist guerilla groups and the government, fueled by drug trafficking, has ravaged the country for more than four decades. In India, the violence between Hindus and Muslims has weakened the polity since independence. And in South Africa, the apartheid system and the struggle against its formal and informal rules have caused tremendous unrest.

The weakness of these three countries' political systems is also linked to economic matters. The promises of economic justice and prosperity for all made by the 1991 Colombian Constitution, the 1996 South African Constitution, and the 1948 Indian Constitution have not been realized. Colombia's Gini coefficient is 0.578, India's is 0.368, and South Africa's is 0.65.⁹² The percentage of the population currently living under the poverty line in Colombia is 45.5 percent, in India 25 percent, and in South Africa 50 percent.⁹³ The levels of unemployment in 2011 reached 11.2 percent in Colombia, 9.8 percent in India, and 23.9 percent in

⁹² Central Intelligence Agency, Gini Index, "World Factbook," available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2172.html> (last accessed Feb. 12, 2012).

⁹³ Central Intelligence Agency, "Percentage below Poverty Line, World Factbook," available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html> (last accessed Feb. 12, 2012).

South Africa. Poverty and inequality, no doubt, limit the legitimacy and stability of these three countries' political system.

Similarly, the appropriate recognition and accommodation of these three countries' cultural minorities is an aim that has not been achieved. The levels of discrimination against cultural minorities are still high. The result has been religious unrest, political violence, and the alienation and marginalization of many individuals and groups. Cultural minorities' rights are still very much paper rules in these countries. Yet the cultural diversity that characterizes Colombia, India, and South Africa is also one of each country's great assets. In Colombia, there are eighty-seven indigenous communities that speak thirty-four different languages.⁹⁴ There are vibrant, culturally diverse black communities on the Atlantic and Pacific coasts, and the Roma people have a small but strong presence in the country.⁹⁵ Small European and Middle Eastern communities enrich (and have historically enriched) Colombia's culture. In India, Hinduism, Buddhism, Jainism, Christianity, Zoroastrianism, and Sikhism have a significant number of followers.⁹⁶ The Muslim population, at around 149 million, constitutes the second largest Muslim community in the world. In India, 630 "scheduled tribes" are recognized by the state. Linguistically, India is similarly rich: 114 languages are spoken by more than 10,000 persons, and more than 1 million persons speak 14 of these languages.⁹⁷ In South Africa, 79 percent of the population is black, 8.9 percent coloured, 2.5 percent Indian or Asian, and 9.6 percent white.⁹⁸ The black population is divided into four major ethnic groups: Nguni,

94 Departamento Nacional de Estadística, "Colombia: Una nación multicultural," available at http://www.dane.gov.co/files/censo2005/etnia/sys/colombia_nacion.pdf, at 20 (2007) (last accessed Feb. 12, 2012).

95 See Daniel Bonilla, *Introduction*, in LA CONSTITUCIÓN MULTICULTURAL [The Multicultural Constitution] (Siglo del Hombre, Universidad de los Andes, Instituto Pensar 2007) (Col.).

96 See Gurpreet Mahajan, "Negotiating Cultural Diversity and Minority Rights in India," available at http://www.idea.int/publications/dchs/upload/dchs_vol2_sec3_4.pdf, at 1.

97 See *id.*

98 Statistics South Africa, "Census in Brief: Census 2001," available at <http://www.statssa.gov.za/census01/html/C2001CensusBrief.asp>, at 13 (last accessed Feb. 12, 2012).

Sotho, Shangaan-Tsonga, and Venda. South Africa recognizes eleven official linguistic communities. Cultural diversity is, surely, a salient component of the past, present, and future of Colombia, India, and South Africa.

The similarities among these three countries – consolidating liberal democracies, political violence, high levels of inequality and poverty, and cultural diversity – are notable. However, these are characteristics that they share with other countries of the Global South. What makes these three countries relevant and attractive for a comparative constitutional law analysis is that they have legitimate, creative, and regionally prestigious constitutional courts that have addressed the foregoing common issues. These three Courts have contributed to understanding and confronting the challenges that these matters create. Surely, the jurisprudence of these Courts has dealt with many other issues. However, the courts' case law has been particularly interesting and innovative when dealing with the many dimensions that compose these key subjects. If this is true, several interesting questions should be raised and answered: What are the contributions that these Courts have made to the understanding, development, or transformation of modern constitutionalism? Are the Colombian Constitutional Court, the Indian Supreme Court, and the Constitutional Court of South Africa slowly creating a constitutionalism of the Global South? If so, what are the differences and similarities between this emerging constitutionalism and mainstream, Global North constitutionalism? Is a constitutionalism of the Global South needed?

These questions cannot be answered in this book. They are too broad, complex, and difficult. They should be addressed collectively, as part of a long-term comparative law project and within the ongoing global conversation on constitutionalism. Nevertheless, *Constitutionalism of the Global South* does address some issues directly related to these questions. The book aims to open the discussion about the jurisprudence of the Constitutional Court of Colombia, the Indian Supreme Court, and the South African Constitutional Court. The chapters gathered in this

book explore the jurisprudence of these courts on three matters: social and economic rights, cultural diversity, and access to justice. These three topics are directly related to poverty and inequality, political violence, cultural minorities, and the consolidation of the rule of law – issues that are fundamental in these three countries. The book also aims to bridge the gap that exists between the Global South and Global North on constitutional matters. Finally, it aims to make explicit the need to widen the number of authoritative interpreters of modern constitutionalism.

2 The Structure of the Book

The book is divided into three parts, on social and economic rights, cultural diversity, and access to justice. These issues have been central to the jurisprudence of the Colombian Constitutional Court, the Supreme Court of India, and the South African Constitutional Court. Each part is composed of three chapters, one written by a Colombian, one by an Indian, and one by a South African scholar.

The first part of the book, “Socioeconomic Rights,” begins with a chapter by David Bilchitz. In [Chapter 1](#), he explores the relationship among distributive justice, social and economic rights, and the Constitutions of South Africa, India, and Colombia. His line of argumentation can be divided in three parts. First, he argues that there is an important difference between these three Constitutions and the Constitutions of the Global North: while the former emphasize social and economic rights, the latter emphasize liberties. Bilchitz contends that the Constitutions of Colombia, India, and South Africa are especially committed to substantive equality – although they also recognize and value autonomy. Second, he analyzes the role that the Constitutional Court of South Africa, the Supreme Court of India, and the Constitutional Court of Colombia have had (and should have) in enforcing social and economic rights, grounding his analysis in the particular political, economic, and social conditions of each country. Bilchitz indicates that these Courts have played and should continue to play an important role in protecting the individual’s right to equality. Without real access to material

resources, the distributive justice aims pursued by the Constitutions of South Africa, India, and Colombia would not be achieved. These Courts, Bilchitz argues, have stepped up to protect the social and economic rights of all members of the polity; the work of these Courts is especially significant given the weaknesses that the legislative and executive branches have in these three countries. Third, Bilchitz studies the jurisprudence of the Constitutional Court of South Africa, the Supreme Court of India, and the Constitutional Court of Colombia on social and economic rights. He examines the legal theories and political strategies used by these Courts to give content to and, ultimately, to realize these rights. Bilchitz concludes that the jurisprudence of these Courts – although promising, insofar as it has given new content to the principle of separation of powers and formulated novel remedies and procedures to enforce social and economic rights – has not yet created a true constitutionalism of the Global South.

Shyplashri Shankar writes the second chapter of this part. In [Chapter 2](#), she argues that political commentators and scholars argue both that the Supreme Court of India is an activist and a nonactivist tribunal. To support both of these views, academics and political observers usually appeal to the Court's jurisprudence on social and economic rights. For some, the fact that the Court has transformed directive principles (nonenforceable social rights) into judicially enforceable fundamental rights shows the activist character of the Court. For others, the fact that the Court has reached agreements with the executive branch to protect the status quo and has not really enforced social and economic rights provides evidence of the nonactivist character of the tribunal. However, Shankar contends that both approaches are wrong; they are based on fuzzy concepts of *activism*, Shankar argues that a Court can be called “activist” only when it violates the borders of the legislature's and executive's jurisdictions. Shankar also notes that an analysis of the Court's jurisprudence on health and education rights between 2006 and 2011 shows that the Court has been neither strictly activist nor strictly nonactivist. What an analysis of the Supreme Court of India's jurisprudence on health and education rights does show is that it has transformed itself into

a negotiator between the state and its citizens. Shankar argues that the Court has assumed the role of an embedded negotiator in order to realize social and economic rights. In Shankar's interpretation, the Court's jurisprudence clarifies the content of the rights – creating no new duties in the process – and facilitates a dialogue between the state and its citizens concerning the ways in which social and economic rights should be realized.

The first part of the book ends with the chapter written by Libardo Ariza. In [Chapter 3](#), Ariza examines the unconstitutional state of affairs (USOA) doctrine formulated by the Colombian Constitutional Court. This doctrine can be used to stop massive and systematic violations of fundamental rights caused by an institutional blockage. This doctrine, which has been used to address the situation of the millions of internally displaced people in Colombia (among other things), has been widely considered as progressive by constitutional law scholars for two reasons. On the one hand, it has allowed the Court to distance itself from a traditionally functional interpretation of the principle of separation of powers. The Court, therefore, has been interpreted as an institution that is willing to cross the borders that determine the jurisdictions of the executive and legislative branches in order to protect the Bill of Rights. On the other hand, the USOA doctrine shows the Court's commitment to the enforcement of social and economic rights – a key issue in a country plagued by inequality and poverty. However, Ariza argues that this doctrine has been problematic when applied to the prison system. Ariza argues that, in this case, the USOA has not helped to stop the systematic violation of prisoners' rights and has instead helped the implementation of neoliberal punitive perspectives that focus on the construction of more prisons and increased mandatory minimum terms in prison. The slow implementation of social and economic rights that the USOA doctrine allows by sponsoring a traditional interpretation of these rights, Ariza argues, collides with the inhumane conditions in which inmates are forced to live within the Colombian prison system.

The second part of the book, “Cultural Diversity,” begins with a chapter by Cathi Albertyn. In [Chapter 4](#), she explores the tension between customary law and gender equality that cuts across the South African Constitution, and she also evaluates the jurisprudence developed by the South African Constitutional Court in response to this tension. Albertyn explores the strengths and weaknesses of the Court’s main argument in the relevant case law: that the concept of living law and custom should solve the conflicts between cultural diversity and individual rights. She argues that the Court’s approach has rightly protected gender equality but has not always properly recognized and accommodated cultural diversity. Albertyn argues against a universalist interpretation of the South African constitution, which would impose liberal values across all cultures. Instead, she argues for an interpretation that gives priority to deliberation and that balances cultural diversity, on the one hand, and autonomy and equality, on the other hand. For Albertyn, this aim is achievable if we accept that cultures are entities in constant flux and are susceptible to different interpretations, and that liberal values are open-textured norms that can reasonably be given different contents. Cultures, she notes, are contested, flexible, and permeable. Liberalism, she also points out, is not a monolithic, unidimensional political philosophy; liberal values, Albertyn contends, are both disputed and capable of change. These arguments, together with a contextual approach that takes into account the particular characteristics of each conflict, will probably attain, Albertyn argues, an adequate balance of the constitutional values that constitute this conflict.

Grupeet Mahajan, in the second chapter of this part, explores the Indian Supreme Court’s jurisprudence on freedom of religion. In [Chapter 5](#), she argues that the Court has tried to protect religious diversity by balancing the interests of religious minorities and majorities, as well as the interests of the community and the individual. The Court, Mahajan states, has not favored an approach that gives priority to the Hindu religious majority, nor has it valued the individual over religious congregations. The Court has tried to balance interreligious equality with diversity

and autonomy, while at the same time balancing individual equality with cultural diversity. Throughout this process of balancing competing values, the Court has taken into account the particularities of each case, the consequences of its decisions, public order issues, and religious history and practices. The Court, from Mahajan's perspective, has also moved beyond interpreting the law to interpreting sacred texts and has ruled in favor of state intervention on decisions made by religious organizations. The Court, in Mahajan's interpretation, has thus become a peacekeeper among competing religious creeds – Hinduism, Islam, and Christianity – and the protector of a democratic and stable India.

In the last chapter of this second part ([Chapter 6](#)), I analyze the Colombian Constitutional Court's jurisprudence on the right to prior consultation. This jurisprudence, in Bonilla's perspective, explores the tension between cultural diversity and cultural unity that structures the 1991 Colombian Constitution. In particular, the relevant case law examines the tension between cultural minorities' self-government rights and the principle of political unity. Bonilla Maldonado divides the jurisprudence of the Court into three stages and critically examines their philosophical foundations. In the first stage, the Court defines the characteristics that give structure to the right to prior consultation and formulates the criteria that should guide its development; in the second stage, the Court determines the rules that should govern the consultation of legislative and administrative measures that directly affect cultural minorities; in the last stage, the Court reiterates the first two stages of its jurisprudence, but rules that the right to prior consultation includes cultural minorities' right to veto the decisions made by the state when these decisions put at risk their survival as distinct cultural communities. Bonilla Maldonado argues that the Court's jurisprudence on the right to prior consultation can be supported by appealing to three philosophical models: multicultural liberal monism, procedural liberal monism, and multicultural liberal pluralism. Bonilla questions the first two models and states that the third one offers a better interpretation of the right to prior consultation. This model appeals to a pluralistic

structure of the state, as well as to intercultural equality, corrective justice, self-government rights, and cultural integrity in order to justify and give content to the right to prior consultation.

The third part, “Access to Justice,” begins with a chapter by Jackie Dugard. [Chapter 7](#) is structured around the following question: Has the Constitutional Court of South Africa become a voice for the poor? Dugard, assuming what she calls a pro-poor approach, argues that this has not been the case. The Court, on the one hand, has not opened a dialogue with the citizenry – particularly with the South African poor. The Court, Dugard states, has not allowed poor South Africans to gain direct access to justice, and, when they do arrive before the Court, poor individuals and groups have often faced important jurisprudential obstacles to receiving protection for their rights and interests, such as a weak interpretation of the right to legal representation. However, the Court has not been willing, Dugard argues, to enforce robustly social and economic rights. This is particularly problematic, Dugard indicates, given the history of oppression and the structural poverty that negatively affects the majority of South Africans. As a consequence, Dugard contends, the South African Constitutional Court is increasingly losing legitimacy and becoming an isolated and distrusted institution among poor South Africans.

Menaka Gurusmany and Bipin Aspatwar are the authors of the second chapter of this part. In [Chapter 8](#), Gurusmany and Aspatwar explore the Supreme Court of India’s jurisprudence on access to justice. The authors analyze the celebrated public interest litigation movement led by the Indian Supreme Court and examine the Court’s flexible interpretation of standing rules. The Court’s jurisprudence on the right to access to justice, the authors argue, has opened the Court’s door to many poor and vulnerable sections of the population, including prisoners, women, and members of cultural minorities. The so-called epistolary jurisdiction, for example, has allowed common citizens to get to the Court and to establish a dialogue with the supreme tribunal. However, the authors also argue that, although the flexible interpretation of *locus standi* has

been widely applied by the Court in major constitutional cases where the public interest is clearly at stake, it has not been applied by the Court in ordinary cases. In these cases, the Court has formulated a more rigid interpretation of standing rules, with negative consequences for both individual litigants and constitutional justice in general.

Manuel Iturralde, in the third and last chapter of this part ([Chapter 9](#)), explores the Colombian Constitutional Court's jurisprudence on access to justice. In particular, Iturralde examines the Court's flexible interpretation of the *tutela* legal action and the *actio popularis*. The first action has allowed Colombians to protect their fundamental rights through a fast, cheap, and uncomplicated legal process. This legal action can be, in principle, brought before any judge in the country to protect a fundamental right from an act or omission of the administration. The second action has allowed common citizens to protect the coherence of the legal system and exercise control over the executive and legislative branches. This legal action allows any citizen to question the constitutionality of almost any law before the Constitutional Court. Iturralde also analyzes the ways in which social organizations and legal clinics have used these legal actions and the Court's jurisprudence on access to justice to promote the protection of the rights of vulnerable and discriminated-against sectors of the population. Finally, Iturralde studies the serious conflicts that the Constitutional Court's access to justice jurisprudence has created with the Supreme Court and the State Council. In this analysis, Iturralde uses a sociolegal approach that utilizes Bourdieu's concept of the legal field.

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Part I SOCIOECONOMIC RIGHTS

1 Constitutionalism, the Global South, and Economic Justice

David Bilchitz

CONSTITUTIONS STRADDLE THE BOUNDARY BETWEEN THE ideal and the real. As the foundational legal text of a society, they give us an indication of the values that lie at a society's heart. At the same time, they often include large sections that deal with the mechanisms and contours of governance, the structural mediating apparatus that is meant to give concrete effect to these ideals. The Constitution is also importantly a legal text: It enables the legitimate exercise of power within a polity and places constraints on what may be done. Given its foundational legal position, its character and content can condition the way in which a particular society develops.

This chapter focuses on the relationship between constitutionalism and distributive justice. In particular, it focuses on three countries – namely India, Colombia, and South Africa – where the Constitutions have included socioeconomic rights and thus placed questions surrounding the distribution of resources at the heart of the constitutional enterprise. These are all countries in what has been termed the “Global South.” These words are placed within quotation marks because the very notion of a Global South is a construct that traverses large differences and has been used to refer to countries as diverse as those in Latin and Central America, Africa, and Asia (which notably is not even in the geographical South). A key focus of this chapter lies in understanding whether there is an emergence of a distinctive type of constitutionalism that characterizes the “Global South,” and, if so, what this looks like.

The chapter does not, however, seek only to be descriptive but also to outline normatively what the desirable characteristics of such a “new” constitutionalism would be.

The first section of this chapter considers the ideals outlined in the Constitutions of these three countries and seeks to show that their express engagement with questions of distributive justice represents a significant departure from more established “Northern” Constitutions, in which liberty is prioritized. This section also indicates how the concern for economic justice articulated through socioeconomic guarantees emerges from the particular histories and struggles of each of the countries under discussion. This is not the whole story, however, and such guarantees also protect universal shared interests possessed in common by all individuals. These Constitutions, it is argued, thus highlight through their protection of these universal interests the inadequacies and gaps within some of the older “Northern” Constitutions. The inclusion of these ideals thus suggests a new type of constitutionalism that not only holds out the possibilities of developing a different tradition in countries of the Global South but also of influencing the nature of global constitutionalism in the future.

The second and third sections of this chapter move beyond a consideration of the ideals contained in the Constitution and consider the manner in which they have been given effect by courts. This is not to suggest that courts are the sole branch of government tasked with realizing these rights; nevertheless, in all the systems under discussion, courts have the power to interpret the rights and ideals in question and to adjudicate disputes in this regard – powers that can be significant in ensuring that these rights are realized. The second section of this chapter considers specifically the doctrinal approaches adopted by courts towards giving determinate meaning to the socioeconomic guarantees in the constitutional text. I argue that these guarantees will only become meaningful for individuals if socioeconomic entitlements are interpreted to guarantee individuals a certain level of resources or services within these societies. The remainder of the second section considers the actual approaches

taken to the content of socioeconomic rights adopted by courts in the three countries in focus and seeks to evaluate their adequacy in advancing the protection of socioeconomic rights within those societies. With reference to these comparative experiences, I attempt to draw certain conclusions about the manner in which doctrines relating to the content of socioeconomic rights affect the translation of constitutional ideals into reality.

The third section of this chapter considers the manner in which the structural and institutional dimensions of constitutionalism can pose obstacles to the advancement of the socioeconomic guarantees in a Constitution. The focus here is on the separation of powers doctrines in the three countries under discussion and innovative procedural and remedial powers assumed by the courts. I argue that, if the ideals relating to economic justice contained in these constitutions are to be obtained, some of the traditional tropes of constitutionalism in relation to the separation of powers that are accepted generally in the North need to be rejected.

Although promising developments have occurred in these countries, I conclude that a distinctive constitutionalism of the Global South has not yet emerged. This chapter also examines what the contours of such a constitutionalism should be, and, ultimately, it contends that a “new” constitutionalism must be prepared boldly to reimagine many of the constraints of constitutionalism in the traditional North.¹ What the trends in the three countries in focus highlight is the need to reenvision constitutionalism in such a manner that it both guarantees that the fundamental rights of individuals to basic resources are given meaningful content and that these guarantees are translated into concrete terms through the

¹ Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of Injustice*, in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 156, 168 (SK Verma Kusum ed., 2000), draws attention to the fact that “[o]ur notions of what judges may, and ought, to perform are thus liable to be held within the dominant North juristic traditions. South judicial activism breaks that theoretical mould.” I shall consider and outline in this chapter the manner in which that “theoretical mould” needs to be broken if the socioeconomic guarantees in the Constitutions under discussion are to be realized.

institutions of governance. For some countries, as in the North, this may simply be a condition of their being decent societies; for others, as in the South, which face severe socioeconomic challenges, it may in fact be a very condition of the success of constitutionalism in their polities.

1 The Ideal: Constitutionalism and Economic Justice

A Constitution is not simply a set of formal institutional arrangements of the state; usually, it also contains a set of ideals that represent the normative core of the constitutional order.² Those ideals, although universal in nature, often emerge against the backdrop of a particular history and social context. The normative core of a Constitution thus emerges from a confrontation between the universal and the particular. The particular context leads to an emphasis on certain principles that have a particular resonance within those societies. For example, the virtually absolute protection of human dignity in Germany is particularly meaningful given the backdrop of the Holocaust, which foreshadowed the emergence of its new Constitution;³ it is also not an accident that the guarantee of equality and prohibition on unfair discrimination is central to the South African Constitution, given the backdrop of apartheid and severe state-sanctioned discrimination on the basis of race.⁴ These ideals – although having a particular resonance in these societies – are, nevertheless, of universal importance in any society that respects the

2 John Rawls, *POLITICAL LIBERALISM* 227 (1993), speaks of “constitutional essentials” that involve both “fundamental principles that specify the general structure of government and the political process” and “equal basic rights and liberties of citizenship that legislative majorities are to respect.”

3 See, for instance, the “Life Imprisonment Judgment,” BVerfGE 45, 187 and the “Aviation Security Judgment,” BVerfGE 115, 118. These judgments are available in English translation in *60 YEARS OF GERMAN BASIC LAW: THE GERMAN CONSTITUTION AND ITS COURT* (J. Brohmer and C. Hill eds., 2010).

4 Justice Langa, for instance, clearly stated in *Bhe v. Khayelitsha Magistrate* (1) SA 580 (CC) (2005) at para. 71 that “rights to equality and dignity, assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.”

demands of social justice.⁵ In outlining a developing new “constitutionalism of the Global South,” we must take account of the dual aspect of the norms involved: on the one hand, the particularities of societies in the Global South that may evince similarities to one another;⁶ on the other hand, the universal reach of the emerging norms and principles that provide the basis for a general critique of the inherited traditions of constitutionalism in the North. I explore some of these themes in relation to the constitutional traditions of some representative countries in relation to socioeconomic rights.

1.1 Particularities and Constitutional Traditions

The repository of the ideals framed in a Constitution is often contained in a preamble, as well as in a Bill of Rights. The earliest Bills of Rights in North America and Western Europe have generally had very little to say expressly about socioeconomic guarantees for individuals. To understand why this is so, it is important to recognize that these Constitutions often came about as a result of political repression and a struggle against the deprivation of liberty. Thus, at the normative core of these Constitutions lie protections for the liberty of individuals against the power of the state and those in authority.

The French Declaration on the Rights of Man and of the Citizen, one of the foundational documents of the modern era, adopted in 1789, states in article 2 that “the aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression.”⁷ Despite the backdrop

5 Here, I assume the notion that there are universal moral principles applicable to all societies and individuals, although the scope of this chapter does not allow further discussion. For a recent defence of universal values, see, for instance, M. Nussbaum, *WOMEN AND HUMAN DEVELOPMENT* 34–106 (2000).

6 As Baxi, *supra* note 1 at 166–68, points out, conditions in the societies of the Global South may also be significantly different from those in the Global North, thus requiring different approaches.

7 French Declaration on the Rights of Man and of the Citizen, article 2, available at <http://www.hrcr.org/docs/frenchdec.html>.

of a feudal type of society and the economically harsh conditions giving rise to the French Revolution, it is notable that the Declaration contains no right to food or housing, or provisions addressing the economic plight of individuals.⁸ The right to property clearly has implications for economic justice, but these seem largely conservative: The right is guaranteed in the Declaration as being “inviolable and sacred,”⁹ prohibiting deprivation unless for public necessity and with compensation to the owner.

Similarly, the U.S. Constitution emerges from a history in which people were forced to escape repression of their religious liberty in Europe. The amendments to the U.S. Constitution are largely focused on civil and political rights, with strong guarantees, for instance, of freedom of expression and religion. Again, there is a provision in the Fourteenth Amendment dealing with no deprivation of property without due process of law or denying to any person the equal protection of law. The phrasing of these amendments again suggests a negative right that protects the status quo of those who own property. Although an alternative reading is no doubt possible,¹⁰ the dominant tradition of interpretation currently is that the U.S. Constitution does not itself contain provisions that directly protect the socioeconomic rights of individuals.¹¹ An instance of a more recent Bill of Rights that omits any such guarantees is the Canadian Charter of Rights and Freedoms. The Charter guarantees a range of civil and political rights without any express socioeconomic guarantees. Interestingly, this more recent Charter omits a right to property as well.

8 Thomas Paine, in *THE RIGHTS OF MAN* (Wordsworth Editions, 1996), writes in his polemic defending the revolution that the object of a Constitution or government is the “general happiness” of the people and expressly seeks to provide ways of addressing the dire poverty existing at the time (in England).

9 French Declaration, *supra* note 7, article 17.

10 See, for instance, Frank Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARVARD L. REV. 7 (1969).

11 Michelman himself admits this in a recent article in which he seeks to “explain America away”: see F. Michelman, *Socio-Economic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 1 (2008).

In contrast to this tradition of focusing on civil and political rights and the ideal of “liberty,” a cursory reading of the Constitutions of Colombia, India, and South Africa immediately demonstrates a sharp difference in this regard. Far from matters of economic distributive justice being subsidiary or subsumed under other considerations, they are central. It is interesting to note that, over the course of the last century, the manner in which socioeconomic guarantees have been included in Constitutions has been strengthened, and the sharp division between civil and political rights reduced.

The Indian Constitution emerges from a battle for independence against the United Kingdom. India, itself, suffered from severe poverty at the time, and Setalvad writes that, consequently, “there was near unanimity on enacting provisions designed to bring about an egalitarian society with social justice.”¹² The Preamble thus begins by recognizing one of the aims of the Constitution as being to secure to the people “justice, social, economic and political.”¹³ At that time, it was unusual for fully justiciable socioeconomic rights guarantees to be included in a Bill of Rights, and there was also concern that a poor country like India could not render such rights immediately enforceable.¹⁴ Consequently, part III of the Constitution deals with fundamental rights but largely enshrines civil and political rights, which are enforceable by courts of law. Part IV includes the directives of state policy that are not enforceable by a court but nevertheless are “fundamental in the governance of the country and it shall be the duty of the state to apply these principles in the making of laws.”¹⁵ The compromise that was reached was thus to outline a range of socioeconomic ideals or directive principles at the normative core of the new constitutional order in India, without rendering them directly

12 Atul M. Setalvad, *The Supreme Court on Human Rights and Social Justice: Changing Perspectives*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 233 (BN Kirpal et al. eds., Oxford University Press, 2000).

13 See Preamble to the Constitution of India, available at <http://lawmin.nic.in/coi/coiason29july08.pdf> (last accessed Sept. 20, 2011).

14 See Setalvad, *supra* note 12, at 233.

15 Article 37 of the Indian Constitution.

justiciable.¹⁶ The directive principles include, *inter alia*, a duty on the state to promote the welfare of the people, to raise the level of nutrition, and to improve public health. They also include guarantees that citizens are entitled to an adequate means of livelihood, to work, to legal aid, to education, and to public assistance when vulnerable.¹⁷ These directive principles of state policy thus set out a comprehensive set of ideals that seek fundamentally to change the economic living conditions of people within India. Economic justice is a key goal of the state, although, on the face of the Constitution, the way in which it achieves this cannot be enforced through the courts.¹⁸

A similar intention concerning the advancement of distributive justice is evident on reading the Colombian Constitution of 1991. The Constitution was “not the product of a triumphant revolution, but rather grew out of a complex historical context as a consensual attempt to broaden democracy in order to confront violence and political corruption.”¹⁹ It was passed against a backdrop of internal armed conflict, as well as

16 S. Muralidhar *The Expectations and Challenges of Judicial Enforcement of Social Rights*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 102, 103 (Malcolm Langford ed., Cambridge University Press 2008), states that “a compromise had to be struck between those who felt that the DPSPs could not possibly be enforced as rights and those who insisted that the Constitution should reflect a strong social agenda.” This resulted in the nonenforceability clause of the directive principles.

17 Part IV of the Indian Constitution contains the entire list of directive principles.

18 S. Shankar, *The Embedded Negotiators: India's Higher Judiciary and Socio-Economic Rights* (D. Bonilla ed., Cambridge University Press 2013), quotes the Chair of the Drafting Committee, Dr. B. R. Ambedkar as saying that “a state just awakened from freedom might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling the Directive Principles.” He also said that the government would have to answer to the electorate for a failure to deliver on these principles. As we shall see in Section 2 of this chapter, the courts have, in fact, adopted a much more robust and activist approach toward the realization of socioeconomic goods in India.

19 R. U. Upimny Yepes, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 127, 128 (R. Gargarella, P. Domingo, and T. Roux eds., Ashgate 2006).

large-scale poverty and inequality.²⁰ The Preamble refers to a just “political, economic and social order.”²¹ Chapter 1 of the Constitution deals with “fundamental rights” and largely includes a range of civil and political rights. An extensive set of economic, social, and cultural rights are recognized in chapter 2 that include, among others, the provision of the right to social security (article 48); public health (article 49); the right to live in dignity (article 51), which includes a component relating to housing; a restricted right to property (article 58); and the right to education (article 67). On the face of the Constitution, the rights in chapter 1 do still appear to have a higher status and justiciability than those in chapter 2: As we shall see in Section 2 of this chapter, judicial doctrine has narrowed the differences between these two sets of rights.²²

The South African Constitution, perhaps, represents most clearly a text wherein economic and social rights are not separated from civil and political rights but are part of one unified Bill of Rights in which all the rights share a similar status. The Constitution of South Africa was passed against a historical backdrop of the apartheid system, which had entrenched racial discrimination and inequality across the society.²³ This discrimination also negatively affected the socioeconomic

20 M. Sepulveda, *The Constitutional Court's Role in Addressing Social Injustice in Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, in SOCIAL RIGHTS JURISPRUDENCE, *supra* note 17 at 144, 161.

21 For an English text of the Constitution, see <http://confinder.richmond.edu/admin/docs/colombia.const2.pdf> (last accessed Sept. 20, 2011).

22 See Uprimny Yepes, *supra* note 19 at 129–31.

23 Judge Mahomed famously characterized the purpose of the new Constitution as follows in *S. v. Makwanyane* (3) SA 391 (CC) at para. 262 (1995): “the contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism. The Constitution expresses in its preamble the need for a ‘new order...in which there is equality between...people of all races’... The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; section 10 constitutionally protects that dignity. The past accepted, permitted, perpetuated and institutionalized pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, section 8 and the postamble seek to articulate an ethos which not only rejects its rationale but unmistakably recognizes the clear justification for the reversal of the accumulated legacy of such discrimination.”

life chances of black people, resulting in high levels of poverty and income inequality.²⁴ The liberation movements (most notably the African National Congress) had also early on expressed the desire to struggle not only for political liberation but for economic equality, too.²⁵ The new order in South Africa began with the adoption of an interim Constitution in 1993 and, in 1996, the final Constitution. The Preamble to the latter (which is the focus here) recognizes that South African society is to be founded on, among other things, “social justice” and that one of the central purposes of the Constitution is to “improve the quality of life of all citizens and free the potential of each person.”²⁶ The Bill of Rights includes both civil and political rights and socioeconomic rights. The right to property is given limited protection, and it is phrased in negative terms and subject to several qualifications (section 25). The socioeconomic rights include the right of access to adequate housing (section 26(1)), the right to sufficient food and water (section 27(1)(b)), the right to have access to healthcare services (section 27(1)(a)), the right to social security and social assistance (section 27(1)(c)), and the right to education (section 29). All these rights are justiciable, although different sets of internal limitations are placed on certain of the rights.

The Constitutions of India, Colombia, and South Africa all differ in the status they grant to socioeconomic rights, as well as in the specifics of their formulation. However, in contrast to the constitutions of France, the United States, and Canada, they share a core normative commitment towards state institutions having obligations to address the economic injustices and inequalities in their societies. These documents generally express such a commitment through recognizing a number of socioeconomic entitlements that advance the welfare of individuals in the society. They differ, on their face, concerning whether these rights can be

24 See Pierre De Vos, *A Bridge Too Far? History as Context in the Interpretation of the South African Constitution*, S. Afr. J. HUM. RTS. 1–33 (2001), who cautions against construing the historical backdrop to the new Constitution too narrowly.

25 See the Freedom Charter, available at <http://scnc.ukzn.ac.za/doc/HIST/freedomchart/freedomch.html> (last accessed Oct. 19, 2011).

26 The Constitution of the Republic of South Africa can be found at <http://www.info.gov.za/documents/constitution/1996/96preamble.htm> (last accessed Sept. 20, 2011).

enforced through judicial review; over time, however, it has become clear that, in all these countries, these entitlements are subject to judicial review (at least to some extent). Thus, these three examples suggest that one of the characteristic features of a “new” constitutionalism of the Global South is the inclusion of socioeconomic entitlements in a Constitution, thus placing a central emphasis on advancing a particular vision of distributive justice through processes of law and, in some cases, through the institution of judicial review.²⁷ This section has considered briefly how this feature of the Constitutions in question arose from the unique historical circumstances of the societies from which they emerged. However, there are reasons of a more universal character why socioeconomic rights guarantees and a constitutional commitment legally to address the structure of economic injustice should be part of any decent constitution. It is to this issue that I now turn.

1.2 Absences, Elisions, and Correctives: The Universal in the Global South

The inclusion of socioeconomic guarantees as part of the relatively “new” constitutions of the Global South highlights an absence in many of the constitutions of the North. This raises the normative question as to whether there are any universally justifiable reasons that support either of these positions, and thus as to whether including such guarantees in Constitutions is in fact desirable. Such a question suggests dissatisfaction with a purely historical explanation for such differences and raises a question of normative political philosophy. In a recent article, Frank Michelman, for instance, engages with this question and seeks to understand why socioeconomic rights commitments are absent from

²⁷ Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 150 (1998) would refer to these constitutions as transformative in nature. He defines transformative constitutionalism as follows: “a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction.”

the U.S. Constitution.²⁸ Ultimately, he concludes that, from the perspective of “ideal theory” (reason-based political philosophy), it is hard to come up with good reasons for excluding such commitments from any Constitution.

The argument he provides is based on the idea that a constitutional text must itself be worthy of being regarded as legitimate. Such a constitution, he claims, is one that “allows you or me to say, with a clear conscience that any law whose process of enactment and whose content pass muster under the constitution’s requirements can ipso facto be deemed a law with which all within range have good enough reason, to comply and which, we therefore are justified in enforcing.”²⁹ Michelman’s view is rooted in a Rawlsian liberal perspective, whereby the test for legitimacy is that everyone could reasonably assent to such a system, and where individuals are conceived as free, equal, and diverse. The question in this context, then, becomes whether any individual who is reasonable and rational would assent to a system of governance *without* fundamental guarantees to certain socioeconomic resources that would enable him or her to live a decent life. Michelman argues that “it may well seem that we cannot fairly call on everyone, when thought of as reasonable, but also rational, to submit their fates to the tender mercies of a democratic, majoritarian law-making system without also committing our society, from the start to running itself in ways designed to constitute and sustain every person as a competent and respected contributor to political exchange and contestation as well as to social and economic life at large.”³⁰ This creates a strong case for constitutionally entrenched social rights, according to Michelman: Without such rights, the Constitution cannot claim to be worthy of legitimization by the populace.³¹ I call this the “legitimacy argument” for constitutional social rights guarantees.

28 F. Michelman, *supra* note 11 at 1.

29 *Id.* at 13.

30 *Id.* at 13.

31 He proceeds, however, to provide reasons relating to the historical exclusion of socioeconomic rights and certain nonideal factors concerning the current state of the United States polity – such as the high level of disagreement concerning matters of economic policy and the role of judicial review within the public political culture – that could

It is important to recognize that this is an argument that has even more force in the context of the Global South: In circumstances in which millions of people live in dire poverty, the exclusion in a Constitution of guarantees that address the economically depressed living conditions of so many would have an impact on the very legitimacy of the system itself. This point also highlights the fact that when courts enforce such guarantees against other branches of government, they are not acting, as many would have it, in an undemocratic manner;³² rather, they are defending the conditions necessary for the very legitimacy of the constitutional order itself, in which none is excluded.³³

The legitimacy argument is itself in some ways dependent on a second argument, which I term “the importance argument.”³⁴ The legitimacy concerns would not really arise unless the interests that are being protected by such guarantees are of great importance in and of themselves. Fabre argues that “[t]urning a moral right into a constitutional right means that the interest protected by the moral right is important enough to legally disable citizens and members of the legislature from enacting laws which violate these moral rights, that is from changing people’s legal situation by forbidding them by law to do certain things, or by not giving them certain things by law.”³⁵ Given that the interests in protecting autonomy and well-being are of such a high level of importance, she argues, they deserve to be constitutionally protected.³⁶ I have also

provide a justification for failing at the present to pass a constitutional amendment that would include such socioeconomic guarantees.

32 R. Arango, *Basic Social Rights, Constitutional Justice and Democracy*, 16 RATIO JURIS 141, 147 (2003) writes: “A society without human dignity, accustomed to human suffering and degradation of life, and blind to marginality and discrimination, is not a society that can aspire to building and identifying itself as a social, constitutional and democratic state of law.”

33 Ronald Dworkin, *Is DEMOCRACY POSSIBLE HERE?* 97 (Princeton University Press 2006), argues that for a legal system to be legitimate, “it must treat all those over whom it claims dominion not just with a measure of concern but with *equal* concern.”

34 These arguments do not exhaust the possible bases for social rights, although I seek to provide some of the strongest philosophical justifications that have been put forth.

35 C. Fabre, *SOCIAL RIGHTS UNDER THE CONSTITUTION* 101 (Oxford University Press 2000).

36 Arango, *supra* note 32 at 145, also appears to rely on the importance to individuals of the interests these rights protect and the harms done where they are not secured.

argued, in a similar vein, that the interests protected by socioeconomic rights are no less fundamental than those protected by civil and political rights. Without respecting both sets of rights, a society cannot claim to treat individual lives as being of equal importance – the measure of any decent polity.³⁷ Judicial review is also justified, I argue, in relation to both sets of rights, given the central significance of the interests they protect in giving effect to the principle of equal importance and institutional features of the judiciary that render it more likely than other branches of government to secure protection for these interests.³⁸

These arguments highlight an important critique that can be lodged against the older Northern Constitutions. The background structure of law conditions the economic relations and distribution of resources that may exist within a society. Without protection for the fundamental socioeconomic interests of individuals, economic relations and the actual distribution of resources can develop in such a way that individuals are unable to survive or are only capable of living in terrible conditions.³⁹ The omission of socioeconomic rights guarantees means that the Constitution, at its normative core, does not protect individuals from being allowed to sink into deep poverty. Indeed, many individuals perish from their deprivation of resources; it is hard to understand how such a situation can be said to involve treating such individuals with any importance or concern at all. A society based on respect for the equal importance of individuals must thus guarantee at least that individuals have the minimum resources to live a life of dignity. Constitutions that omit socioeconomic rights guarantees thus set up a background structure of society that can lead to a severe violation of the equal importance of individuals. The Constitutions of the Global South can be seen to correct this

37 I can only briefly summarize the argument in the text; for the full justification of why equal importance requires protection for both sets of rights, see D. Bilchitz, *Poverty and Fundamental Rights* 57–74 (Oxford University Press 2007).

38 For the full development of this argument, *see id.* 102–34.

39 Presumably, this reasoning underlies Rawls's recognition that a "social minimum providing for the basic needs of all citizens" is an essential element of a constitution; see Rawls, *supra* note 2 at 228–29.

imbalance in Northern Constitutions⁴⁰ and thus help advance our understanding of the principles and guarantees that should be essential elements in any decent Constitution.⁴¹

From an ideal point of view rooted in political philosophy, by including socioeconomic guarantees, the new constitutions of the Global South are not simply reactions to their own histories and particularities. In doing so, they assert universal principles that are highly desirable and, at least, difficult to contest at an ideal level.⁴² However, some authors consider that the legal entrenchment of socioeconomic rights makes grand promises, raises expectations, and delivers very little, thus rendering them a “bitter mockery to the poor.”⁴³ Others doubt that these rights can properly or legitimately be enforced by judges and insist that they should be realized through ordinary political processes.⁴⁴ If these criticisms are

40 K. D. Ewing, *The Unbalanced Constitution*, in *SCEPTICAL ESSAYS ON HUMAN RIGHTS* 103 (T. Campbell ed., Oxford University Press 2001).

41 J. Rawls, *THE LAW OF PEOPLES* 67 (Harvard University Press 1999), refers to the notion of a “decent” society in his theory of international justice as a “minimal idea” that is distinct from the notion of a perfectly just society. He expressly argues that subsistence rights are among those that would be protected by any decent society (at 65). A. Margalit, *THE DECENT SOCIETY* 10 (Harvard University Press 1998), famously states that “[a] decent society is one that fights conditions which constitute a justification for its dependents to consider themselves humiliated.” He discusses the humiliating nature of poverty and contends that a society that “assists the needy on the basis of their being entitled to assistance is less humiliating in principle” than a society where no such entitlements exist (at 239–40). See also Fabre, *supra* note 35, and Dworkin, *supra* note 33, who places the emphasis on treating individuals with equal concern and respect. All these authors thus suggest that protections for every individual to have at least a minimum level of economic resources are an essential criterion in judging whether a society can be classified as “decent,” let alone fully just.

42 I do not suggest that some extreme libertarian philosophies would not do so, but their ability to defend convincingly the strong absolute property rights that they do is highly doubtful. Even a libertarian philosopher such as Nozick is forced to concede that property ownership is subject to a proviso that there is “as much and as good” available for people to use, a condition arguably not realized in modern patterns of property ownership. See Robert Nozick, *ANARCHY STATE UTOPIA* 178–82 (Basic Books 1974).

43 See, for instance, O. O’Neill, *TOWARDS JUSTICE AND VIRTUE* (Cambridge University Press 1996) 133.

44 C. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. FORUM 124 (2000–01).

to be met, socioeconomic guarantees must be shown not simply to exist as “paper rights” but must be capable of bringing concrete changes into the lives of the poor. Institutional obstacles to their enforcement must also be shown to be capable of being removed, and there is a particular role for judges in this regard. The rest of this chapter is concerned with the process of translating the ideal into the real and the various dimensions involved in doing so. It focuses on the role of courts in this process, although, of course, the responsibilities for the implementation of such rights do not rest on courts alone.⁴⁵ The next section considers the extent to which it is necessary to provide determinate content for these guarantees if they are to be translated successfully into reality.

2 Translating the Ideal into Reality: The Question of Content

2.1 *Specifying the Ideal: Some Reflections*

The mere inclusion of socioeconomic guarantees in a Constitution does not tell us exactly what individuals are entitled to or what the obligations of a state are in this regard. O’Neill has, for instance, argued that rights discourse, by its nature, does not focus on the obligations of agents responsible for the realization of such rights. Although this feature of this discourse is not harmful in relation to negative rights, it is particularly problematic in the case of positive rights, which require a more detailed specification and allocation of obligations to specific agents. Without doing so, such rights will result in very little concrete action to address the suffering of individuals who are poor.⁴⁶ This critique does not, in my view, provide a strong case against the recognition of positive rights; what it does do, however, is highlight the need to provide such rights with determinate content and attend to the obligations they impose.

⁴⁵ I seek to highlight the role of courts through an examination of their jurisprudence in the three countries under examination. For a theoretical justification of the judicial review of socioeconomic rights, see Bilchitz, *supra* note 38 at 102–34.

⁴⁶ O’Neill, *supra* note 43 at 133.

Understanding the normative basis of such rights is necessary to give them content. The two philosophical arguments in Section 1.2 provide such a justification and thus recognize that socioeconomic guarantees are rooted in interests that are of a high level of importance for all individuals and relate to the very conditions for the legitimacy of the constitutional order itself. These justifications lead to a number of important points that help provide more determinate content. First, socioeconomic guarantees in a Constitution do not themselves seek to specify the ideal distribution of economic resources in a society, as would be achieved in a utopian arrangement. Indeed, the ideal distribution of resources in a society is a matter of strong contestation within societies and among those political philosophers and economists who professionally are required to address this question.⁴⁷ The difficulties involved in determining an ideal distribution of economic resources and the consequent lack of consensus surrounding this issue suggest that it may be undesirable to constitutionalize a fixed standard in this regard.

Whatever one's perspective on this matter, this is not, in fact, the question that socioeconomic guarantees seek to address. These guarantees rather flow from the minimum implications of a principle that every decent society that wishes to develop legitimate institutions must recognize: that each individual is to be treated with equal importance. Socioeconomic rights thus, second, specify a threshold of resources that every individual should be entitled to if a society is to be regarded as treating them with equal importance.⁴⁸ That threshold includes universal and particular components: The universal concerns what every human being needs to function decently and to be able to realize his or her purposes; the particular involves local and societal conditions concerning what is

47 See, for instance, the differing notions of equality articulated in the following literature by well-known political philosophers: Ronald Dworkin, *SOVEREIGN VIRTUE* (Harvard University Press 2000), chapters 1 and 2; R. Arneson, *Equality and Equal Opportunity for Welfare*, 56 *PHILOSOPHICAL STUDIES* 77–93 (1989); and Gerald Cohen, *On the Currency of Egalitarian Justice*, 99 *ETHICS* 906–44 (1989).

48 D. Bilchitz, *supra* note 37 at 64–65.

deemed necessary, within that particular context, to be treated with dignity and respect.⁴⁹ Although not strictly speaking necessary for functioning, Adam Smith famously recognized that in his time a linen shirt and leather shoes were regarded as indispensable, such that “the poorest creditable person of either sex would be ashamed to appear in public without.”⁵⁰ I shall term this the “sufficiency threshold”: The ideals specified in the Constitutions we are concerned with are ultimately designed to provide individuals, within those particular societies and with reference to local conditions, with a sufficient amount of resources to enable them to live a life of dignity and respect. What is sufficient requires further elaboration. Yet what is clear is that these rights provide entitlements to societal resources that protect the significant interests of individuals, which enable them to live lives of value to them.

Sadly, the real conditions in evidence in societies such as India, South Africa, and Colombia often render an immediate entitlement to even a sufficient threshold of resources for everyone unattainable in the short term. To provide guarantees that cannot be fulfilled and to fail to alleviate (at least partially) some of the suffering of individuals is to hold out the false promise of an entitlement that seems impossible to enforce. It also raises the expectation of individuals and, when those expectations are dashed, cannot but bring disappointment in the constitutional project as a whole. Such an approach also fails to recognize that there are degrees to which individual lives can be improved, short of providing them with “sufficient resources.” These considerations, in my view, suggest the importance of developing a standard of resource allocation that is capable of being enforced in the shorter term and that can help alleviate the worst suffering of individuals. The standard falls short of what is entirely adequate or sufficient provision, yet addresses the most

49 I cannot here develop deeply the argumentation surrounding these claims but have done so in Bilchitz, *supra* note 37, chapters 1 and 2.

50 Quoted in A. Sen, *POVERTY AND FAMINES: AN ESSAY IN ENTITLEMENT AND DEPRIVATION* 18 (Oxford University Press 1981).

urgent, pressing interests of individuals.⁵¹ It also ensures that individuals are placed in a position to be able to benefit in the future, when the government can, in fact, provide a sufficient amount of resources to them. In other words, the third key point relating to the determination of content is that the confrontation between the ideal and the concrete realities of many societies entails that socioeconomic guarantees, in the interim, require the prioritization of providing a lower threshold of resources than “sufficiency.” Such a threshold should focus on the pressing, urgent interests of individuals in being free from threats to their survival.⁵² This is a threshold that I term (following the United Nations Committee on Economic, Social, and Cultural rights) the “minimum core.”

This reasoning should indicate that the minimum core is not the overall ideal threshold that socioeconomic rights guarantee to individuals in a society; rather, it is the concrete, realizable standard that must be applied in the shorter term to ensure that the constitutional ideal of everyone having sufficient resources in due course can, in fact, be realized. The minimum core constitutes the presently realizable component of a larger, longer-term ideal enshrined in the Constitution, one that requires at least ensuring that individuals are provided with the general necessary conditions to be free from threats to their survival.

This discussion has made certain general theoretical claims about how the content of socioeconomic rights is to be conceptualized and what interests they protect. It is important now to turn to a consideration of how courts in the three countries under consideration – India, Colombia, and South Africa – have actually sought to specify the content of these rights and some of their shortcomings in this regard.

51 Arango, *supra* note 32 at 147, also makes reference to the notion of urgency when he writes, “The urgency of the situation gives rise to the justiciability of basic social rights.” I believe, however, he goes too far here in suggesting that it is only under conditions of urgency that social rights are justiciable.

52 I outline this conception of the minimum threshold at Bilchitz, *supra* note 37 at 38–40 and 183–96.

2.2 Content in the Jurisprudence of India, Colombia, and South Africa

For a true constitutionalism of the Global South to exist, it is not sufficient to look at the ideals enshrined in the Constitutions in question on their face.⁵³ It is also necessary to understand how they have been interpreted within the particular systems in which they have been enshrined. This section examines the approach adopted by courts towards the content of socioeconomic rights in the three countries that are the focus of this chapter. The purpose of this analysis is not to provide a comprehensive analysis of the legal doctrines in each of the countries but to outline the broad approach adopted in these jurisdictions for purposes of comparison and critical assessment. The cases engaged are thus not dealt with in any depth but are identified by virtue of their contribution towards the development of legal doctrine relating to socioeconomic rights.

2.2.1 India

As has been mentioned, the directive principles of state policy were expressly not rendered enforceable by courts. Although, initially, the courts followed this injunction, over time, they found ways of making some of these principles justiciable.⁵⁴ In the *Fundamental Rights* case, the Supreme Court recognized that the fundamental rights in the Constitution and the directive principles are complementary, with neither being

53 Some Global Northern constitutions may not contain any express socioeconomic rights yet have been read to grant certain such entitlements through civil and political rights. In Canada, for instance, although courts have been timid in this regard, the equality guarantee has been used to recognize certain socioeconomic rights: see Martha Jackman and Bruce Porter, *Canada: Socio-economic Rights under the Canadian Charter*, in Langford, *supra* note 16.

54 R. Sudarshan, *Courts and Social Transformation in India*, in Gargarella, Domingo, and Roux, *supra* note 19, 157. See also S. Shankar and P. B. Mehta, *Courts and Socioeconomic Rights in India*, in COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (V. Gauri ed., Cambridge University Press 2007) at 149, who claim that the shift resulted from an attempt by judges to recoup legitimacy after they capitulated to the executive during the state of emergency in force between 1975 and 1977.

subordinate to the other. The Court stated that “there is a certain air of unreality when you assume that Fundamental Rights have any meaningful existence for the starving millions. What boots it to them to be told that they are the proud possessors of the Fundamental Rights including the right to acquire, hold and dispose of property if society offers them no chance or opportunity to come by these rights?... It is only if men exist that there can be fundamental rights.”⁵⁵

Since then, directive principles have been recognized as aids “to interpret the Constitution and more specifically to provide the basis, scope and extent of the content of fundamental rights.”⁵⁶ Indeed, at times, this approach has led to the expansion of the scope of fundamental rights guarantees so as to effectively guarantee certain socioeconomic rights protections. In the *Mullin* case, the Court expressly recognized that “the right to life includes the right to live with human dignity and all that goes with it, namely, bare necessities of life such as adequate nutrition, clothing, and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”⁵⁷ Similarly, in the *Olga Tellis* case, the Court held that the right to life included the right to livelihood.⁵⁸ In the *Shanti Star Builders* case, the Court further held that “the right to life would take within its sweep the right to food and a reasonable accommodation.”⁵⁹

The Supreme Court has thus held that certain socioeconomic guarantees can be interpreted to be part of the right to life, thus rendering them justiciable. Has it, however, pronounced on the level of resources people are entitled to and the extent of government obligations in this regard? Is there certainty as to what people are entitled to claim in India? In this

55 *Kesavananda Bharati v. State of Kerala*, 4 SCC 225 (*Fundamental Rights case*) at 879 (1973).

56 S. Muralidhar, *supra* note 16, 106.

57 *Francis Coralie Mullin v. The Administrator*, 1 SCC 608 at 608–19 (1981).

58 *Olga Tellis v. Bombay Municipal Corporation*, 3 SCC 545 at 572 (1985).

59 *ShantiStar Builders v. Narayan K Totame*, 1 SCC 520 at 527 (1990).

short review, it is not possible to give a complete account of its jurisprudence on the subject: Nevertheless, it appears that the Court's development of the normative content of these rights is rather incomplete and underdeveloped. For instance, the Court has made a number of striking pronouncements in the context of the right to housing: It has held, for instance, that the right to life includes the right to the "bare necessities of life."⁶⁰ This suggests an adoption of a minimum core notion requiring the government to focus on the urgent interests of individuals, which may fall short of what is sufficient to live a full life of dignity in the community. However, in the *Shanti Star* case, the court speaks of the human being as needing "suitable accommodation which would allow him to grow in every aspect – physical, mental and intellectual."⁶¹ This seems to be an expression of the sufficiency standard rather than of a minimum core threshold: The court here confusingly regards its statement concerning these more extensive interests in housing as an expression of the basic needs of a human being.

Given the high levels of poverty and homelessness in India, and the failure of majoritarian institutions to address these ills, it is crucial for the Court to clarify what citizens are entitled to claim from the government in this regard. Indeed, in the *Olga Tellis* case, for instance, the Court had to consider whether the city of Mumbai could evict and destroy the dwellings of those who lived in slums and on the pavements of the city. The Court here held in very striking terms that "[a]n equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live."⁶² Despite its

60 *Mullin* case, *supra* note 57.

61 *ShantiStar*, *supra* note 59 at 527.

62 *Olga Tellis*, *supra* note 58 at 572.

progressive dicta, the Court only imposed on the government a duty to consult those facing eviction and did not provide for alternative accommodation to be provided to the slum dwellers as a condition prior to their removal.⁶³ Muralidhar writes also that the “court has never really acknowledged a positive obligation on the State to provide housing to the homeless.”⁶⁴ Indeed, arguably, housing represents a socioeconomic guarantee towards which little progress has been made in India;⁶⁵ normative weakness in relation to the socioeconomic guarantees could play a significant role in this regard when the government lacks focus and does not understand what it is required to provide to its citizens. It is suggested that a more realizable short-term goal would be a focus on ensuring that every individual has a minimum level of housing provided while still retaining the sufficiency standard for the medium to long term.

In the context of the right to food, on the other hand, the Supreme Court in India has made a number of impressive interventions in the *PUCL v. India* case and continues to issue ongoing interim orders.⁶⁶ The Court has recognized, for instance, that “in our opinion, what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them.”⁶⁷ The interim orders of the Court have required the development of midday meal programs for children at school and nationwide food security schemes, and guarantees of employment. The Court has never, however, given a full-length judgment in the case outlining its normative approach to the content of the right in question.

63 *Id.* at 586.

64 Muralidhar, *supra* note 16 at 112.

65 The National Housing Policy of India in 1998, available at http://www.nhb.org.in/Publications/trends_nhhp.php, estimated the housing shortage at around 22.9 million units.

66 *PUCL v. Union of India* (Writ Petition No. 196 of 2001). Details of the orders can be found at <http://www.righttofoodindia.org/orders/interimorders.html>.

67 *Id.*

Arguably, one could construct such an approach from the various orders that have been made: There is no question that the focus (as is evident in the quote above) is on guaranteeing individuals a minimum amount of food when they are extremely vulnerable. The concrete nature of the orders in this case renders the normative underdevelopment of the right to food less significant; nevertheless, if these orders are to appear less ad hoc and are to be designed around a conception of state duties that individuals can understand and enforce in other contexts, then developing a more precise understanding of what the right to life entitles people to claim remains important for the realization of the economic and social ideals stated in the Indian Constitution.

2.2.2 *Colombia*

On its face, the 1991 Constitution of Colombia suggests that recourse to courts for the immediate protection of a violated right only applies to traditional civil and political rights. Economic and social rights are, in general, seen to be progressive in nature, requiring the government to adopt a plan of action for implementing these rights, make progress in giving effect to such a plan, and avoid undertaking retrogressive measures.⁶⁸ Despite this, courts have employed a purposive interpretation of the Constitution to expand the protection offered to economic, social, and cultural rights and, in some circumstances, to render them immediately enforceable.

Under article 86 of the Constitution, an individual whose “fundamental constitutional rights” are threatened or violated by an action or omission of a public authority may file a “writ of protection,” or *tutela*, action with the courts, requesting the immediate protection of his or her right. The writ involves an expeditious procedure, with judges having a deadline of ten days within which to reach a decision. Judges also have the discretion to fashion whatever remedies are necessary to protect constitutional rights. Although the term “fundamental constitutional

68 M. Sepulveda, *supra* note 20 at 147.

rights” refers to civil and political rights in the Colombian constitution, the Constitutional Court has interpreted this notion widely to render the writ of protection available whenever rights are “by their nature” fundamental.⁶⁹ In an even more expansive manner than in India, this led initially to the development of a doctrine of “fundamental rights by connection”: This refers to circumstances in which a socioeconomic right is so connected with another fundamental right that the lack of immediate protection for the former would lead to a violation of the latter.⁷⁰ This, for instance, can occur when the life, physical integrity, or dignity of an individual is at stake. This reasoning has been used successfully in the context of the right to health, for instance, in which the court has ordered the state or even a private healthcare provider to render a service not necessarily expressly contemplated by the law or an existing health plan.⁷¹ This has been particularly important, for instance, in the context of people gaining access to antiretroviral treatment for HIV/AIDS.⁷² More recently, the Court has sought to move beyond the “connection” doctrine, recognizing that certain socioeconomic rights (like the right to health) should be considered fundamental rights of a provisional character.⁷³ The Court stated that “the provisional and incremental facet of a constitutional right allows the holder of such right to demand via the judiciary at least (1) the existence of a public policy, (2) aimed at ensuring the effective enjoyment of the right, and (3) that such policy provide mechanisms for the participation of interested parties.”⁷⁴

In situations in which the Court receives many individual *tutela* actions, it has, in certain circumstances, declared an “unconstitutional

69 *Id.* at 147.

70 See T-406/92, T-571/92, and T-116/93.

71 R. Uprimny Yepes, *supra* note 19 at 34.

72 M. Sepulveda, *supra* note 20 at 157.

73 This evolution of the Court’s doctrines in this regard is outlined by L. J. Ariza, *Judicial Intervention and the Penitentiary System: The Paradox of Economic and Social Rights of the Incarcerated*, in this volume.

74 Case T-760 of 2008.

state of affairs.” Such a situation exists when there is present “a repeated and constant violation of fundamental rights, affecting a multitude of persons, due to problems of a structural nature and requiring the intervention of several State authorities for its resolution.”⁷⁵ Here, the Court can require that remedies be adopted that seek to protect not only those who filed a writ of protection but all others who are similarly situated. The Court can thus order the state in such circumstances to adopt a plan of action to remedy the situation.

A significant use of this doctrine occurred in the judgment that declared the existence of an “unconstitutional state of affairs” in relation to the plight of internally displaced persons (IDPs) in Colombia. The number of IDPs in Colombia may be as high as 3.9 million individuals, a situation that has resulted from forty years of internal armed conflict.⁷⁶ After receiving hundreds of *tutelas* relating to IDPs, the Constitutional Court issued a judgment declaring that the fundamental rights of IDPs were being violated in a systemic manner and that this situation constituted an unconstitutional state of affairs.⁷⁷

The Court’s reasoning is instructive and provides an understanding of the content it has attributed to social rights. It held that the state’s response to the IDP problem has “serious deficiencies in regards to its institutional capacity which cross-cut all of the levels and components of the policy and therefore prevent in a systematic manner, the comprehensive protection of the rights of the displaced population.”⁷⁸ In relation to finances, the court reiterated “the priority that must be given to the appropriation of resources to assist this population and thus solve the social and humanitarian crisis generated by this phenomenon.”⁷⁹ The Court recognized here that “it will not always be possible to satisfy,

⁷⁵ M. J. Cepeda Espinosa, *The Constitutional Protection of IDPs in Colombia*, in JUDICIAL PROTECTION OF INTERNALLY DISPLACED PERSONS: THE COLOMBIAN EXPERIENCE 18 (R. A. Rivadeneira ed., Brookings-Bern Projection Internal Displacement 2009).

⁷⁶ *Id.* at 2–4.

⁷⁷ Decision T-025 of 2004.

⁷⁸ *Id.* at section 6.3.1.4.

⁷⁹ *Id.* at section 6.3.2.

in a simultaneous manner and to the maximum possible level, the positive obligations imposed by all the constitutional rights of the entire displaced population, given the material restrictions at hand.”⁸⁰ Nevertheless, a minimum level of the rights of the IDPs had to be protected immediately. These minimum levels “are those that have a close connection with the preservation of life under elementary conditions of dignity as distinct and autonomous human beings.”⁸¹ This expresses the Court’s doctrine of *mínimo vital*.⁸² Importantly, the Court held that “[i]t is there, in the preservation of the most basic conditions that permit a dignified survival, where a clear limit must be drawn between the State obligations towards the displaced population of imperative and urgent compliance, and those which, even though they must be fulfilled, do not have the same priority.”⁸³ This reasoning was then used to identify a number of minimum rights – including the right to life, a basic level of subsistence, essential medical services, and sanitation – that had to be realized as a matter of urgency through positive action on the part of the state.

The Constitutional Court in Colombia has clearly sought to give concrete effect to socioeconomic rights. The early doctrines of content that it developed were forced on it by the structure of the Constitution, which separates civil and political and socioeconomic rights. The court thus sought creatively to use the “interdependence” of the interests underlying these two sets of rights to ensure the justiciability of socioeconomic rights in certain urgent circumstances where dignity and life were at stake. More recently, it has strengthened its approach to socioeconomic rights by recognizing them as fundamental rights of a provisional character. It has also recognized that one of its key tasks, when large-scale structural factors are implicated in the violation of rights, is to prioritize and identify a minimum threshold of provision the state must maintain, even if it cannot fully realize these rights. The Colombian Court has thus

⁸⁰ *Id.* at section 9.

⁸¹ *Id.*

⁸² See T 207/95 and T-254/93, for instance.

⁸³ *Id.*

developed a particularly promising space in which to fill out the content of socioeconomic rights by placing urgency, dignity, and life at the core of its jurisprudence. If there is room for development, it is in further building on its understanding of urgency and the threshold to be prioritized in the light of the circumstances of each case. The Court, to its credit, has also recognized the tension between granting individual relief in response to *tutelas* and the need to address systematic rights violations (through declaring an “unconstitutional state of affairs”) in a way that does not simply privilege those who are able to come to court.⁸⁴ In the future, it will be important to develop more principled guidelines as to when these differing procedures are used, to ensure that the courts respond to suffering but do so in a manner that treats everyone equally.

2.2.3 *South Africa*

The Constitutional Court of South Africa is not challenged in the same way as the courts of India and Colombia have been to find a way in which to render socioeconomic rights directly justiciable. The Constitution itself does not grant a separate status to civil and political rights and thus all the rights in the Bill of Rights appear to be justiciable. Thus, of the three Constitutions we are considering, the Constitutional Court of South Africa was provided with the best textual basis upon which to develop strong doctrines that render these rights meaningful for the poor. Unfortunately, the Court has weakened these rights significantly through its consistent refusal to specify their content and through the adoption of a vague jurisprudential approach founded on the notion of “reasonableness.”

⁸⁴ For a critical assessment of the jurisprudence of the Colombian Constitutional Court, see D. Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 190–247 (2012). Landau argues that although court doctrine appears to have been designed to favor the marginalized in society, the individualized enforcement of claims and remedies given have often landed up privileging the middle and upper classes. He argues in favor of stronger programmatic remedies such as structural injunctions that can be targeted better at assisting the worst off.

The main socioeconomic rights provisions in the South African Constitution have a particular structure. For instance, section 26(1) states that “everyone has the right to have access to adequate housing.” Section 26(2) provides that “the state must take reasonable legislative and other measure, within its available resources, to achieve the progressive realization of this right.” Section 27(1), similarly, in three subsections, guarantees the right to have access to healthcare services, sufficient food and water, and social security and assistance. Section 27(2) contains provisos similar to those in section 26(2). Surprisingly, instead of spending equal interpretive effort on both sections, the Court has focused its doctrinal approach on sections 26(2) and 27(2). In *Government of the Republic of South Africa v. Grootboom*,⁸⁵ the Court had to consider the constitutionality of the government’s housing program in relation to a community that was virtually homeless, with only plastic sheeting to cover them. The Court held that the positive obligations of the state in relation to the right to have access to adequate housing involved the requirement “to devise a comprehensive and workable plan to meet its obligations in terms of the subsection.”⁸⁶ Once such a plan is in place, however, “the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable.”⁸⁷ The Court provided a number of factors that would play a role in assessing reasonableness: These include that a reasonable program must be balanced and flexible, and it must “make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.”⁸⁸ The Court expressly distanced itself from the minimum core approach adopted at the international level, although it left open the door in particular cases to take account of a minimum core to determine the reasonableness of a government

⁸⁵ 2001 (1) SA 46 (CC).

⁸⁶ *Id.* at para. 38.

⁸⁷ *Id.* at para. 33.

⁸⁸ *Id.* at para. 43.

program.⁸⁹ The Court in this case granted declaratory relief, finding that the government housing program was unconstitutional for failing to make provision for those who were homeless and in desperate need of shelter.

The *Treatment Action Campaign (TAC)*⁹⁰ case saw the Court consolidate its reasonableness approach to these rights in the context of a claim for access to nevirapine, a drug that was largely effective in preventing the mother-to-child transmission of HIV at birth. The Court again, in this case, engaged in scant analysis of the content of the right to have access to healthcare services.⁹¹ It held that “[i]t is impossible to give everyone access even to a ‘core’ service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.”⁹² On the facts of the case, the Court found that the refusal to provide universal access to nevirapine – particularly in light of the drug’s effectiveness and its free provision by the manufacturer to public hospitals – was unreasonable. The Court ordered the government to provide nevirapine to pregnant mothers across South Africa. Despite the normative weakness of the Court’s approach to socioeconomic rights in this case, its success lay in a strong mandatory order that required a concrete effect for a vulnerable group of individuals. Thousands of lives were, in all likelihood, saved by the Court’s ruling. Through its highlighting of the obdurateness of the government policy on HIV/AIDS, it may also have precipitated a general change in policy towards the provision of antiretroviral drugs more universally in the public healthcare system.⁹³

89 Grootboom, *supra* note 86 at para. 33. I have sought to provide counterarguments to what I take to be ill-founded criticisms of the minimum core approach and an incoherence in the court’s own approach in Bilchitz, *supra* note 38 at 197–200.

90 Minister of Health v. Treatment Action Campaign (5) SA 721 (CC) (2002).

91 I have criticized the Court’s failure to deal with content in this case in D. Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence* 19 S. Afr. J. HUM. RTS. 6–9 (2003).

92 Treatment Action Campaign, *supra* note 91 at para. 35.

93 Mark Heywood, *Preventing Mother-to-Child HIV transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the*

Despite the concrete results in the *TAC* case, and the weaker order in *Grootboom*, the approach has attracted much criticism.⁹⁴ It has been argued that the Court's approach lacks substantive content and thus leads to decisions that are not adequately justified; similarly, it also deflects attention from the urgent interests at stake in these cases and overshadows these within a general balancing process that avoids giving special weight to them.⁹⁵ The approach also fails to provide certainty concerning government obligations in relation to these rights, a failure that hinders their implementation by other branches of government and in lower courts. Individuals (and their legal representatives) lack clarity as to exactly what they can claim in court as well as how to succeed in litigation on the basis of these rights. The reasonableness approach often appears to place a large barrier before individuals bringing socioeconomic rights claims, with claimants having to provide strong evidence (which often requires significant research) of why the government program that they are challenging is unreasonable. The “reasonableness” approach and the obstacles it creates for potential litigants have contributed to a situation in which, in a country beset by poverty and inequality and with widespread government inaction or incompetence, only a handful of socioeconomic rights cases in seventeen years of constitutional adjudication have reached the Constitutional Court.⁹⁶

Minister of Health, 19 S. AFR J. HUM. RTS. 278 (2004), documents the background and civil society pressure around the case.

94 See Bilchitz, *supra* note 37, 135–77. See also D. Brand, *The Proceduralisation of South African Socio-Economic Rights Jurisprudence or “What Are Socio-Economic Rights For?”*, in *RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION* 33–56 (H. Botha, A. Van Der Walt, and J. Van Der Walt eds., Sun Press 2003); M. Pieterse, *Coming to Terms with the Judicial Enforcement of Socio-Economic Rights*, 20 S. AFR. J. HUM. RTS. 383–417 (2004). For a contrary supportive view, see C. Steinberg, *Can Reasonableness Protect the Poor? A Review of South Africa’s Socio-Economic Rights Jurisprudence*, 123 S. AFR. L.J. 264–84 (2006).

95 See Bilchitz, *id.* at 176; and, also, Brand, *id.* at 36, who argues that the Constitutional Court has through its procedural approach “succeeded in removing itself one (or more) step(s) away from the concrete and particular realities of hunger, homelessness, disease and illiteracy that socio-economic rights are meant to deal with.”

96 Of course, other factors have played a role in this situation as well. Many people may not know about legal remedies, and access to lawyers is a problem. Increasingly,

Although the outcomes in the early cases were at least to some degree positive for the poor, in recent years, the approach has led to significant losses for them. The defects of the reasonableness approach and its emptying of the content of socioeconomic rights are strongly demonstrated by the *Mazibuko v. City of Johannesburg*⁹⁷ case. Here, the Constitutional Court was confronted with a constitutional challenge to the adequacy of a government program that provided six kiloliters of water for free to each household in Johannesburg per month.⁹⁸ The community in question argued that the amount of water provided to them could only be regarded as “sufficient” if the Court ignored the fact that many people in the community were suffering from HIV/AIDS and also lived in an urban setting, with flushing toilets that use a significant amount of water. The Court, in this case, held that it was not its role to specify a particular amount of water that individuals are entitled to claim. The purpose of socioeconomic rights was, rather, “to ensure that the state continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the state would be able to furnish citizens immediately with all the basic necessities of life. Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights.”⁹⁹

If these rights are interpreted in this manner to avoid any reference to the amount of resources individuals are entitled to, then the

though, public interest litigation organizations such as the Social and Economic Rights Institute and Legal Resources Center are able to inform people about their rights and provide them with legal assistance. The Court's approach to these rights remains a major obstacle, with lawyers declining to litigate as a result of the heavy burden of evidence required and uncertain outcomes.

⁹⁷ 2010 (4) SA 1 (CC).

⁹⁸ The community also challenged the imposition of prepaid meters, which, for reasons of length, I cannot address here.

⁹⁹ *Mazibuko*, *supra* note 98 at para. 59.

entire purpose of including them in the Constitution has been shifted by the Court.¹⁰⁰ In specifying what these rights are about, the Court has changed their nature: Instead of suggesting concrete entitlements for individuals that guarantee a minimum level of social justice, the Court renders them simply requirements upon the government to explain, in a very weak manner, what it is doing in a particular area. Socio-economic rights thus become entitlements to an explanation. The failure to specify the content of these rights also renders it unclear exactly what criteria must be used in deciding whether the government's explanation is reasonable or not.

Take, for example, the Court's task in this case, which involved evaluating a government program to provide water.¹⁰¹ Surely, the reasonableness of a program for the provision of water cannot be determined in the absence of considering the *amount* of free basic water being provided. Imagine that the government decided to provide one liter of water per household per day: This seems blatantly unreasonable, but on what grounds can we make such a judgment? Inevitably, it seems, a consideration of the interests human beings have in the provision of water must enter into the picture: Our interests include such basic activities as drinking, cooking, sanitation, and cleaning. Since water is a quantifiable commodity, our judgments concerning what is reasonable must take into account the amount of water necessary to realize these important interests (at least to a minimum degree). Context will play an important role in this regard: Indeed, the lower courts in this case both reached the conclusion, on the basis of expert evidence, that communities with flushing toilets require a greater amount

100 Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* 469–71 (Juta 2010), who views the reasonableness approach in a more favorable light than I do, sees the court as retreating in this case from a more substantive account of reasonableness in *Grootboom* to a more “process-orientated account.” I would contend that the “proceduralisation of socio-economic rights” (as Danie Brand calls it) was already inherent in the early reasonableness approach of the court in *Grootboom* and *TAC*, and the full consequences of this have only recently been seen in the *Mazibuko* case.

101 The Court evaluates the program between paras. 78 and 103.

of water than do those that with pit latrines (and other sanitary facilities). Despite the Constitutional Court's own injunction to consider context, it avoids engaging in any detail with the specific circumstances of the applicants.¹⁰² Reasonableness thus requires an engagement with the human interests at stake in particular contexts, and thus with the amount of water (or another resource) that is required; to avoid any engagement with these questions is to weaken significantly the socioeconomic entitlements of individuals and severely reduce the court's ability to scrutinize government action (or inaction) in matters of crucial importance to individuals.

South Africa provides an example of a situation in which justiciable socioeconomic rights have been included in a Constitution yet have been significantly weakened by a conservative jurisprudence. The approach to content in the Constitutional Court of South Africa shows how a failure to achieve greater specification of the progressive ideals in a Constitution can jeopardize their realization and meaningfulness for the poor and vulnerable. It also provides a case study of how courts, charged with a different task from that of their counterparts working with certain "Northern" Constitutions, can use similar interpretive techniques to render their task much the same. This no doubt provides some explanation of why the approach of the Constitutional Court of South Africa has received much greater acclaim from commentators in the United States, for instance, than it has generally in South Africa.¹⁰³

102 The court states at para. 62 that "this case illustrates that the obligation in relation to the right of access to sufficient water will vary depending on circumstance." It, however, avoids dealing with the evidence of the variability of people's needs by rejecting the need to engage with the quantity-of-water socioeconomic rights guarantee.

103 I have referred earlier to several of the leading academic commentators in South Africa who have largely been critical of the Court's approach to these rights. See, in contrast, the more positive account of the Court's jurisprudence in Cass Sunstein, *DESIGNING DEMOCRACY* 221–37 (Oxford University Press 2001), and Mark Kende, *CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES* (Cambridge University Press 2010).

2.3 Content and the Realization of Socioeconomic Rights

Considering the jurisprudence in these three countries in relation to the content of socioeconomic rights demonstrates a number of important points. In dealing with the ideals in the constitutional text, we saw that South Africa's Constitution went furthest in equalizing the recognition of socioeconomic rights with civil and political rights. Yet, as we have seen, the Constitutional Court of South Africa's jurisprudence is the most disappointing of the three, in that it fails to give a concrete sense to individuals of an entitlement to resources that they can claim from the state. It has also failed to engage adequately with difficult questions concerning the prioritization of resources. The Court in India has also not developed a detailed doctrine of content but has, nevertheless, made a number of promising remarks that provide greater detail about the nature of the guarantees provided to individuals. There still remains a gap in understanding the exact duties placed on the government and how it is required to prioritize among needs. The Colombian Court has shown the greatest willingness to engage with questions of content and when the immediate provision of resources is required through developing an understanding of priority rooted in notions of life and dignity. Socioeconomic rights are widely litigated in Colombia and have provided a range of concrete benefits to individuals.

Clearly, the approach to content is highly significant and conditions the very manner in which these guarantees become operative within a society. Courts have been wary, to differing degrees, of developing a full understanding of the normative content of these rights. At times, weak doctrinal approaches to content may be mitigated by strong remedial orders given by courts. Thus, in the *PUCL* case, the approach of the Court to content can be interpreted through its orders; the minimal discussion of content in *Treatment Action Campaign*, similarly, had a lesser impact on the result, given the concrete relief that was provided by the Court. Thus, a key conclusion from these cases is that concrete orders and remedies that require resources to be provided to individuals

are critical in making socioeconomic rights meaningful. Indeed, these orders provide individuals with a sense of having gained through the process and encourage these rights to be litigated.

Such an approach is not sufficient, however: The problem with moving directly from constitutional provisions to concrete remedies lies in the ad hoc nature of the relief provided. As the South African experience demonstrates, a weak approach to specifying the content of these right means that neither individuals, courts, nor other branches of government understand what level of provision is required by these rights. This leads to positive results for those who are vulnerable in some cases and negative results in others, and ultimately undermines the general ideal of addressing questions of economic justice through constitutional processes in court.

I argued in Section 1 that one of the potentially distinctive features of a “constitutionalism of the Global South” involved the commitment enshrined in these Constitutions that the basic structure of these societies is to be organized in a way that achieves a measure of economic justice for individuals in the distribution of resources. If this is a distinctive characteristic of such a “new constitutionalism,” then it is necessary to evaluate whether courts have adopted doctrinal approaches to these rights that succeed in giving concrete effect to such an ideal. The brief review of the case law and jurisprudence conducted earlier suggests that the promise of such an approach has only partially been realized. The South African Court has largely sought to limit its role in this regard and thus has largely withdrawn from engaging substantively with the conditions of economic justice in South African society; the Colombian Court, conversely, has played a vital role in making these constitutional guarantees meaningful and thus is prepared to adjudicate on questions of distributive justice.¹⁰⁴ Despite surface similarities in some cases, a

¹⁰⁴ A question that cannot fully be addressed in this chapter is what in fact explains this difference. One central factor that I discuss in Section 3 is the differing attitudes of these Courts to the separation of powers. This is no doubt not the whole story, however, and factors particular to each society and the role of courts therein may help

common approach to specifying the content of socioeconomic rights, and thus engaging with questions of distributive justice in more detail, has not emerged in these three jurisdictions.

Nevertheless, the track records of these courts demonstrate those approaches that are likely to be promising in giving concrete effect to the constitutional ideals in question: In the context of large-scale poverty, a particularly fruitful approach appears to be one that distinguishes between particularly urgent interests rooted in life and dignity, which require immediate realization, and “sufficiency” interests, which need to be realized progressively over time. This conclusion is drawn from an analysis of the legal doctrines of these three countries and their shortcomings, and it importantly accords with the normative theoretical approach to how the content of socioeconomic rights should be developed (advanced in Section 2.1). This provides strong support for providing content to socioeconomic rights in accordance with a “minimum core approach” (discussed in Sections 2.1 and 2.2).

Despite this conclusion about the doctrines that are likely to render socioeconomic rights meaningful, significant obstacles remain to their adoption. One of the central difficulties in all jurisdictions has been the separation of powers and the manner in which this has been understood. The “new constitutionalism” that requires court involvement in questions of distributive justice tends to be hampered by an older “Northern” conception of the separation of powers, which generally is

explain the weaker and stronger approaches adopted. The stronger approach in India has been attributed partly to “post-Emergency catharsis” and “an attempt to refurbish the image of the Court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimization of judicial power” (U. Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUDIES 107, 113 [1985]). Uprimny Yépes, *supra* note 19, explains the strong approach adopted by the Colombian Constitutional Court as resulting also from two structural political factors: “the crisis in political representation, and the weakness of social movements and opposition parties in Colombia.” T. Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L. J. CONST. LAW. 106 (2009), argues that, in South Africa, the reasonableness approach also reflects a pragmatic concern by the Court to establish its own legitimacy.

understood to exclude courts from having a role in deciding matters of distributive justice. Unfortunately, many of the judges in the South – faced with differing circumstances and a different text – tend to be influenced by the doctrines prevalent in the North, and this tempers the developments that can occur. There also tends to be an assumption of the superiority of Northern conceptions, which may result from the power differentials existing between developed and developing countries. This perception is strengthened by the fact that Northern conceptions of constitutionalism have a longer history and benefit from an extensive body of academic writings, given the larger and better-funded academic communities that often exist there.

The last section of this chapter considers the way in which traditional doctrinal factors relating to the separation of powers have hampered courts in the South from adopting more stringent approaches to translating socioeconomic constitutional ideals into reality. I also investigate instances in which such obstacles have been jettisoned in favor of innovative, creative procedural and institutional processes that provide a glimpse into what a constitutionalism that seeks concretely to realize socioeconomic rights might become. I shall argue through a discussion of these examples that, for a meaningful “constitutionalism of the Global South” to emerge, there is a need to reimagine certain elements that have traditionally been thought to define constitutionalism itself.

3 Reimagining Constitutionalism

3.1 *Structures and Ideals*

Constitutions are usually documents that contain two main elements. I have thus far focused on the dimension that relates to the ideals and values enshrined therein, usually within a Bill of Rights or related section. Constitutional texts also, however, contain a second element that relates to the structures and institutions of governance. In South Africa, for instance, chapter 2 contains the Bill of Rights, whereas chapters 3 to

13 deal with the methods whereby the society will be governed. These governance structures are often created along vertical and horizontal dimensions: The vertical dimension involves a “federal” type of division among national, provincial, and local structures; the horizontal dimension involves a “separation of powers” division among legislative, executive, and judicial branches of government. There is a crucial connection between these two parts of any Constitution: The structures and institutions of governance need to be regulated by normative ideals that provide their very *raison d'être*; the ideals and values of a Constitution, however, would lack any way of being transformed into concrete reality without the structures and institutions of governance.

In Section 1, I argued that the Constitutions under consideration all exhibit a shift in focus to include ideals and entitlements relating to the distribution of economic resources in society. If this is the case, what implications does this have for the structures and institutions of governance that are required to implement such ideals and rights? These structures and institutions, in my view, should not be seen as ends in themselves: Indeed, the ends for which they function, and the constraints placed on them, should be determined by the ideals of the Constitution itself. If the Constitution mandates that a measure of distributive justice is to be obtained in the society, then the doctrinal conception of the roles of those structures and institutions needs to shift accordingly, so that they are well suited to realize the socioeconomic rights provisions of the Constitution. The form such structures take should thus follow their function; this, importantly, requires a rethinking of certain elements of the traditional conception of the “separation of powers.” The doctrine itself has a long history, one that can be traced back to the recognition in political thought of the undesirability of concentrating too much power in any one institution.¹⁰⁵ Montesquieu, to whom the traditional conception

105 For an overview of the development of this doctrine, see S. Seedorf and S. Sibanda, *Separation of Powers*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 12.2 (S. Woolman ed., Juta 2008).

of the separation of powers has been attributed, sees it as designed to counter the abuse of power and to further liberty:

[There is no] liberty if the power of judging is not separate from legislative power and from executive power... All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or disputes of individuals.¹⁰⁶

The values underlying the separation of powers are no doubt of great importance in all societies, and the prevention of corruption is perhaps particularly applicable in countries of the South. Yet the rigid separation among legislative, executive, and judicial powers may not always be well suited to achieve these ends.¹⁰⁷ This may be especially true when one of the central values that the institutional structures are meant to achieve include – as in the Southern constitutions under discussion – ensuring that a measure of distributive justice is attained in the polity. A new constitutionalism of the Global South, thus, may retain a division of power but require a reconsideration of the relationship among different branches of government in order to achieve the core constitutional ideals of distributive justice.

However, a note of caution is required here. If form is to follow function, then the doctrines relating to structures and institutions must respond to the particular conditions present in a particular society. Particularly in developing countries, where there is some political instability and a developing culture of democracy, rigid prescriptions for what is required from the structures and institutions of governance may be impossible to determine in a universally applicable manner. The key goal is to ensure that the socioeconomic (and other) rights in the Constitution

106 Montesquieu, *THE SPIRIT OF THE LAWS* 157 (A. M. Cohler, B. C. Miller, and H. S. Stone eds., Cambridge University Press 1989).

107 As Seedorf and Sibanda, *supra* note 106 at 12–11, recognize, “a system of totally separated powers may lead to a diffused and [uncoordinated] exercise of power.” The “pure form” of this doctrine has thus not really been implemented in reality.

are concretely realized. As such, there may be a particular need for flexibility in those doctrines relating to structures and institutions, so that they can respond to the particular conditions of a society. Often, for instance, in the context of a separation of powers doctrine, courts in young democracies must also consider certain “pragmatic considerations” relating to their long-term legitimacy and institutional security.¹⁰⁸ Rigid prescriptions in this area thus cannot be made, but the contours of doctrines likely to give effect to distributive ideals can perhaps be outlined.

From these more general reflections, I turn to consider the relationship between structures and institutions of governance and socioeconomic rights in India, Colombia, and South Africa. I shall focus on two aspects of this issue: first, the relationship between the doctrine of separation of powers and the approach of courts in these countries to content; and, second, particular remedial and procedural innovations brought about by courts, which illustrate the kinds of shift in doctrine that may be required to give concrete expression to the ideals of these Constitutions.

3.2 *Separation of Powers: Content and Innovation*

3.2.1 *India*

The Indian Supreme Court has stated that “the Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State of the functions that essentially belong to another.”¹⁰⁹ In this statement, the Court clearly recognized some differentiation between different branches of government, yet the separation is not entirely rigid. This has, of course, allowed for some

¹⁰⁸ Theunis Roux, *supra* note 105 at 106.

¹⁰⁹ Ram Jawaya Kapur v. State of Punjab, 2 SCR 225 at 235–36 (1955).

flexibility in determining the Court's role in Indian democracy. One of the key problems for the Court has been to distinguish between legal questions that lie within its domain and policy questions that are supposedly the domain of other branches of government. Public interest litigation, which has been responsible for major advances in social rights jurisprudence in India, often appears to blur the boundaries between law and policy.¹¹⁰

A clearer doctrine concerning the content of fundamental rights would help draw the boundaries where judges legitimately may intervene. The lack of such a doctrine has, unfortunately, led to a series of inconsistent decisions: I consider here two cases that have had an impact on environmental and socioeconomic rights. In one matter relating to the depletion of forests, the Court itself constituted an expert committee to examine the issue and to determine who could use forest produce and under what circumstances. It also imposed restrictions on the felling of trees and the sale of timber.¹¹¹ However, in relation to a case in which 41,000 families were to be displaced from their homes for the purposes of building a dam, the court stated that “[w]hen a decision is taken by the government after due consideration and full application of mind, the court is not to sit in appeal over such a decision.”¹¹² The majority of the Court went further to hold that “if a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in the public interest to require the court to go into and investigate those areas which are the functions of the executive.”¹¹³ The Indian Court thus does not appear to have a clear, principled basis to distinguish between cases when it should intervene and when it should not.¹¹⁴

110 S. Shankar, *The Embedded Negotiators: India's Higher Judiciary and Socio-economic Rights*, in this volume, refers to the current Chief Justice as warning judges not to make policy choice and states that “it is the task of the electorate, not the judges, to make the government accountable.”

111 TN Godavarman Thirumulpad v. Union of India, 3 SCC 312 at 312–16 (1997).

112 Narmada Bachao Andolan v. Union of India, 10 SCC 664 at 764 (2000).

113 *Id.* at 763.

114 Sandra Fredman, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES*,

142 (Oxford University Press 2008), states that “[w]here, however, PIL challenges an

Its deferent statements in the *Narmada* case also mistakenly fail to recognize that courts may legitimately interfere with policy decisions if these violate fundamental rights.

Despite some inconsistency in its application of the separation of powers doctrine, at times the Court has shown a willingness to break down the traditional divisions between branches of government and to intervene in innovative ways. The forestry case referred to earlier indicates how the Court itself constituted an expert committee to make recommendations in that area, a function that would usually be performed by parliament or the executive. In a case dealing with the sexual harassment of women, the Court effectively ordered certain interim regulations to be enforced until the government passed a law consistent with the Convention on the Elimination of All Forms of Discrimination against Women.¹¹⁵ In the *People's Union for Civil Liberties* case, the Court was concerned with the provision of a minimum amount of food to members of the population when the government had an excess of food stocks. The Court made a number of interventionist orders requiring all state governments to provide midday meals to children and appointed expert commissioners to make recommendations and oversee the implementation of its orders.¹¹⁶

These examples suggest that the Supreme Court of India, in suitable cases, does not feel hampered by the separation of powers doctrine in developing innovative remedies and procedures that can help translate the ideals contained in the Constitution into reality. The Court attempts to find effective methods – which include taking on certain powers usually exercised by other branches of government – for the purpose of enforcing these rights. Its orders come against a backdrop of large failures of governance in which other branches of government demonstrate

existing policy backed by powerful political forces, and established in the name of economic development, the Court's grasp of its fundamental mission becomes more unsteady...Using familiar legal formulae, such as the separation of powers, legality and deference, courts have in several dramatic cases endorsed the position of the powerful and the privileged at the expense of the poor and marginal.”

¹¹⁵ *Vishaka v. State of Rajasthan*, 6 SCC 241 (1997).

¹¹⁶ See <http://www.righttofoodindia.org> for the detail of these orders.

a lack of will and the capacity to address the most basic needs of all Indians with the requisite urgency. The Court, in worrying about vulnerable women, thus does not hesitate to enter into the domain of essentially “making legislation” – traditionally the domain of the legislature – pending effective legislative intervention. It also is prepared to adopt executive powers by convening expert commissions and managing the process of implementation. This blurring of the boundaries between different branches of government is arguably necessary in the Indian context to ensure effective implementation of the Court’s orders in relation to socioeconomic questions.

3.2.2 Colombia

As we have seen, the Colombian courts have used socioeconomic rights actively and powerfully in providing relief to individuals and in seeking the correction of systemic injustices. Although the courts have recognized the progressive nature of the obligations stated in the Constitution, they have also developed a jurisprudence that provides for immediate enforcement, particularly in circumstances where dignity and life are at stake. The active enforcement of socioeconomic rights has attracted both proponents and opponents, given the profound impact of these decisions on “the economy, public expenditure and the allocation of scarce resources. Many commentators question whether the court should make final decisions regarding crucial economic matters, and propose that its power to decide these issues should be strictly limited, and that there should be a specialized economic section in the Court in charge of resolving them.”¹¹⁷

What is interesting in Colombia is that, despite stringent criticism, the courts have continued to make strong rulings in socioeconomic rights cases. This has also occurred despite the fact that, in 2001, seven out of nine of the judges of the Constitutional Court were replaced.¹¹⁸

117 Uprimny Yepes, *supra* note 19 at 137.

118 *Id.* at 145.

Several reasons could explain this, but, interestingly, far from undermining its legitimacy, Uprimny Yepes argues that “the court’s progressive orientation has become one of its principal sources of legitimacy, so that now there is a wide social understanding that the Court’s principal mission is to protect and expand the Constitution’s progressive content.”¹¹⁹ This has occurred within a society in which there is a general disenchantment of Colombians with politics and a failure by political branches to protect and advance the content of the Constitution.¹²⁰ Moreover, civil society and opposition parties have historically been weak, with many leaders and activists having been murdered.¹²¹ These factors have led to a situation in which “the Court has become practically the only body capable of implementing the original constitutional project, an image that has afforded it significant legitimacy in certain social sectors.”¹²² Sadly, the Court’s strong approach has recently resulted in a legislative backlash, with a constitutional reform being passed that allows cabinet ministers to modify Constitutional Court rulings in relation to socioeconomic rights in the interests of “financial sustainability.”¹²³ It remains to be seen how the courts will respond to this reform.

Procedural innovations put forth in the Colombian Constitution and developed by the Colombian Court have been of great importance in developing the Court’s legitimacy and giving concrete effect to social rights. The *tutela* action appears to be of vital importance; it allows individuals to “directly demand, with no special prerequisites, the intervention of a judge to protect his or her fundamental rights.”¹²⁴ This action allows individuals to approach courts relatively easily and to receive a judgment within a short time. Individuals will only be motivated to bring

119 *Id.*

120 *Id.* at 129.

121 *Id.* at 130.

122 *Id.*

123 See M. Iturralde, *Access to Constitutional Justice in Colombia: Opportunities and Challenges for Social and Political Change*, in this volume.

124 Uprimny Yepes, *supra* note 19 at 129.

cases if they are able to receive quick and speedy relief.¹²⁵ The courts, however, also have the power to declare an “unconstitutional state of affairs,” which allows for a systemic response when the solution requires relief that goes above and beyond the situation of particular individuals.

The Court has also been innovative in the form of relief it has granted in seeking to ensure the effective implementation of its orders. In doing so, the Court has been mindful of its own limitations, the competencies of other branches of government, and the difficulties of implementation. Indeed, in the IDP case discussed earlier, the Court outlined a minimum level of provision for individuals that had to be realized as a matter of urgency. To this end, it ordered government entities in charge of assisting IDPs to coordinate their activities effectively, to quantify and make available adequate resources necessary to realize the minimum levels of these rights, to develop a program of action to correct institutional capacity problems that hampered the realization of IDP rights, and to report to the Court on progress in this issue within set time periods. Although seeking to address the systemic problems involved in this case, the Court did not seek to determine exactly the manner in which these duties should be carried out, or even exactly when other government agencies had to adopt specific measures. “What it did require of them is to report on what they are doing, to establish their own goals and their timetables that they are to follow when complying with their constitutional and legal obligations and to explain to the Court – and the public – how the activities that they have chosen are going to lead to the results that they are expecting.”¹²⁶ The Court thus set the *standards* that other branches of government must meet without ordering the exact *means* by which these standards must be realized. By retaining jurisdiction and making follow-up orders, the Court ensures continued government accountability for meeting these standards, supervises the implementation of its orders,

125 D. Landau, *supra* note 85, argues, however, that these individualized remedies have, in the main, benefited higher-income groups who are more readily able to navigate the court system to their benefit.

126 M. Cepeda Espinosa, *supra* note 76 at 26–27.

and encourages continued “inter-institutional dialogue among different branches of government.”¹²⁷ The Court here carves out a sense of its own role as a standard-setting entity focused on monitoring the implementation of its orders relating to fundamental rights. It does so without usurping the functions of other branches of government and seeks to encourage a creative collaboration rather than rigid division between these different spheres. Importantly, the Court here begins to reenvision what an account of separation of powers in the context of a Constitution that requires a focus on achieving a measure of distributive justice might entail. Far from undermining the democratic system in Colombia, such an approach, one that takes seriously the Court’s role in realizing social rights, has only enhanced its legitimacy.

3.2.3 South Africa

In contrast to the Colombian approach, in South Africa, the Constitutional Court’s approach to determining the content of socioeconomic rights has been highly influenced by its concerns relating to the separation of powers. The “reasonableness” approach of the Constitutional Court is often praised for being an “administrative law” approach to these rights, particularly by commentators in countries of the Global North.¹²⁸ The notion of reasonableness is particularly useful for this Court, in that it allows a margin of discretion to be granted to other branches of government. In the Constitution, the word “reasonable” qualifies the “measures” that the legislature and other branches of government are required to take in fulfilling these rights. It would indeed be sensible, as the Colombian Court has shown, to allow those branches some latitude in determining the exact manner in which these rights will be fulfilled. The South African Court, however, has gone much further than this and held effectively that these other branches of government have a strong latitude in determining the very nature of their

¹²⁷ *Id.* at 35.

¹²⁸ See, for instance, Cass Sunstein, *supra* note 104 at 234.

obligations in terms of the Constitution. In the *Mazibuko* case – a high point in deference by the Court to other branches of government and the leading current statement of the Court’s approach – the Court holds the following:

The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus, it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.¹²⁹

Here, we see the Court holding that socioeconomic rights do not have independent content, but rather that, through the adoption of measures by other branches of government, they acquire content. The only constitutional standard is that of reasonableness. This is a bizarre approach to take to fundamental rights and denudes them of their bite and purpose. It essentially grants other branches of government the ability to determine what a constitutional right entails (where such rights are meant to provide the framework for the policies and actions of these branches) and greatly reduces the ability of the Court to review the actions and policies of other branches of government. It also places a heavy burden on the notion of reasonableness, which will need to be fleshed out in more detail if the judicial review of socioeconomic rights is not to be undermined completely. A traditional, rigid conception of the separation of powers is here allowed to minimize the Court’s own role in giving content to the ideals and rights contained in the Constitution. This can be seen in the Court’s statement that “ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a

¹²⁹ *Mazibuko*, *supra* note 108 at para. 66.

matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.”¹³⁰ We can thus see how the Court’s conservative understanding of the separation of powers influences the approach it adopts to adjudicating socioeconomic rights claims.

It appears that only a reenvisioning of its role in relation to socioeconomic rights can lead to their greater enforcement in society. The Court has, however, in one particular area, adopted an innovative approach that has achieved positive results for the poor. In the *Olivia Road* case,¹³¹ a group of poor applicants approached the Court after having been evicted from inner-city buildings in Johannesburg, where they lived. These buildings were in a terrible condition, and the city claimed to be acting in the interests of the applicants by evicting them and offering them alternative accommodations: Unfortunately, the new accommodation was far from the applicants’ source of livelihood in the inner city, and no provision was made for daily transportation to and from their places of work and home.

The Court, in this case, had to adjudicate two difficult and competing claims: The people wanted to remain in these buildings or be removed to better accommodation in the inner city; the city (if its approach were to be construed charitably) was concerned for the safety of the applicants, given the shocking state of disrepair of these buildings. Instead of making an immediate ruling on the issue, the Court directed the parties to engage meaningfully with each other toward finding a solution to the problem within the framework of the Constitution.¹³² The parties were effectively forced to negotiate with each other: Eventually, an agreement was reached whereby the people were allowed to stay in the buildings

130 *Id.* at para. 61.

131 Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg (3) SA 208 (CC) (2008).

132 *Id.* at para. 5.

for an interim period, the city agreed to improve certain features of those buildings in the interim, and the people consented thereafter to move to other buildings in the inner city that would be identified by the municipality. The Court eventually confirmed the agreement between the parties and delivered a judgment in which it outlined a new requirement for the state's program of action to be reasonable; namely, that "meaningful engagement" had to occur between the parties.¹³³ In this manner, government engagement with citizens would respect the dignity and agency of poorer people, although it would have to occur within the bounds of the Constitution.¹³⁴ The doctrine of meaningful engagement is an important one and suggests that a court may play a significant role in advancing the interests of the vulnerable without always directly ordering a particular result itself.¹³⁵ Without the possibility of going to court, it was clear that the government, in this case, would have ignored the interests of the applicants. By being forced to engage meaningfully with them, a solution was reached that was beneficial to all.¹³⁶ The Court retains the ability to intervene and make an order if no adequate solution is reached, but, in this case, it essentially adopted the role of a mediator and was able to achieve significant results. Mediation with the threat of arbitration thus is an innovative and important possibility for resolving disputes concerning social rights.¹³⁷

133 *Id.* at para. 18.

134 *Id.* at para. 16.

135 See the analysis of Brian Ray, *Occupiers of 51 Olivia Road: Enforcing the Right to Adequate Housing through 'Engagement'*, 8 HUM. RTS. L. REV. 703–13 (2008).

136 S. Shankar, *supra* note 18 at 7, sees the Indian Court as also "carving a niche for itself as mediator/facilitator overseeing the access to and the quality of these rights."

137 This case could also be explained nicely in terms of the argument by Katharine G. Young, *A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review*, 8 INT. J. CON. L. 385 (2010), that the court can be seen in socioeconomic rights cases as adopting a "catalytic role" for change: The Court importantly in *Olivia Road* was the catalyst that pushed the parties to reach an agreement. Nevertheless, there are some weaknesses in this approach that the Court needs to address, such as the relative strength of the parties and the need for a normative baseline such that the vulnerable do not end up negotiating their rights away.

3.3 Structures and Ideals in the Enforcement of Socioeconomic Rights

This discussion of these three jurisdictions suggests a number of important points about the relationship between the structures and ideals in a Constitution. The first is that the ideals in the Constitution should inform and give content to the structures and their processes of implementation. Ultimately, structures are there to realize ideals and entitlements and are not ends in themselves. In South Africa, the Court has allowed its conception of the separation of powers to weaken its very role in giving content to the socioeconomic guarantees contained in the Constitution. The Indian experience has been more haphazard, but the Court there appears not to have developed a strong enough doctrine of content or of the separation of powers to provide guidance concerning when it should intervene where socioeconomic rights are impugned. The Colombian Court has been most successful in implementing social rights and can be seen to have developed strong doctrines concerning content; it has not seen the separation of powers as an obstacle to its role in this regard. It has also creatively used structures and procedures in the Constitution to make the courts accessible to individuals for the enforcement of their rights.

The second key point is that the positive fulfillment of socioeconomic rights may require courts to assume roles that are not traditional in older Northern constitutional systems. Recognizing the different entitlements they are faced with implementing requires them to adapt their own roles and the consequent structures, procedures, and remedies available. Where traditional objections raise legitimate concerns, the answer often lies not in abstaining from intervention but in developing innovative solutions. The Indian Court has attempted to deal with judicial competence problems, for instance, through appointing experts and commissions of inquiry to report to it. It has also adopted a managerial and supervisory role to ensure that projects are implemented in the face of government inaction. The South African Court has shown how a mediatory role with the threat of arbitration can achieve significant results for

the poor. The Colombian Court has shown the importance of grappling with systemic obstacles to the realization of rights and exercising supervisory jurisdiction over government activities when there is an “unconstitutional state of affairs.” These shifts indicate the manner in which a rigid separation of powers doctrine should not constrain the development of effective structures and remedies to ensure the implementation of socioeconomic rights.

They also highlight the manner in which the inclusion in Constitutions of distributive justice ideals requires a reenvisioning of some of the very structures and institutions of governance. The approach of the Colombian Court recognizes its role as a standard-setting body while harnessing the strength of other branches of government in implementing these standards. This suggests the possibility of carving the divisions between the respective branches of government in a manner that differs from the traditional conception. It also articulates the important notion that a collaborative rather than competitive conception of the separation of powers may be more apposite in relation to the realization of socioeconomic rights.¹³⁸

4 Conclusion

This chapter has sought to show that the Constitutions of India, South Africa, and Colombia contain a set of ideals and values that require the background structures of society to be set up in such a way that they achieve certain minimum conditions of distributive justice. These conditions are expressed through a set of socioeconomic rights or guarantees. Ensuring that these guarantees are meaningful requires engagement with a number of issues: Two were explored in this chapter. The first concerned the specification of these ideals and the assurance that they do not

¹³⁸ See, for instance, M. Wesson, *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, 20 S. AFR. J. HUM. RTS. 307 (2004), and D. Davis, *Adjudicating the Socio-Economic Rights in the South African Constitution: Towards Defence Lite?*, 22 S. AFR. J. HUM. RTS. 323–24 (2006).

remain vague exhortations but rather provide concrete entitlements to the poor. Some of the complexities involved in doing so were explored, as well as the approaches of the respective courts to this question. A uniform approach was not in evidence among these countries; it was argued, however, that where these rights have been effective, a more specific conception of content with a method for prioritizing particularly urgent interests (as advocated by the “minimum core” approach that I outline in Section 2.1) was operative. The second question concerned the way in which the structures and institutions of governance operate to translate these ideals into reality. It was argued that giving concrete expression to socioeconomic rights in societies with high levels of poverty and institutional incapacity may require adopting a different and less rigid approach to the separation of powers doctrine. This doctrine, it was shown, has inhibited certain courts from developing the content of socioeconomic rights in more detail (and thus hampered their effective enforcement). Where the courts have adopted a more flexible approach to the separation of powers, I sought to demonstrate the innovative possibilities that have been developed to ensure socioeconomic rights are realized.

Ultimately, although the Constitutions of India, South Africa, and Colombia all demonstrate a commitment to achieving a minimum level of economic justice within their societies, it appears too early to claim that a distinctive “constitutionalism of the Global South” can easily be identified (at least by reference to these three countries). The surface similarities hide many differences in their current approaches to the content of these rights, their justiciability, and the rightful role of the courts. This chapter has also sought to argue, from an examination of the jurisprudence in these particular countries, what form such a distinctive constitutionalism of the Global South should take if it is to emerge. The inclusion of socioeconomic guarantees in these Constitutions, I argue, is an important development and requires us to investigate the practices and normative approaches that are most likely to give concrete expression to them. The engagement with these differing jurisdictions demonstrates, for instance, those approaches to content that are

likely to be successful in rendering these rights meaningful and accessible to the poor and vulnerable. It also demonstrates some innovative remedial possibilities that can help improve the possibility of translating the ideals and guarantees in these Constitutions into concrete reality. Socioeconomic guarantees need not remain on paper: The doctrines of content and institutional methodologies for their enforcement are critical in determining their successful implementation.

I have argued, too, that the ideals contained in these Constitutions are not only attractive from the particular perspectives of the countries under discussion but have a universal appeal, too. Although a constitutionalism of the Global South may not yet have fully emerged, the discussion suggests that the broad contours of such a reconfigured constitutionalism, one that addresses questions of distributive justice, may be in the process of emerging. If this is so, then it may be that we can be more ambitious and hope that the “new constitutionalism” moves beyond the boundaries of the Global South and helps to improve the justice and fairness of constitutionalism in the Global North, too.

2 The Embedded Negotiators

India's Higher Judiciary and Socioeconomic Rights

Shylashri Shankar

PUBLIC COMMENTATORS AND INDIA'S PARLIAMENTARIANS have assigned sobriquets such as “activist,” “transformative,” “progressive,” “overactivist,” and “judicial overreach” to India’s Supreme Court for transforming nonjusticiable social rights into fundamental rights, monitoring government irregularities by setting up special investigative committees, and intervening in the jurisdiction of the parliament and the executive. Scholarly studies, newspaper reports, and the Court’s own judgments give us contradictory images of a judge in India’s Supreme Court: activist, political, confrontational, policy maker, ineffective, corrupt, apolitical, and impartial. Much has been written about the activism of the Indian Supreme Court after a low point during the Emergency regime from 1975 to 1977, when the Court was accused of descending “into a dark valley” and surrendering to the executive.¹ On June 25, 1975, India’s president, on the advice of Prime Minister Indira Gandhi, suspended article 21 (right to life). Hundreds of political opponents and members of civil society groups were imprisoned after an Executive Order proclaimed a state of emergency. Nine high courts said that detainees could challenge their detention, but they were overruled by the Supreme Court, which then suffered a dent in its authority for allowing civil liberties to be violated.² The apex

1 H. M. Seervai, *CONSTITUTIONAL LAW OF INDIA* (3 vols, 4th ed., N. M. Tripathy 1993).

2 ADM Jabalpur v. Shiv Kant Shukla, 2 SCC 52 (1976), also known as the *Habeas Corpus* case.

court's focus on nonjusticiable social rights after the Emergency was as an endeavor to "seek new, historical bases of legitimization of judicial power," and a "bold but controversial response to the perceived implications of social inequality and economic deprivation."³ The Constitution of India (1950), which established a federal republic with a parliamentary system, a strong central government, and a unified judiciary under an apex court, classified nutrition, health, education, food, and shelter not as fundamental rights but as directive principles. The Indian Constitution makes a distinction between rights and goals, and puts fundamental rights, including civil liberties, in the enforceable section (part III), while relegating social rights (right to health, education, nutrition, environment, among others) to nonjusticiable directive principles (part IV). Although the framers of the Constitution agreed on the need to provide health and education to all citizens, they adopted the view that social rights should function as goals whose fulfillment was contingent on the state's economic capacity. Justifying the decision, Dr. B. R. Ambedkar (the chairman of the drafting committee) said that a state just awakened from freedom might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling the Directive Principles.⁴ As for who would put pressure on the government to deliver social rights, Ambedkar said that in any breach of the Directive Principles, the leaders would have to answer to the electorate.⁵ The Supreme Court of India, which functions as a constitutional court

3 Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in JUDGES AND THE JUDICIAL POWER (R. Sudarshan et al. eds., 1987); Krishna Iyer, *OUR COURTS ON TRIAL* (B. R. Publishing Corporation 1987); S. P. Sathe, *JUDICIAL ACTIVISM IN INDIA* (Oxford University Press 2002).

4 Critics like Sunstein (2000) point out that such an arrangement would put social rights at systemic risk in legislative democracies because those who would benefit from it would lack political power. However, Mark Tushnet (2004) argues that, in the long run, nonjusticiable social rights would be less contentious because enforceable rights would force the courts to adopt strong remedies that could spark political opposition and even noncompliance. See Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. FORUM 123 (2000); Mark Tushnet, *Symposium: Constitutional Courts in the Field of Power Politics: Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004).

5 Constituent Assembly Debates, November 4, 1948–January 8, 1949.

and as the court of final appeal,⁶ was given no role in the matter, and this resonates with more recent views that the judiciary is an illegitimate actor that is institutionally incapable of delivering social rights.⁷ The apex court adopted flexible and creative interpretations of its epistolary jurisdiction and *locus standi* (rules of standing). In *S. P. Gupta v. Union of India*, the Court relaxed the rules of *locus standi* and opened the doors of the Court to public spirited persons – those wishing to espouse the cause of the poor (representative standing) and those wishing to enforce the performance of public duties (citizen standing).⁸ In the first three decades after independence, the Supreme Court treated social rights as nonjusticiable directive principles. From the 1980s, and more so in the past two decades, the judiciary has interpreted socioeconomic rights as part of a fundamental right to life with dignity. It is this move that scholars point to as an instance of judicial activism.

Contrast these charges of activism and overactivism with the following 2008 editorial in a prominent academic journal, *The Economic and Political Weekly*: “Supreme Court judgments in recent years do not

6 The Supreme Court of India has original jurisdiction over disputes between the central government and the states, and between states; original writ jurisdiction (article 32) to issue orders, directions, or writs to enforce fundamental rights; appellate function over criminal and civil courts involving substantial questions of law; advisory functions on matters referred by the president; and special leave jurisdiction (article 136) that allows it to grant special leave to appeal from any judgment, decree, determination, sentence, or order in any case or matter passed or made by any court or tribunal in the territory of India except a court or tribunal constituted by or under any law relating to armed forces. At the intermediate appellate level, the high court stands at the head of a state's judicial administration. Apart from writ jurisdiction, the twenty-one high courts have jurisdiction over the 13,000 lower courts (district, magistrate, and magistrate II and equivalent). Together, they form the higher judiciary.

7 Gerald N. Rosenberg, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (University of Chicago Press 1991).

8 AIR SC 149 (1982). Traditional standing permits only a person who has suffered a legal injury to approach the court for redress; in PILs, a public-spirited person could initiate proceedings through a letter (epistolary) or representative standing because the person is accorded standing as a representative of another person. For an analysis of PIL in India, see Armin Rosencranz and Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVIR. L. 223 (2003).

indicate any uniform pattern that would either justify the fears of the other two wings of the troika, or strengthen the hopes of the citizens who may be banking on the judiciary as their saviour. The judiciary, the executive and the legislature have generally managed to work out compromise formulae on disputes that pose a threat to the status quo, with the apex court intervening to save the situation.” Others have pointed out, and rightly so, that the Supreme Court has used the power of judicial review sparingly to challenge government policies.⁹ The Court has also been criticized for failing to ensure the actual delivery of these rights and for being ad hoc in its approach.

Which of these views about the Supreme Court – activist or status quoist – is accurate? An analysis of case law on socioeconomic rights reveals a more muddled picture of India’s apex court’s “activism.” An empirical survey of health and education cases shows that the bulk of higher-court rulings have clarified the statutory obligations of the state rather than creating new duties for the government.¹⁰ For instance, the Court said that a right to education meant the right to free and compulsory elementary school education, and not to higher education. However, it is more difficult to determine the Court’s stance on the content of the right and the remedy proposed. In some cases, although it has specified the content of the right by referring to the constitution’s provisions (e.g., that a right to education was a right to elementary education), the actual case law has dealt with the application of the right to university education, where the apex court has produced a series of rulings that have further complicated the issue. The Court has been unable to articulate a consistent stance on the clash between merit and affirmative

⁹ Sathe, *supra* note 3, at 100, 107.

¹⁰ Shylashri Shankar, *Scaling Justice: India’s Supreme Court, Anti-Terror Laws and Social Rights* (Oxford University Press 2009). AIR SC 149 (1982). Traditional standing permits only a person who has suffered a legal injury to approach the court for redress; in PILs, a public-spirited person could initiate proceedings through a letter (epistolary) or representative standing because the person is accorded standing as a representative of another person. For an analysis of PIL in India, see Armin Rosencranz and Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVIR. L. 223 (2003).

action, on whether educational providers run a business or a service, and on the extent of regulation of unaided (by government) private educational institutions. Even in environmental cases, which are usually cited as examples of judicial activism, the Court's involvement merely activated the statutory machinery established under several environmental laws.¹¹

Neither has the court made policies; the rulings have, at best, had an indirect effect on public policy. For instance, the “right to education” that the Court articulated in a 1992 judgment became a constitutional amendment only after it appeared as an election promise of a political party and finally became a law ten years later.¹² At the policy level, the *Unnikrishnan* judgment contributed to the government’s universal education policies and the education guarantee scheme, the midday meal scheme in primary schools (discussed in the health section) contributed to higher attendance (up 15–20 percent), and a ruling on free textbooks until class IV contributed to more access by poor children to learning materials.

So how do we understand the behavior of India’s Supreme Court judges in the context of nonjusticiable socioeconomic rights? I begin with Murphy’s¹³ insight that judges operate within a framework of internal

11 Ashok Desai and S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in SUPREME BUT NOT INFALLIBLE (B. N. Kirpal et al. eds., Oxford University Press 2000).

12 *Unnikrishnan v. State of AP*, 1 SCC 645 (1993) reviewed the state’s right to interfere in the admissions policy and fee structure of private professional institutions. It held that education, being a fundamental right, could not be an object of profiteering and that the fee structure should be compatible with the principles of merit and social justice. This allowed the state to intervene in the administration of higher education provided by the private sector. However, the Court revised the above judgment in *TMA Pai Foundation v. State of Karnataka*, 8 SCC 481 (2002), where it found the *Unnikrishnan* judgment’s license to interfere in private professional institutions unreasonable. A constitutional bench was set up to clarify the *Pai* judgment (*Islamic Academy of Education and Anr. v. State of Karnataka and Anr.*, 6 SCC 697 (2003)), which allowed private institutions leeway to have a reasonable surplus in the fee structure for future expansion. Although the court outlined the limits of regulation for minority unaided institutions, it did not clarify the extent of regulation permissible in nonminority, unaided institutions.

13 Walter Murphy, ELEMENTS OF JUDICIAL STRATEGY (University of Chicago Press 1964).

and external constraints. A judge makes choices but is not merely a part of a conglomeration of individual legitimacy- and policy-seeking judges; he is also a member of an institution with its own memories and rules, and a member of society. The notion of public concerns is hard to measure and, more importantly, difficult to connect to a judge's rulings. Yet we know from memoirs and interviews that judges are members of society and react to issues like pollution, traffic jams, increases in crime, security threats, and other issues concerning society. There are four factors influencing a judge – the presence and content of laws; institutional experience, norms, and rules; political configuration; and public concerns. The limits and opportunities are triggered by the relative power of these four factors.

My basic assumption is that a judge wants his or her judgment to be perceived as legitimate. Legitimacy of the court, as Sathe¹⁴ says, depends on the feeling among the people that the judgments are principled, objective, and just. Contrary to the assumption made by a number of European legal scholars, legitimacy has to be negotiated; it is not inherent in the institution. This is more than a *modus vivendi* argued by Mehta,¹⁵ who says that most judgments "are a delicate and political balancing of competing values and political aspirations; they seek to provide a workable *modus vivendi* rather than articulate high values." Legitimacy involves combining the workability of a decision with the spirit of the right. Judgments on public health issues articulate high values like a "right to potable water" or a "right to clean streets," but the actual decision focuses on what the government can feasibly perform rather than what it ought to do. The diffuse nature of the term "legitimacy" allows us to incorporate two ideas, drawn from Ferejohn, about the motivation of a judge: (1) A judge reaches a decision in the light of his or her more or less coherent jurisprudential ideas about what the law requires;

14 Sathe, *supra* note 3.

15 Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the "Basic Structure,"* in INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES 65 (Zoya Hasan, E. Sridharan, and R. Sudarshan eds., Oxford University Press 2002).

and (2) a judge shapes his or her decision on the basis of a normative understanding of the appropriate role of courts. These two presuppositions allow us to avoid the morass of establishing a judge's policy preferences or the ideological orientation of the appointing or ruling regimes. To paraphrase one scholar, a judge's decision is a function of what he prefers to do, tempered by what he thinks he ought to do, but constrained by what he thinks is feasible to do. A judge could have several goals: He or she may want to influence policy; may crave power or public recognition; may want to be seen as a good judge or may want peers, the lower courts, or the bar to respect him or her, but underlying all these goals is the notion of legitimacy.¹⁶

The mechanism that triggered judgments on social rights was the Emergency. After martial law was lifted, judges, particularly from the apex court, sought to retrieve legitimacy for the judiciary. Social rights were attractive to post-Emergency judges in building legitimacy for three reasons: (1) the rights would primarily benefit vulnerable groups, (2) the nonconfrontational nature of these rights, and (3) the endorsement of these rights by the executive and legislature.

While writing a judgment, a judge walks a fine line between deference to the political system and judicial autonomy, between populism and activism, between overstating the problem and losing authority because of noncompliance by the executive and the bureaucracy, and between understating the solutions and losing the respect of the public. Judges may often fail to get the balance right, but the constant negotiation by judges helps explain why different groups perceive them so differently and even contradictorily. Despite the Constitution's exclusion of social rights from justiciability, the emphasis on redistributive policies

16 Please note that I do not argue that the Supreme Court of India had a goal that justices knew of and followed. Several scholars and former justices have argued, and quite rightly so, that, particularly after the Emergency, the apex court did not have a vision. Instead, it rapidly lost "its corporate character, and began its great march towards its transformation into an assembly of individual justices." Serving justices of the 1980s, like P. N. Bhagwati, lamented the demise of judicial collectivism.

and the legalization of some social rights by governments provided a window of opportunity for judges to interpret more of these rights as part of a constitutional right to life (article 21). The approach provides a dynamic account of the Court's transformation of social rights; judges were more careful about how they dealt with government failures, preferring to request rather than order compliance. So, the charges of activism and overactivism mentioned at the beginning of the chapter are a result of a fuzzy definition of the term "activism."¹⁷ Choudhary and Hunter¹⁸ are right to criticize scholars for using judicial activism in a notoriously slippery fashion to mean variously – depending on who is employing it and in what context – departure from well-established precedent, adjudication based on judicial preferences, or judicial reallocation of institutional roles between courts and other branches of government.¹⁹ Choudhary and Hunter quantify their definition of activism as undue incursions by the judiciary into the policy

17 Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in JUDGES AND THE JUDICIAL POWER (R. Sudarshan et al. eds., Oxford University Press 1985), highlights three types of activism: In the first, judges regard judicial power as a trust and themselves as trustees of citizens' rights and express this through pro-citizen judgments in social rights and by instituting legal aid. A second type is juristic activism – the *obiter dicta* of judges, in which they outline theories and speak to the future of law making without including these in the final order. The third type is eclectic activism, in which a judge gives decisions case by case, without necessarily manifesting ideological coherence. Sathe, *supra* note 3 at 100, 107, calls activism "doctrinal creativity" and "processual innovations" involving a liberal interpretation of articles 21 (right to life) and 14 (right to equality). However, neither scholar gives us evidence that supports such goal-oriented behavior. "These are after all our conjectures, we do not have the evidence to support them," notes Sathe (100).

18 Sujit Chowdhary and Claire Hunter, *Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees*, 48(3) MCGILL L.J. 525–62 (2003).

19 As Kmiec points out, the mere fact that the Court strikes down a law does not mean it has engaged in activism. K. D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441–76 (2004). The line between judicial review and judicial activism depends on the speaker's understanding of what the Constitution does and does not clearly prohibit. It is also unclear how many invalidations it would take to call the Court activist.

domain of the elected branches by calculating the percentage of cases the government loses less the percentage the government would be likely to lose. But they acknowledge the difficulty of identifying objective criteria that can tell the difference between proper and undue incursions.

I use a more nuanced definition of the term “activism” and show how India’s apex court has acted as an embedded negotiator in facilitating a dialogue between the state and citizens. The embedded negotiator approach adopts the following definition of activism: The judiciary is activist if it intervenes in areas clearly demarcated by the Constitution as being within the jurisdiction of the executive or the legislature. In my view, if the Court prescribes a solution in areas where the law is silent or absent and says that it is an interim measure until the legislature creates the law that does not constitute judicial activism. In *Vishaka v. State of Rajasthan*, for instance, the Court directed that the guidelines it issued with regard to sexual harassment in the workplace “would be binding and enforceable in law until suitable legislation is enacted to occupy the field.”²⁰ Another example: In issuing directives related to blood banks, the Court asked the central government to “consider the advisability of enacting separate legislation for regulating the collection, processing, storage, distribution and transportation of blood and the operation of the blood banks in the country.”²¹ In *Vineet Narain v. Union of India*, the Court observed that its directions would fill the vacuum until the legislature or the executive stepped in to cover the gap.²² Although these cases have often been claimed as examples of judicial activism (legislation by the courts), I would argue that they are not; they are simply stop-gaps until another branch accepts its responsibility and legislates. The role of the judiciary in these cases is qualitatively different from the one in which judges monitor day-to-day administration of the government or where judges revise existing legislation.

20 AIR 6 SCC 241 (1997).

21 Common Cause Reg. Soc. v. Union of India, 1 SCC 753 (1996).

22 2 SCC 199 (1996).

There is a difference between articulating the existence of a right without specifying a remedy, outlining the remedies, specifying the content of the policy, and its delivery. The judiciary is supposed to be responsible for articulating the existence of a right and prescribing a remedy, whereas the executive is supposed to create policies that translate these rights into achievable goals and administer the delivery of the policies. A court can be termed as activist if it overturns legislation for being unconstitutional, specifies the content of policy, and intervenes in its delivery. So, instead of categorizing the Court's actions as activist, over-activist, or not activist enough by using fuzzy definitions of activism, it would be more useful to assess the nature of intervention by the Court and the effectiveness of the mechanisms adopted for clarifying the content of social rights. I argue that while the Indian Supreme Court has not yet grown into its moniker of "activism" and may never do so for institutional and other reasons, the Court is carving a niche for itself as mediator and facilitator, overseeing the access to and quality of these rights.

In a 1976 article, "The Role of the Judge in Public Law Litigation," Abram Chayes contrasted the traditional remedies, such as compensation for harm, with the more complex and ongoing remedies created in public law litigation. "Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons."²³ India's apex court has engaged in complex negotiations with the other organs of the state and with petitioners from civil society, the private sector, and other parts of the citizenry to craft solutions that are ongoing and flexible. Kent Roach makes a similar point in the context of the Indian and Canadian judiciaries; he argues that a reiterative process is better suited to managing

²³ Abram Chayes, *The Role of the Judges in Public Law Litigation*, 89 HARV. L. REV. 1305–06 (1976).

the complexities of modern bureaucratic government than a one-shot process of damage awards.²⁴ It would be more pertinent to see India's apex court and its high courts as facilitators and/or mediators that enable the state and citizen groups to negotiate settlements and that achieve the goal of enhancing the access to and quality of these rights. This approach offers one way of analyzing the post-Emergency judgments in social rights. My approach avoids the trap of an "either law or preferences or politics or institutions" paradigm and addresses the diverse influences on judicial decision making. It also avoids a "catch-all" critique because it outlines the conditions and processes by which one element trumps the others in influencing a judgment.

This chapter traces the contours of this role by focusing on social rights litigation in education and health in the apex court and in the twenty-one high courts from 2006 to 2011. A Supreme Court judge typically serves for twelve to sixteen years in the high court system before his or her elevation; hence the analysis also focuses on high court judgments. I have already analyzed the case law (foundational and general cases) from 1950 to 2005 in health, education, and food and will therefore focus on the post-2005 period.²⁵

The first two sections discuss the path to justiciability of socioeconomic rights, particularly those of health and education. Although the focus is on the apex court, I also discuss the jurisprudence in the high court in order to highlight the patterns produced in the higher judiciary. The third section highlights the fact that the mechanisms adopted by the higher judiciary encourage a participative and collaborative route, thus reinforcing the picture of a judge as a negotiator. The final section links such judicial behavior to institutional and constitutional constraints and concludes the chapter.

24 Kent Roach, *The Challenges of Crafting Remedies for Violations of Social, Economic and Cultural Rights*, in SOCIAL ECONOMIC RIGHT JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 46–58 (M. Langford ed., Cambridge University Press 2009).

25 See Shankar, *supra* note 10.

1 The Supreme Court and Socioeconomic Rights

There are three ways in which a Constitution can recognize social and economic rights: by enumerating them but making them nonjusticiable, by making them justiciable but allowing courts to find a violation only when the legislature dramatically departs from the constitutional requirements (weak substantive rights), or by making them enforceable to the same extent as civil and political rights (that is, strong substantive rights).²⁶ As noted earlier, the Constituent Assembly adopted the first approach. En route to this arrangement, the Constitution makers debated two issues: the legal position of social rights and the agency that would deliver these rights.

The legal position was that these rights were nonjusticiable, and the Court adhered to this view in the initial decades after independence. Then Chief Justice Gajendragadkar agreed that social rights were unjus-ticiable but ought to be included in government policies if the state could afford to do so. He said that Directive Principles were unjusticiable and could not be judicially enforced; but, with regard to the place of pride accorded to them, it is obvious that the Constitution makers expect the governments of different states, as well as the central government, to bear these Directive Principles in mind and mold their policies from time to time to give effect to them. These sentiments were echoed in the next decade by Justice Subba Rao,²⁷ who highlighted the limited scope for courts in implementing social justice. He made a distinction between natural rights (to life, liberty, and property) inherent in every person, and economic and social rights (to health, education, livelihood), which could be transformed into justiciable rights only if the government created the necessary conditions.

In the 1970s, the Court advocated harmony between fundamental rights and Directive Principles and said that both belonged to the basic structure of the Constitution. In a landmark decision (*Kesavananda*) in

26 Tushnet, *supra* note 4.

27 K. Subba Rao, SOCIAL JUSTICE AND LAW, FIRST SHYAMA PRASAD MOOKERJEE MEMORIAL LECTURES (National Publishing House 1974).

the early 1970s, the court said that Directive Principles and fundamental rights together belonged to the basic structure of the Constitution, but the decision did not specify the contours of such a basic structure.²⁸ The judgment constitutionalized judicial review, but this did not necessarily translate into judgments commanding the state to deliver social rights, because great indeterminacy attended to what would count as fulfilling the objectives of the Directive Principles.²⁹ Two statements made at the beginning and the end of the 1970s highlight the indeterminacy. The landmark *Kesavananda Bharti v. State of Kerala* ruling said that from a “juridical point of view, it makes sense to say that Directive Principles do form part of the Constitution Law of India and they are in no way subordinate to Fundamental Rights,” but the implementation of these principles occurs when the state enacts a law. On the other hand, Justice Bhagwati said in *Minerva Mills* that Directive Principles created obligations or duties binding on the state and that the state would be bound by a constitutional mandate to carry them out “even though no corresponding right is created in anyone which can be enforced in a court of law.”³⁰ The judge’s words implied that the electorate, not the courts, would have to hold the state accountable, which was a reiteration of Ambedkar’s sentiments. But it was not clear how the constitutional mandate was to be enforced.

Immediately after the Emergency, the judiciary (particularly the Supreme Court) had two concerns. First, it had to regain legitimacy.³¹ It began by legalizing an expanded notion of standing that allowed

28 The Court did not outline the basis of what constituted the basic structure of the Constitution but merely reserved for itself the right to pronounce what constituted the basic structure. One judge in the *Kesavananda* case (Sikri) tried to tabulate the basic features of the Constitution as supremacy of the Constitution, republican and democratic form of government, secular character, separation of powers and federal character.

29 Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the “Basic Structure,”* in INDIA’S LIVING CONSTITUTION: IDEAS, PRACTICES, AND CONTROVERSIES (Zoya Hasan et al. eds., Oxford University Press 2002).

30 *Minerva Mills*, AIR 1980 SC 1789.

31 Baxi, *supra* note 3; Rajeev Dhavan, THE SUPREME COURT OF INDIA – A SOCIAL-LEGAL CRITIQUE OF ITS JURISTIC TECHNIQUES (Tripathi 1977); S. P. Sathe, *supra* note 3.

nongovernmental organizations (NGOs) and others to bring public interest litigation (PIL) cases to the court.³² Constitutional scholar Baxi said in an interview with the author that the Court deliberately used the decision to legalize the PIL mode of litigation because it wanted to draw closer to the bar associations, which had initially opposed the expanded nature of standing that the judges had devised. The ruling reflects the emphasis post-Emergency judges placed on collaborating with other legal bodies and the executive. It also demonstrates that the judges knew exactly how far they could go.

Second, having experienced the executive's authoritarianism and court-curbing moves, the Court "resisted confrontation with the government" and opted for a "wide measure of mutual accommodation" that had "a whisper of politics as well as a whisper of pragmatism."³³ This is reflected most vividly in the analysis of health and education litigation in India,³⁴ which reveals that the judges were reluctant to punish government providers (compared to private providers) for failing to fulfill their obligations, preferring instead to use softer remedies, such as instituting committees to correct deficiencies in the state's provision of public utilities. The next section discusses these patterns and links them with the role of judges as embedded negotiators.

2 Pattern of Litigation on Health and Education

The Constituent Assembly subcommittee on fundamental rights initially saw education as a fundamental right, but, in the Draft Constitution, education "mysteriously" moved to the nonjusticiable Directive Principles section.³⁵ Forty-five years after independence, the Court

32 Justice Bhagwati in *S. P. Gupta v. Union of India* (Supp.) SCC 87 (1981).

33 Baxi, *supra* note 3, at 202.

34 S. Shankar and P. B. Mehta, *Courts and Socioeconomic Rights in Brazil*, in COURT-ING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri and Daniel Brinks eds., Cambridge University Press 2008).

35 Seervai, *supra* note 1.

transformed education into a fundamental right for children aged six to fourteen years. Ironically, it did so in a case dealing with university-level admissions.³⁶ The judgment resonates with what Tushnet calls a “weak remedy,” in which the judges made a declaratory statement affirming the strength of the right without necessarily designing a remedy.³⁷ A decade after the judgment, the Indian Parliament passed the eighty-sixth constitutional amendment, providing for free and compulsory education for all children six to fourteen years as a fundamental right under article 21A.

2.1 Right to Education Cases in the Supreme Court

In comparing litigation in education cases before and after 2005 in the Supreme Court, **Table 2.1** highlights several suggestive patterns emerging from the comparison.³⁸

First, more cases on elementary-level education (the focus of the right) have come to the apex court in the past five years than in the pre-2005 period, and two-thirds are PILs, as compared to only 4 percent in the previous period.³⁹ In the earlier period, the grievances and autonomy of minority and private schools accounted for the bulk of the litigation,

36 Unnikrishnan v. State of AP, 1 SCC 645 (1993).

37 Mark Tushnet, *supra* note 4.

38 Note that the number of cases from 2006 to 2011 is not large enough to discern definite patterns. Several of these cases are ongoing, and we have used the interim orders to tabulate the success rate.

39 India has one of the largest education systems in the world. At the elementary school level, of the 931,471 schools in twenty-five states, 80 percent are located in rural areas. The government runs 65 percent of schools, and the rest are managed by the private (government aided and unaided) sector. NIEPA, 2004 REPORT, <http://educationforallinindiacom/analyticalreport2004summary.pdf>. Teacher absence ranged from 17 percent in Maharashtra to 30 percent in Bihar. From 2001 to 2004, of the 535,203 approved teacher positions at the all-India elementary level, only 310,506 positions had been filled, leaving vacancies in almost 40 percent of the posts (Indiastat.com, available at <http://www.indiastat.com/education/6370/stats.aspx>). The average pupil-to-teacher ratio was 39:1, and 10 percent of the schools were getting by with para-teachers. There is no quality control in government-run schools, unlike in the private sector, where entry is regulated by the state. Moreover, parents are a greater check on inefficient private schools, since they will walk out if the school underperforms.

Table 2.1. *Education Cases Dealing with “Education as a Right”*

Variables	1950–2005 Supreme Court ⁴⁰	2006–2011 Supreme Court	2006–11 Supreme Court and High Courts
Number	26	11	51
Public interest litigation ⁴¹	4%	66%	20%
Petitioner	Students/teachers: 45% Private institutions: 32% NGOs: 6%	State: 57% NGOs: 32%	State: 18% Individual: 55% NGOs: 14% Private: 14%
Issue – School	47%	82%	78%
Type of issue	Autonomy of minority and private schools, teacher-related issues (salaries and appointments), student related issues	Quality of teaching and school infrastructure, teacher salaries, government policies on educational institutions, and student-related issues	

followed closely by teacher-related issues, such as salaries and appointments (32 percent) and student-related issues (26 percent).

Second, PIL is being increasingly used by NGOs, suggesting that the tool has become part of the NGO repertoire and is being used systematically to improve public services; PILs are not simply responses to

40 Shankar, *supra* note 10.

41 Cases can come to the Supreme Court in two ways: through the high court or directly through a writ petition. In the latter case, the Supreme Court decides whether to admit a case through a writ petition, whereas in the former, the high court decides. In the early 1980s, the Supreme Court introduced a third route to approach it, namely PIL, which relaxed the rules of standing and allowed any member of the public (individual, NGO, institution) to approach the Supreme Court (and high courts) directly to seek legal remedies when public interest is at stake.

“episodic cases of outrage”⁴² as they were in the past. Whether litigation will continue to be the least preferred strategy of public action by NGOs, as Galanter and Krishnan have argued, remains to be seen. Nongovernmental organizations increased their success rate from 66 percent to 100 percent in the post-2006 period, whereas the government has continued the pre-2005 trend of losing more often than winning (it won only 25 percent of the cases from 2006 to 2011). We may be seeing a shift in the way judges view certain types of PILs and NGOs in the post-2006 period.⁴³

Third, the petitioners have focused on school-level issues of access and quality pertaining to teaching and facilities. This stands in contrast to the earlier period, when the notion of a right to education was primarily used at the university level to argue issues including the autonomy of private and minority institutions to admit students, charge capitation fees, and have a differential fee structure; the access of well-off students to higher education; and the permission process required to start new private universities. What hasn’t changed is that the bulk of litigation on access continues to be instigated by well-off individuals. For instance, in a case where the petitioner was denied admission to a private school despite obtaining the qualifying mark, the Court said that the petitioner ought to be admitted and defended its intervention in the affairs of a nongovernmental school on grounds that the institution was discharging the state’s function of promoting the educational interests of the people of India. In another case, where the school had drawn lots to determine admissions, the Court dismissed the petition of a parent whose child had been denied admission.⁴⁴ The Court also dismissed a petition where the petitioner sought admission in a Navyug school (which has better teachers) despite being ineligible to do so (on residency grounds).⁴⁵ It said:

42 Mark Galanter and Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 Hastings L.J. 789–834 (2004).

43 In the earlier period, the Court was more wary of PILs and NGOs and was less likely to favor PILs.

44 Master Shikhar Gupta v. Govt. of NCT of Delhi and Ors., MANU/DE/2326/2011.

45 Mohd. Asif Khan and Ors. v. Navyug School and Ors., MANU/DE/2868/2010.

“The desire of the petitioners for admission in the said Navyug Schools is perhaps because of better standard of education being maintained in the Navyug Schools than in the other Schools closer to the residence of the petitioners. However, the said desire does not constitute a right.”⁴⁶

Fourth, there has been an increase in cases dealing with the quality of education delivered by schools.⁴⁷ The Court’s judgments have linked teacher training to a right to education (article 21A) and said that the right would remain illusory unless the state took adequate steps to create schools manned by efficient and qualified teachers. “Before teachers are allowed to teach the children, they are required to receive appropriate and adequate training from a duly recognized training institute.”⁴⁸ Responding to another PIL, which objected to the use of teachers in government schools for manning election booths and carrying out other

46 *Id.*

47 Indian Medical Association v. Union of India, C.A. 8170/2009. The Supreme Court’s philosophy, or worldview, on education seems to be that education is a public duty and cannot be a subject of profiteering. In *Unnikrishnan*, the petitioners said that this view challenged article 19(1)(g), which provided the right to practice any profession or carry on any occupation, trade, or business. The apex court ruminated on this and said that although the state could regulate the fee structure of unaided private educational institutions in order to prevent commercialization, imparting education cannot be a trade, business, or profession (note at 750). No private unaided educational institution could operate for profit. But the Court did not answer whether imparting education could be considered a profession. Subsequently, in *TMA Pai*, the court reversed itself and said that *Unnikrishnan*, which had prescribed the conditions under which the state could grant recognition or affiliation to an educational institution, was unconstitutional because the scheme failed to distinguish between public and private establishments. The Court now emphasized autonomy for private institutions on matters such as appointments to fees but continued to reiterate that the establishment of an educational institution was a charitable act. But private institutions could have “reasonable surplus to meet costs of expansion and augmentation of facilities,” which would not be treated as profiteering since the funds were recycled into the institution. In the *IMA* case, the court dealt with the concept of education as a charitable profession and brought schools within the ambit of public places under 15(2), thereby making any restriction to access by a private educational institution a violation of fundamental rights.

48 State of Uttar Pradesh and Ors. v. Bhupendra Nath Tripathi and Ors., 13 SCC 203 (2010).

government tasks, such as census work, during school hours, the Court directed the state to use teaching staff only on holidays and nonteaching days.⁴⁹ The judge pointed out that primary education in the country was already in a deplorable state, and those suffering from the absence of teachers in government schools were students from middle or lower middle class or poor families. In a 2010 case on the regulation of schools run by religious minorities, the Court said that it would “strike the balance between different facets relating to grant-in-aid, right to education being the fundamental right, protection available to religious or linguistic minorities under the Constitution and the primary object to improve and provide efficiency and excellence in school education.”⁵⁰

2.2 Right to Education Cases in the High Court

The trends discussed earlier are also apparent in the right to education cases heard in the high courts. Since the enactment of article 21A, dozens of cases have appeared in the dockets of these courts. An examination of the content of these cases suggests that more cases dealing with the access to and quality of school education are being litigated, although the petitioners are mainly from well-off states such as Delhi, Maharashtra, Karnataka, Gujarat, and Andhra Pradesh.

As Table 2.1 shows, these cases have focused on issues of quality of school infrastructure and of teaching. In response to a PIL after a fire in a school in Madras, the court directed the government to comply with safety regulations.⁵¹ “It is the fundamental right of each and every child to receive education free from fear of security and safety. The children cannot be compelled to receive education from an unsound and unsafe building.” The Delhi High Court issued an extensive order in a case on the deputation of teachers for election duty, where it urged the schools to

49 Election Commission of India v. St. Mary’s School and Ors., 2 SCC 390 (2008).

50 Sindhi Education Society and Anr. v. The Chief Secretary, Govt. of NCT of Delhi and Ors., 8 SCC 4 (2010).

51 Avinash Mehrotra v. Union of India and Ors., 6 SCC 398 (2009).

achieve a teacher-to-pupil ratio of 1:5 at the secondary level and 1:2 at the primary level.⁵² In a petition by parents that a hike in fees was arbitrary and illegal, and the Karnataka High Court agreed, finding that the state was obliged to prevent “commercialization and exploitation” in private unaided educational institutions.⁵³ The Andhra Pradesh High Court also upheld the application of a government order on fee regulation to private unaided schools. The Court said:

Since the State is increasingly shifting from the participatory towards a mere regulatory role in the administration and nurturing of educational institutions (at all levels), the State must evolve effective and sensitive tools to regulate this sphere, to maintain that delicate balance between academic and operational autonomy of private unaided educational institutions and the legitimate Governmental interest in ensuring that these private entities do not indulge in profiteering.⁵⁴

The Bombay High Court quashed an order notifying the shifting of a school after the parents petitioned the court.⁵⁵ “Convenience and need

52 Akhil Dilli Prathmik Shikshak Sangh (Regd.) v. Govt. of NCT, 106 DRJ 434 (2008). In order to increase the supply of qualified teachers, the Court directed the government to grant equivalence to some teacher training courses and appoint special teachers within six months. “Needless to say that the service conditions of the special teachers shall be the same as that of the regular teachers holding the qualification of general teachers ... The school authorities shall ensure that each school shall have at least two special teachers and further that necessary teaching aids and reading materials are provided.” As an interim arrangement, it suggested that two or three schools in a cluster should avail the services of itinerant teacher. The court directed one of the respondents to train teachers to take care of disabled children and to start short-term orientation programs for principals and educational administrators so as to sensitize them toward the needs of disabled children. “It is brought to our notice that in some cases the disabled children are being denied admission on the ground that the schools do not have the necessary facility. This is clearly contrary to our order dated 19.2.2009. It is made clear that no disabled child shall be refused admission in any of the schools either run by the State Government or the local bodies.”

53 Air Force School Parent’s Welfare Association v. The State of Karnataka, MANU/KA/0005/2011.

54 Nalanda Educational Society and Ors. v. Government of Andhra Pradesh, 2 ALD 163 (2011).

55 Anil S/o Panjabrao Nahate and Gajanan S/o Sahebrao Rede v. The State of Maharashtra, 5 BomCR 569 (2010).

of the children for whom the School is being established/shifted should be the paramount consideration while dealing with such proposals and not the desire and convenience of Institutions/Managements.” In other cases, the Court said that the school could not have working hours that adversely affected the attendance of children,⁵⁶ and it defined the content of the right to education as conferring on the child as well as the parent a fundamental right to choose the medium of instruction in a school.⁵⁷

An overview of the fifty-one cases in the high courts and the Supreme Court since 2006 reinforces our conclusions. The government was the defendant in more than 80 percent of the cases, while the main appellants were individuals (55 percent), followed by the state (18 percent) and NGOs (14 percent). A fifth of the cases were PILs, and all these received interim orders that supported the position of the petitioner NGOs. Contrast this with the fact that PILs in the pre-2005 period had a significantly lower chance of receiving a favorable judgment as compared to non-PILs and writ petitions.⁵⁸ The main issues dealt with access to schools (41 percent), quality of teaching (29 percent), and quality of infrastructure (27 percent). More than half the cases dealt with quality of teaching and infrastructure. About half the cases had regular remedies (i.e., the court either upheld or rejected the petition without instituting committees, etc.). In 29 percent of the cases, the Court outlined guidelines and policies with time limits, and, in a fifth of the cases, the Court monitored the government’s actions by requiring the officials to file affidavits within prescribed time limits. The judgments favored the state in more than half the cases (57 percent). In these twenty-nine cases, the

56 Dipankar Dey v. State of Assam and Ors., 4 GLT 905 (2010).

57 Associated Managements of Primary and Secondary Schools in Karnataka v. The State of Karnataka by its Secretary, Department of Education and Ors, 4 KarLJ 593 (2008).

58 PILs can be pursued either in the high court (under article 226) if the complaint is seeking redress of a legal wrong, or in the Supreme Court (under article 32) if the complaint alleges a violation of fundamental rights. Several scholars and jurists argue that judges began viewing PILs with greater suspicion and introduced institutional safeguards when private firms started misusing the tool to hurt their competitors.

Court issued detailed guidelines with time limits in ten cases, monitored by way of affidavits in seven, and delivered regular remedies in eleven cases. Although only about 30 percent of the cases had implications for the educational rights of poor people, this percentage is higher than the pre-2005 figure. In these fifteen cases, eight dealt with quality of school infrastructure, while three each pertained to the quality of teaching and access to schools. In more than half the cases, the judgment enhanced the accountability of the state or the institution, and, in about a quarter of the cases, transparency of procedures and involvement of stakeholders was enhanced. Of the forty-two cases in which the state was the defendant, the Court issued detailed guidelines in a third of the cases. For instance, private institutions challenged the government's rejection of their applications (through an executive order) to open new primary and secondary schools using the Marathi medium (local language in that state).⁵⁹ The Maharashtra High Court agreed with the petitioners and said that the government had to scrutinize each application on a case-by-case basis before the next academic year. "We have also made some broad suggestions in Paragraph 62, as to the factors to be considered and remedial measures taken before finalizing the perspective plan or School Development plan," said the Court, further expressing the hope that the government would consider these suggestions. The mechanism favored by the Court in half the cases was monitoring by way of issuing detailed guidelines or requiring the government to lodge affidavits within specified time limits.

2.3 *Health Cases*

In the pre-2006 period, public health cases (43 percent) accounted for the majority of health cases, followed by medical negligence and hospital management (26 percent), medical reimbursement (14 percent), and HIV/AIDS (6 percent) (Table 2.2). Cases included regulation by

59 Shri Sadguru Shikshan Prasarak Mandal v. State of Maharashtra, MANU/MH/1089/2010.

Table 2.2. *Health Cases Dealing with “Right to Health” in the Supreme Court*

Variables	1950–2005 ⁶⁰	2006–2011
Number	53	23
PIL	10	12
Petitioner	Individuals: 53% NGOs: 29% Private institutions: 12% State institutions: 6%	NGOs: 34% State/state funded: 30% Individual: 21% Private business: 13%
Type of Issue	Public health: 43% ⁶¹ Medical negligence and hospitals: 26% Medical reimbursement: 14% HIV: 6%	Rights of poor people: 39% Worker health: 26% Public health: 22% Medical negligence: 4%

the state (44 percent), obligations of public and private providers and/or clients (35 percent), and financing of healthcare by the government (18 percent). The state was the defendant in 86 percent of the cases, but was likely to win only around 30 percent of the time. Public health concerns were reflected predominantly by NGOs or public-spirited individuals who were plaintiffs in over half of these cases and won more than 80 percent of the time.

Table 2.2 displays several suggestive patterns. The number of PILs on health-related issues has increased in the post-2006 period, with more than two-thirds receiving a positive response from the apex court. The profile of the petitioner has also changed, with NGOs emerging as the main appellants. Correspondingly, the type of issue litigated in the Court has changed, and now leans toward the health rights of poor people and workers, as compared to the focus on public health and medical negligence in the earlier period. Several cases dealt with the treatment of children rescued from circuses and of sex workers, and advocated the

60 Shankar, *supra* note 10.

61 These figures pertain to cases in the higher judiciary.

provision of night shelters. About 43 percent of the cases dealt with quality issues. For instance, the Court issued an interim order to set up a committee to study the use of endosulfan as a pesticide for rice, mangoes, cashews, and other crops after the petitioner (an NGO) alleged that it was associated with various neural disorders. In another case involving a sewage worker's death, the Court made the state accountable for instituting an effective mechanism to ensure the safety of the workers employed in maintaining and cleaning the sewage system. It said:

The human beings who are employed for doing the work in the sewers cannot be treated as mechanical robots, who may not be affected by poisonous gases in the manholes. The State and its agencies/instrumentalities or the contractors engaged by them are under a constitutional obligation to ensure the safety of the persons who are asked to undertake hazardous jobs.⁶²

Where the law and the government were silent, the Supreme Court shepherded the formulation of policies as a stop-gap measure (e.g., policies on the licensing and quality of blood banks, regulation of drugs and vaccines, antiretroviral treatment for those affected by HIV/AIDS). The Court has played an active role in the actual delivery of the right only in a handful of cases. For instance, the Court set up a committee in 2006 to look into irregularities in the public distribution system (PDS) of food. It acknowledged that it was issuing "unusual directions," but said that it was necessary to do so in view of the large-scale corruption involved and the fact that the poor were being deprived of their basic right to food. In May 2011, the Court challenged the government's definition of the poverty line and asked the committee to identify 150 of the poorest districts in India for additional allocations in the PDS.

The mechanisms used by the Court to evoke compliance by the other organs of the state also support a view of judges as embedded negotiators. The next section highlights this aspect.

62 Delhi Sewage Board v. Union of India, 7 SCALE 489 (2011).

3 Mechanisms Adopted by the Judiciary

Sabel and Simon, in a reiteration of Chayes's contention, argue that judicial interventions have moved away from remedial intervention modeled on command-and-control bureaucracy toward a kind of intervention that can be called "experimentalist."⁶³ Instead of top-down, fixed-rule regimes, the experimentalist approach emphasizes ongoing stakeholder negotiation, continuously revised performance measures, and transparency.

Can the Indian Supreme Court's interventions be termed "experimentalist"? Do the remedies suggested by the Court include participation, flexibility, and accountability? Participation, as Susan Sturm points out, is important for several reasons: It identifies the group of parties responsible for a particular social problem and involves them in problem-solving, and it serves an educational function, exposing plaintiffs to the difficulties involved in implementing a solution early on and helping all parties identify obstacles and potential solutions.⁶⁴ The approaches that these scholars (Chayes, Roach, Sabel and Simon, Sturm) depict combine more flexible and provisional targets with procedures for ongoing stakeholder participation.

In about 18 percent of the right to education cases, the Court adopted processes that encouraged participation by parents, villages, and other stakeholders in designing solutions with the state. In a petition from a village chief who said that the government-run elementary school was being constructed on a small-sized plot, the high court refused to intervene in the matter.⁶⁵ Instead, it directed authorities to arrive at an amicable solution with the stakeholders, in the "best interest of school children." In another case, the Gauhati High Court directed that a general

63 Charles F. Sabel and William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2003–04).

64 Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1397 (1991).

65 Chanchla Devi v. State of Punjab and Ors. MANU/PH/1182/2011 CWP No. 4917 of 2011.

body meeting be held where the school authorities and representatives of the parents' association could discuss convenient school hours, and also gave a deadline (six weeks) for a decision to be adopted.⁶⁶

In the pre-2005 cases, judges favored weak remedies – declarations that identify the strength of the right rather than the remedy, or else mandating the government (through committees or other ways) to develop plans to eliminate constitutional violations within a reasonably short but unspecified time. Previously, in the hierarchy of mechanisms used by the Court, judgments were more likely to prefer committee-style collaborative measures to elicit actions from the erring parties, followed by no enforcement and, only at the last, strong enforcement measures with fines and time limits. But the post-2006 cases show some shift toward stronger remedies wherein time limits are specified and arrangements with more stakeholder participation are crafted. Earlier, in public health and other complex cases, the Court favored the use of committees, but now a committee was set up in only one case. As in its earlier practice, the Court continues to use two types of supervision: (1) A supervising ministry or authority has to report via affidavits to the court, following which the court issues new directions; or (2) the court directly monitors implementation.

Since several of the cases discussed above are ongoing, it is not possible to determine how effective the Court's remedies will be in enabling citizens to achieve these rights. Other scholars have argued that some of the Court's remedies have focused on improving participation by civil society in complex issues, as in the right to food cases. Neff points out that the court-appointed commission in the right to food cases involved multiple civil society stakeholders in monitoring implementation and making recommendations for further action.⁶⁷ The commission sought

66 Dipankar Dey v. State of Assam and Ors., 4 GLT 905 (2010).

67 Emma C. Neff, *From Equal Protection to the Right to Health: Social and Economic Rights, Public Law Litigation, and How an Old Framework Informs a New Generation of Advocacy*, 43 COLUM. J.L. & SOC. PROBS. 151 (2010).

information from state and local governments on how the court's interim orders have been implemented, but it did not "pursue inputs on shaping future orders from local officials with the same veracity." However, Sajjad Hassan rightly states that rights-based development only creates opportunities for the poor to change power imbalances, but it does not itself create results.⁶⁸ In the right to food cases, these rights have been realized through a better working of the schemes only when a mediating role was played by community organizations or pro-poor administrations. Hassan's primary research into the implementation of the Supreme Court's interim orders reveals a mixed picture. On the positive side, the Court's interim orders defined specific justiciable entitlements. Commissioners helped ensure that these orders were taken seriously by states and the central government – by engaging with state and central governments, holding joint commissions of inquiries on hunger deaths, conducting surveys, and organizing public hearings to enforce accountability. On the negative side, the Commissioners have little authority and resources at their command to enforce interim orders with states that decide not to play ball. More serious, says Hassan, is the fact that the accountability that the Commissioners have been able to build into the system is at a very general level. The effectiveness of these monitors depends on the resourcefulness and contacts of the Commissioners and the civil society organizations, media coverage, and the willingness of state-level officials to comply with the instructions.

A similar analysis is needed of the efficacy of the mechanisms adopted in the right to education and right to health cases. The picture that emerges is of a pragmatic judge who constantly negotiates with the laws, institutional processes, political configurations, and public opinion to craft remedies that emphasize accountability, transparency, and participation.

68 Sajjad Hassan *Rights, Activism and the Poor in India: The Supreme Court and the Right to Food Case*, International Conference "Social Protection for Social Justice," Institute of Development Studies, United Kingdom, April 13–15 (2011).

4 Understanding Judicial Behavior

Some scholars have theorized that the strategic behavior⁶⁹ of the executive and the legislature in empowering judges is part of a “top-down” process⁷⁰ in which elected officials might allow judges to make policies so as to avoid responsibility for controversial decisions,⁷¹ or to protect their rights from new or emerging electoral majorities.⁷² Others have emphasized the motivation of judges themselves.⁷³ Still others have emphasized macro drivers (democratization) or “bottom-up” processes, such as the spread of rights discourses and legal networks.⁷⁴

The behavior of Indian judges does not fit neatly into any of these categories. Supreme Court judges have negotiated with different actors, thus highlighting not the rise of a “juristocracy” but a continuous dialogue with other actors and organs of the state. Indian judges want their judgments to be perceived as legitimate, but legitimacy has to be negotiated; it is not inherent in an institution. One source of the court’s legitimacy, as Sathe points out,⁷⁵ rests on the people’s perceptions that judgments are principled, objective, and just. This involves seeing whether a decision conforms to the spirit of a right. Judgments on public health issues, for instance, articulate major values, such as a right to potable water or to clean streets, but the actual decision focuses on what is feasible. Legal scholar Upendra Baxi⁷⁶ calls such rulings “juristic activism” because they set the stage for the future direction of the law.

69 This section draws from Shankar, *The Judiciary, Policy, and Politics in India*, in JUDICIALIZATION OF POLITICS IN ASIA (Bjoern Dressel ed., Routledge 2011).

70 Ran Hirschl, *Judicialization of Mega Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93–118 (2008).

71 M. A. Gruber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUDIES IN AM. POL. DEV. 35 (1993).

72 Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–91*, 3 AM. POL. SCI. REV. 96 (2002).

73 Lawrence Baum, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (Princeton University Press 2007).

74 Charles Epp, *THE RIGHTS REVOLUTION* (University of Chicago Press 1998).

75 Sathe, *supra* note 3.

76 Upendra Baxi, *THE CRISIS OF INDIAN LEGAL SYSTEM* (Vikas 1982).

To understand why the Indian judiciary accumulates power but is restrained in using it against the executive, we have to comprehend how the Constitution conceptualizes judicial powers and how the courts have interpreted it. Although the Indian Constitution has given courts the power of judicial review, the executive has the ability to suspend or repeal that power. This ambiguity in whether the Constitution privileges parliamentary sovereignty or judicial review has been manipulated in different periods by both the executive and the judiciary.⁷⁷ India's parliamentary system institutes separation of powers, but the effective division is between the parliament and judiciary because the leader of the party that has won the largest number of seats in Parliament is also the executive, the prime minister. The president may have veto powers and appoint judges but, like the British monarch, he or she is merely a titular head.

The Constituent Assembly favored a system that instituted balance among the three branches, rather than checks by one over the other, but agreed with the chairman of the drafting committee that the Constitution had to walk the fine line between creating a leviathan and giving the judiciary adequate power to act without fear or favor. The Supreme Court's powers would be determined by law – made by Parliament rather than the Constitution – but that document was ambiguous about the extent of judicial scrutiny of legislation, the powers of the federal court, the process for appointing and removing judges, and whether judges could take post-retirement jobs.

Institutional constraints, including the large case load, short tenure (Supreme Court judges serve on average for four to six years), small benches (two to three judges), and the low rate of dissenting opinions (about 2 percent), do not permit a consistent record of activism. These institutional shortcomings have been compounded by charges of corruption against the lower and higher judiciary, including those in the apex

⁷⁷ Article 13, for instance, states that laws must be compatible with the Constitution, and interpretation of compatibility would be the task of the judiciary. However, during the Emergency regime (1975–77), the executive suspended the power of judicial review.

court, and more recent concerns expressed by the executive, the legislature, and the media about the need for judicial accountability.

These checks create judges who are negotiators, who recognize their inability to compel the government to comply with their orders. As we saw in the previous section, when the court instituted time limits, enforcement depended more on monitoring by the litigant. And even when NGOs supervised progress, the results did not match the promise of the judgment – the gap between legal entitlement and on-the-ground reality is vast.⁷⁸

The Supreme Court's restraint is a result of institutional norms and memories concerning the perils of challenging executive power.⁷⁹ The allocation of cases by the Chief Justice, lack of enforcement capacity, the emphasis on collaboration rather than dissent within the two- or three-judge panels that typically hear a case, and short stints on the Supreme Court bench (since judges retire at the age of 65) produce overworked judges who barely have time to finish their work.⁸⁰ High court and subordinate judges, too, are overworked and understaffed.⁸¹ Dissenting opinions are rare in the high courts and Supreme Court; more than 99 percent of judgments in the pre-2005 data set were unanimous, comparable to Gupta's finding of 1.56 percent dissenting opinions from 1973 to 1981.⁸²

78 Some of the problems of litigation included access, the time taken, funding constraints, and the poor efficacy of court judgments. See Mark Galanter and Jayanth K. Krishnan, *supra* note 42.

79 It is therefore important to distinguish between different levels of the judiciary. Lower courts like the high courts have been cautioned for their “adventurism” by the Supreme Court. Many of the environmental judgments and the cases referred to in the opening paragraph were issued by the high courts. It may be that lower-court judges are more likely to experiment with solutions than are apex court judges.

80 Similar arguments have been made by Baxi, *supra* note 3, and Sathe, *supra* note 3, among others.

81 Figures released by the Court in June 2010 indicate that the number of vacancies has gone up in the subordinate courts (3,070) and high courts (287 of the authorized 895). Pending cases, too, have increased to 4,183,731 in the high courts and 27,800,000 in the subordinate courts.

82 Vijay K. Gupta, DECISION MAKING IN THE SUPREME COURT OF INDIA (Kaveri 1995).

This does not mean that judges don't disagree with one another; they just don't seem to register their dissent formally.⁸³ So, although Supreme Court judges are aware of their power, they are careful about wielding it in opposition to the other wings of the state because, institutionally, they are unable to accomplish change on the ground. Judges realize that their decisions may not be enforced and that they will not be there long enough to ensure enforcement. In a number of recent cases in health and education, the Court has highlighted the economic inability of the state to deliver the content of a right. For instance, in a case dealing with the auction of land for educational purposes, one of the losing bidders argued that the state ought to take adequate measures to promote a right to education.⁸⁴ In response, the Court said that by offering land at concessional rates, the state was already acting in pursuance of its obligations, and these obligations were subject to its economic capacity. The Court chastised the bidder for engaging in speculative litigation.⁸⁵

⁸³ Gupta found that judges tended to dissent more on larger benches (typically constitutional issues), and did so individually rather than in a group. Our results reinforce the conclusions of previous works by Dhavan and Gupta that judges follow a collaborative mode of decision making.

⁸⁴ Meerut Development Authority v. Association of Management Studies, 6 SCC 171 (2009).

⁸⁵ See P. O'Connell, *The Death of Socio-Economic Rights*, 74 MOD. L. REV. 532–54 (2011). Over the past decade, apex courts in Canada, India, and South Africa – which have traditionally been viewed as socioeconomic rights friendly – have issued judgments fundamentally at variance with the meaningful protection of socioeconomic rights. This jurisprudential turn can be understood as part of a de facto harmonization of constitutional rights protection in the era of neoliberal globalization. These national courts, although dealing with idiosyncratic domestic constitutional systems, have nonetheless begun to articulate analogous conceptions of fundamental rights that are atomistic, “market friendly,” and, more broadly, congruent with the narrow neoliberal conception of rights, and consequently antithetical to the protection of socioeconomic rights. This view of rights is becoming well established as the hegemonic view, and the preeminence of this view, taken with the entrenchment of neoliberal policy prescriptions – and tacit judicial approval of such policies – signals the end, in substantive terms, of the prospect of meaningful protection of socioeconomic rights.

Litigation patterns also demonstrate a major limitation of courts: Judges can only rule on the cases that are brought to them. Most cases brought by NGOs have dealt with urban pollution and sanitation; relatively few have dealt with India's most urgent health problems, such as the need to enhance the quality and provision of medical services in rural areas, to overhaul government hospitals and health centers, and to provide more doctors in rural and poorer areas.

5 Conclusion

The judiciary's positive response to petitions from NGOs on issues of quality and access to schools and health facilities may be linked to the increasing judicialization of politics in India. In another paper, I have argued that such judicialization has had positive and negative implications. On the positive side, first, the judiciary has knitted alliances with other actors – political parties, citizen groups, activists, and the media – to keep a watchful eye on the administration's performance. This has strengthened state-society relations and the scrutiny of misrule. Second, the Court has used the force of law to impose deadlines,⁸⁶ define elements of governmental accountability,⁸⁷ and ask for explanations for noncompliance.⁸⁸ This seems to have generated efforts within

86 PUCL v. Union of India (right to food Petition) Or dt. 28.11.2001 (setting a deadline for the identification of BPL families) and 20.5.2001 (setting a deadline for the implementation of certain welfare schemes); People's Union for Civil Liberties v. Union of India and Ors., 9 SCALE 25 (2007) (setting up Anganwadi centers).

87 Centre for PIL v. Union of India 355/2010 (Or. Dt. 3.3.2011) CVC Matter (wherein the Court held that the institution is more important than the individual); Sri Radhy Shyam (Dead) through L. Rs. and Ors. v. State of U.P. and Ors. JT (4) SC 524 (2011), where the Court emphasized that when land is acquired from the poor, greater judicial scrutiny is warranted.

88 Dr. Subramaniam Swamy (SLP 27535/2010) (asking why the PM had delayed the grant of sanction for the prosecution of A. Raja); Baba Ramdev (asking the government for an explanation with regard to the incident at the Ram Lila grounds); Ram Jethmalani v. Union of India WP 176/1009 (asking why Hassan Ali had not undergone custodial interrogation); Nandini Sundar v. Union of India 250/2009 (seeking an explanation as

the government to tighten administrative rules and weed out corrupt officials. In addition to including corruption as a key performance management evaluator of ministries, the top administrative officer (the cabinet secretary) recently decided to hold weekly meetings for disposal of pending cases against top bureaucrats in different ministries. On the negative side, a more worrying concern is the monitoring by the higher judiciary of the day-to-day or month-to-month implementation of its orders. This increases the load on an already overburdened judiciary and will lengthen backlogs in delivering justice. And if despite such supervision the executive fails to comply with Court directives, the institutional legitimacy of the judiciary will be besmirched.

The senior judges seem aware of this problem. In a memorial lecture, the former Chief Justice of India, Justice S. H. Kapadia said that it was the task of the electorate, not of judges, to make the government accountable. He warned the judges that the Court did not have the competence to make policy choices and run the administration, and asked them to resist “the pressure to please the majority.”⁸⁹ He concluded that:

In many PILs, the courts freely decree rules of conduct for government and public authorities which are akin to legislation. Such exercises have little judicial function in them. Its justification is that the other branches of government have failed or are indifferent to the solution of the problem. In such matters, I am of the opinion that the courts should be circumspect in understanding the thin line between law and governance.⁹⁰

The upsurge of civil society groups able to command a groundswell of public support for clean governance and anticorruption drives, the

to the action taken by the government with respect to incidents of arson and violence in three villages in Chattisgarh in March 2011 and with respect to the attack on Swami Agnivesh).

⁸⁹ CJI S. H. Kapadia, *Fifth M. C. Setalvad Memorial Lecture on Judicial Ethics*, reported in the *Indian Express*, op-ed page (April 18, 2011).

⁹⁰ Id.

surge in the number of social rights cases dealing with problems affecting poorer citizens, and the willingness of the judges to issue interim orders and judgments that support these goals may portend the start of an Epp-style rights revolution in the country.

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3 The Economic and Social Rights of Prisoners and Constitutional Court Intervention in the Penitentiary System in Colombia

Libardo José Ariza

IN 1998, THE CONSTITUTIONAL COURT OF COLOMBIA ISSUED one of its most significant rulings, case T-153, which declared the existence of an unconstitutional state of affairs (USoA) in the country's penitentiary system. In my opinion, this ruling is of the utmost importance for two main reasons. The first is because it consolidated a doctrine, the USoA, which had barely been outlined before this case.¹ The USoA doctrine defends the structural intervention of the Constitutional Court in those cases in which the Court detects a massive and systematic violation of rights. Such a situation is understood to have been generated by deficiencies in the institutional arrangements of the state. Applying this doctrine, when the Court detects an "institutional blockage"² that generates a violation of rights of this magnitude, it declares the existence of an unconstitutional reality, the principal consequence of which is that the Court takes on functions in public policy making, resource allocation, and the implementation of economic and social rights that would pertain to the legislative branch in a conventional model of separation of powers.

1 Libardo Ariza, *La realidad contra el texto: Una aproximación al estado de cosas constitucional*, 1(4) REVISTA MENSUAL TUTELA 967–78 (2000).

2 César Rodríguez, *Beyond the Courtroom: The Impact of Judicial Activism on Socio-economic Rights in Latin America*, 89(7) TEX. L. REV. 1679–98 (2011).

The second reason that the case T-153 ruling is important is that it demonstrates the challenges inherent in addressing proper judicial performance with respect to the implementation of economic, social, and cultural rights (ESCR). Since the first appearance of the USoA doctrine, it has become an important discourse for configuring the analytical framework for judicial review of the implementation of ESCR within the context of structural reform driven by the courts.³

Despite criticism of the USoA doctrine and its shortcomings, there is some consensus in the local arena around the idea that judicial enforcement of ESCR by means of structural intervention is “progressive.”⁴ Two principal arguments support the characterization of the performance of the Colombian Constitutional Court as “progressive.” First, the Court’s decisions are considered to be an advance on the traditional conceptions of separation of powers that defend a passive attitude on the part of the judiciary when applying the Constitution in general and

3 The first case in which the Constitutional Court declared the existence of an unconstitutional state of affairs was ruling SU-559 of 1997. In this case, the Court found that the violation of the rights of public school teachers generated by their lack of registration with the social security system was due to an unequal distribution of resources. Thus, the Court noted that the remedy involved “a specific or generic request addressed to the authorities for the purposes of performing an action or refraining from doing so.” Subsequently, in case T-068 of 1998, the Court noted that remedies consisting of institutional reforms to protect the rights in question could be ordered: “If an entity violates one of the objectives for which it was created, then it is required for the institution to adapt its structure to the new constitutional standards.”

4 Rodolfo Arango, *La justiciabilidad de los derechos sociales fundamentales*, 12 REVISTA DE DERECHO PÚBLICO 185–212 (2001); Rodolfo Arango, *Los derechos sociales en Iberoamérica: Estado de la cuestión y perspectivas de futuro*, CUADERNOS ELECTRÓNICOS No. 5, DERECHOS HUMANOS Y DEMOCRACIA 1–23 (2003); Everaldo Lamprea, *Derechos fundamentales y consecuencias económicas*, 8(14) REVISTA DE ECONOMÍA INSTITUCIONAL 77–103 (2006); César Rodríguez and Diana Rodríguez, *CORTES Y CAMBIO SOCIAL: CÓMO LA CORTE CONSTITUCIONAL TRANSFORMÓ EL DESPLAZAMIENTO FORZADO EN COLOMBIA* (Dejusticia, 2010); Ramón Ruiz and Clara Viviana Plazas, *La exigibilidad de los derechos sociales: El caso de Colombia*, 14 UNIVERSITAS REVISTA DE FILOSOFÍA DERECHO 13–20 (2011); Rodrigo Uprimny, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 127–51 (Roberto Gargarella, Pilar Domingo, and Theunis Roux eds., Ashgate 2006).

ESCR in particular. Second, this characterization is based on a “political” attitude held by the Constitutional Court regarding the improvement of living conditions for the most disadvantaged sectors of Colombian society, thereby converting the Court into an institutional voice for the poor in the event that the legislative power has been silent on such matters.⁵

In spite of this, when it comes to the question of Constitutional Court intervention in adjudicating the rights of prisoners, this consensus appears to fade. Progressive perspectives become conservative when dealing with prison-related issues.⁶ Although both of the given arguments appear to coincide – an innovative position compared to the traditional conception of separation of powers and a political declaration

5 For an argument regarding the judiciary as an institutional voice for socially and economically disadvantaged persons, see Rodrigo Uprimny, *supra* note 4, and Christian Courtis, *Judicial Enforcement of Social Rights: Perspectives from Latin America*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? (Roberto Gargarella, Pilar Domingo, and Theunis Roux eds., Ashgate 2006). One of the main statements of the Colombian Constitutional Court to support its political position regarding the enforcement of social and economic rights is to frame itself as a representative of minority groups. This argument was fully deployed for supporting the Court position in the case T-153: “Public officers’ attitudes towards prison problems are grounded on the logic of majorities, which rule democratic regimes. Prisoners are socially-marginalized people. The very fact of being held in special institutions with limited access shows their segregation. In such conditions, prisoners do not constitute a pressure group with a voice that can be heard. Their pain and claims get lost amidst the broad needs that overwhelm underdeveloped societies such as Colombia.” Constitutional Court of Colombia, case T-153 of 1998.

6 Some members of the academic community, who criticize the use of the traditional model of separation of powers to justify the structural intervention of the Court, take a position based, paradoxically, on the defense of moderate activism of the Court when it comes to the protection of prisoners. Where prisons are concerned, they defend the traditional model to justify why the Court cannot adopt remedies such as early release in the context of an unconstitutional state of affairs: “The proposal to free inmates in pretrial detention is debatable. Although it is true that the Court is required to ensure the protection of prisoners’ rights, it is no less true that the possibility of establishing criminal or prison policy is not within its scope, as this would imply excessive interference in areas that have been reserved for the legislature.” See Rodrigo Uprimny, Diana Guarnizo, and Juan Jaramillo, *Intervención judicial en cárceles*, 12 FORO CONSTITUCIONAL IBEROAMERICANO 129–63 (2005).

with respect to social justice – the evaluation of the meaning of judicial intervention and its effects on imprisoned populations reveal an important discrepancy. Indeed, there is no consensus on the meaning or impact of case T-153 of 1998 in the field of criminal justice. By some, it is considered a milestone in the legal history of prisons in Colombia, a ruling that significantly improved the status and protection of prisoners:

Despite the difficulties in complying with the decisions or oversights of constitutional judges, it is undeniable that in those cases where they have intervened, they have succeeded in improving the situation of prisoners, which likely could not have been achieved without their participation.⁷

This position is based largely on the content of the ruling – which is controversial in any case⁸ – and does not give much weight to the actual effects of the decision on the Colombian prison system or the *in situ* protection of the fundamental rights of the incarcerated.⁹ By contrast, among those who focus on the implementation phase of USoA rulings

⁷ *Id.* at 21–22.

⁸ As will be seen later in this text, the form in which the Court constructs the case serves to privilege the structural expansion of the prison system, without giving more attention to the design of effective remedies for the protection of the rights of the incarcerated.

⁹ See Libardo Ariza, *Datos sin números: Un acercamiento al orden social en la cárcel La Modelo*, 26 REVISTA DE DERECHO PÚBLICO 1–21 (2011a), for a qualitative approach to living conditions in the Colombian penitentiary system. The case study on living conditions was carried out in La Modelo prison (Bogotá), the facility that triggered the reform process ordered by the Constitutional Court. My first encounter with this prison was in 1999, in *Centro de Investigaciones Sociojurídicas (CIJUS), análisis de la situación carcelaria en Colombia: Un enfoque cualitativo* (Universidad de los Andes 2000), one year after the Court issued the T-153 decision. At that moment, living conditions were extremely harsh, and deprivation, violence, and discrimination were the core of prison social order. Eleven years after the USoA declaration, I came back to do research in La Modelo prison once again. Through direct observation and in-depth interviews, the research team gathered data that strongly suggest that living conditions and violations of inmates' rights remain essentially the same. For inmates and prison staff, case T-153 of 1998 was a victory, indeed, but a pyrrhic one after all.

(and the conceptual shift they propose),¹⁰ it is agreed that the ruling makes substantial contributions to the protection of rights but has a minimal impact on the state of affairs it sought to address. This is due principally to the absence of monitoring systems to verify the ruling's implementation:

Although the court issued a number of short-term orders aimed at addressing the gravest administrative and budgetary flaws underlying prison overcrowding, it stopped short of establishing any meaningful monitoring mechanism. This omission helps explain the decision's overall low impact.¹¹

In both cases, the interpretations of the ruling's significance are not sufficiently supported by a concrete assessment of the impact of its mandates on the Colombian prison system, although both perspectives consider T-153 of 1998 to be a paradigmatic case of judicial enforcement of ESCR through structural reform.¹²

To make a critical assessment of these two opposing positions, I offer a different interpretation of the case, one that suggests that the ruling has had a significant structural impact (quantitative as well as qualitative) but has failed to translate into an effective protection for the prisoners, due

10 The conceptual shift proposed by Rodriguez is based on two assumptions. The first is that most studies on Constitutional Court decisions are concentrated in the production phase of the rulings, without paying much attention to its implementation. It is necessary to consider what kinds of effects are produced in order to establish whether a judicial decision is capable of social transformation. Consequently, the conceptual shift consists in studying how the rulings are implemented and what effects are produced by such decisions, because “we do not have systematic studies on the fate of activist decisions after they are issued.” Rodríguez, *supra* note 2, at 1674.

11 *Id.*, at 1675.

12 According to Rodríguez, structural reform decision may be defined as follows: “I characterize those cases as judicial proceedings that (1) affect a large number of people who allege a violation of their rights, either directly or through organizations that litigate the cause; (2) implicate multiple government agencies found to be responsible for pervasive public failures that contribute to such rights violations; and (3) involve structural injunctive remedies.” *Id.*, at 1671. As we will see later in this chapter, this definition closely matches the Court’s conceptual arrangement that shapes the USoA doctrine.

to the way in which the case was constructed in terms of an incremental implementation of ESCR. Thus, we should reconsider the hypothesis that argues that the case's low impact was caused by the lack of a subsequent monitoring system, as well as the opposite reading that suggests a high-level impact in terms of the protection of rights based on the judicial rhetoric permeating the content of the decision. There is sufficient evidence to reasonably support this assessment.

From the perspective that I advocate, the case's problems emerge upon the framing of the ruling and are accentuated by the definition and implementation of structural remedies. The initial stage in which judges construct the case, namely the production phase, defines the type of remedy, its scope, and its subsequent evaluation in terms of the protection of rights.

To develop my argument, I divide this chapter into the following sections. In the first section, in order to contextualize the doctrine of USoA, I briefly present the Constitutional Court's developing case law on the enforceability of ESCR. In the second and third sections, I explore the principal statements that have been made in both case law and academic commentary about the doctrine of USoA and its relation to the structural reform for the ESCR implementation promoted by the Colombian Constitutional Court.

In Section 4, I turn to the constitutional regime of incarceration, in order to show its particularity and to highlight the problematic nature of situating such cases in the context of judicial enforcement of ESCR through structural reform. To accomplish this, I analyze the ruling in T-153 of 1998 to defend the central thesis of this chapter: that the interpretation of inhumane conditions of detention in terms of an incremental implementation of ESCR within the USoA doctrine constitutes evidence of conservative judicial intervention, which has facilitated the commitment to the expansion of the penitentiary system as the principal strategy for responding to the havoc caused by the excessive use of punitive segregation in a context of high social and economic inequality. In this

sense, the constitutional discourse has opened the prison doors to policies of punitive neoliberalism.¹³

Finally, by way of conclusion, I offer a possible alternative interpretation of the situation, deriving from the prohibition on imposing cruel and unusual punishment, which favors the adoption of remedies oriented to the immediate protection of the imprisoned person. From a political point of view, the construction of the case in these terms can lead to limits on the expansion of imprisonment and the reduction of its use as an instrument for perpetuating conditions of exclusion for the most disadvantaged sectors of society. This last point is precisely one of the strong arguments put forth by those who advocate for a “progressive” judicial activism in matters of the recognition and implementation of ESCR through structural interventions by judges in the social realm.

1 The Development of the Debate on the Legal Enforceability of Economic and Social Rights

In Colombia, the consecration of a wide set of fundamental rights prompted a transformation of the principles that had been articulated and used to describe and establish the relationship between citizens and the state through the constitutional text.¹⁴ The Constitution of 1886,

13 Manuel Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción* (Universidad de los Andes 2010); Manuel Iturralde, *Prisiones y castigo en Colombia: La construcción de un orden social excluyente*, in *LOS MUROS DE LA INFAMIA: PRISIONES EN COLOMBIA Y AMÉRICA LATINA*, 110–94 (Libardo Ariza and Manuel Iturralde eds., Universidad de los Andes 2011); Libardo Ariza, *Reformando el infierno: Los tribunales y la transformación del campo penitenciario en América Latina*, in *LOS MUROS DE LA INFAMIA. PRISIONES EN COLOMBIA Y AMÉRICA LATINA*, 18–108 (Libardo Ariza and Manuel Iturralde, eds., Universidad de los Andes 2011b).

14 The 1886 Constitution enshrined only a few individual rights. The conservative, centralist, and slightly inclusive character of the 1886 Constitution explained many of Colombia’s structural problems. The enactment of the 1991 Constitution was expected to produce a major transformation of social, economic, and political affairs. The definition of Colombia as a state grounded on social justice was a major innovation in this regard, as was the consecration of a wide range of rights. The 1991 Constitution

subsequently replaced by the Constitution of 1991, was based on the pillars of centralism, representative democracy, and the defense and promotion of Catholicism, and the text established only a few individual rights.¹⁵ Since the issuance of the Constitution of 1991, the prominence of the Constitutional Court has often been analyzed in the Colombian context. The Court has intervened forcefully in different spheres of Colombian society, prompting significant changes in judicial and social practices.¹⁶ These changes can be observed in its position on the defense

devotes part II to Rights, separating them into three chapters (“Fundamental Rights”; “Economic, Social, and Cultural Rights”; and “Collective and Environmental Rights”). Both academically and jurisprudentially, the debate has focused on identifying which of those rights may be consolidated through a writ of protection, that is to say, to define the criteria for determining whether a right is immediately applicable or whether it requires an incremental development. The Constitutional Court stated the following in one of its first rulings (case T-496 of 1992): “For a constitutional right to be considered as fundamental, it must be the result of a direct application of the Constitution, without requiring a normative intermediation policy... In this scheme the constitutional judge takes a leading role, since it enjoys a considerable margin of freedom to determine, in each case, when fundamental rights can be identified, defining the specific remedies for their protection,” Constitutional Court, case T-496 of 1992. This position of the judge is also related to a political agenda that seeks the renewal of constitutional law in the region: “A new interpretation of the charter of rights will be constructed in order to adjust itself to the reality of underdevelopment (new constitutionalism for Latin America),” Colombian Constitutional Court, case T-496 of 1992.

15 Uprimny states the following regarding the weakness – or near nonexistence – of the enforcement of rights before 1991: “Many factors explain this lack of enforcement, but I will stress only two: first, the previous Constitution had a rather meager Bill of Rights; and secondly, the Supreme Court of Justice, which was responsible for judicial review during this period, understood that its function was not primarily to develop and protect rights, but mainly to resolve conflicts between state institutions.” Uprimny, *supra* note 5, at 128.

16 The Colombian Constitutional Court is arguably the institution that enjoys the greatest credibility and legitimacy in the Colombian context, as opposed to the legislative branch, which is considered a bastion of corruption, inefficiency, cronyism, and political patronage. See Mauricio García y Rodrigo Uprimny, *Tribunal Constitucional y emancipación social en Colombia*, in DEMOCRATIZAR A DEMOCRACIA: OS CAMINHOS DA DEMOCRACIA PARTICIPATIVA (Boaventura de Sousa Santos ed., Afrontamiento, 2002). It not only has broad social support, as shown by a public opinion favorable to its performance (see *Centro de Investigaciones Sociojurídicas*, *supra* note 9), but has also replaced the legislative branch as a forum for discussion of sensitive political and social issues. As pointed out by Landau: “the Colombian Constitutional Court has viewed

of the rights of minorities; in its stance on the control of presidential extraordinary powers; and, principally, in its position regarding the proper application of the Constitution in matters of ESCR. The intervention of the Court in the case of populations displaced by the armed conflict in Colombia is possibly the most significant example.¹⁷

Since the consecration of a Bill of Rights, the identification and definition of fundamental rights that can be enforced through the judiciary has been a core constitutional issue. Most of the legal and doctrinal discussions have hinged on the role of the Constitutional Court in the enforcement of fundamental rights, especially when it comes to the contested issue of judicial application of ESCR. The relatively open character of the constitutional text, together with the need for unification of constitutional case law issued by regular judges,¹⁸ has prompted the

these political conditions as a license to become perhaps the most activist court in the world. Most importantly here, the Court has acted as a replacement for the legislature at various times by injecting policy into the system, by managing highly complex, polycentric policy issues, and by developing a thick construct of constitutional rights that it uses to check executive power.” See David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51(2) HARV. INT’L. L.J. 321 (2010). The legitimacy of the Court is also grounded in its loyalty to the spirit of Colombian Constitution of 1991: “In this way the Court has become practically the only body capable of implementing the original constitutional project, an image that has afforded significant legitimacy in certain social sectors. However, it frequently walks on a knife edge because its progressive decisions have resulted in energetic criticism from other social and political sectors.” Uprimny, *supra* note 5, at 130.

17 Rodríguez describes the case as follows: “in January 2004, the Colombian Constitutional Court (CCC) aggregated the constitutional complaints (*tutelas*) of 1,150 displaced families and handed down its most ambitious ruling in two decades of existence: Judgment T-025 of 2004. In this decision, the CCC declared that the humanitarian emergency caused by forced displacement constituted an “unconstitutional state of affairs;” that is, a massive violation of rights associated with systemic failures in state action.” Rodríguez, *supra* note 2, at 1670.

18 The Colombian Constitutional Court has distinguished between two categories of constitutional control. The first category is known as an *abstract* and *concentrated* approximation. This control is performed only by the Constitutional Court under the interposition of a public action of unconstitutionality. In this case, the Court verifies the correlation between the text’s legal and constitutional rules that are supposedly overlooked. The second category is defined as diffused constitutional control. This type of control is exercised by any judge who receives a writ of protection, regardless of its

development of a doctrine defending the active role of the judiciary in this field. The Colombian Constitutional Court has established a series of statements to identify those rights that would be enforceable through the courts, primarily through the filing of an *acción de tutela*.¹⁹ Since the issuance of the Constitution, the Court defended a nonformal approach to the definition of fundamental rights, stating that fundamental rights subject to immediate application are not only those defined as such by the constitutional text.²⁰ That position was clearly in favor of judicial

jurisdiction. When the judge decides the case, the ruling must be sent to the Constitutional Court which, by its own discretion, chooses which cases are reviewed. Isabel Jaramillo and Antonio Barreto, *El problema del procesamiento de información en la selección de tutelas por la Corte Constitucional, con especial atención al papel de las insistencias*, 72 COLOMBIA INTERNACIONAL 53–86 (2010).

19 The writ for the protection of fundamental constitutional rights (*acción de tutela*) is possibly one of the main innovations introduced by the Colombian Constitution of 1991; it has been described as “one of the most powerful instruments for the protection of fundamental rights and the promotion of democratic constitutional culture in Colombia.” Catalina Botero, *LA ACCIÓN DE TUTELA EN EL ORDENAMIENTO CONSTITUCIONAL COLOMBIANO* 183 (Escuela Judicial Rodrigo Lara Bonilla 2006); Catalina Botero, *Acción de tutela*, in *MANUAL DE CONSTITUCIÓN Y DEMOCRACIA* 181–201 (Henrik López ed., Universidad de los Andes, 2010). Allowing direct access to the constitutional jurisdiction, it has been widely used by the public because it is an informal mechanism that can be filed by any citizen in any court without legal representation, and is one that should be resolved within ten days. For a discussion of how this mechanism operates in the Colombian context, refer to Iturralde’s work in this book. For a general description and analysis of the mechanism, see Botero, *id.* According to Arango, the debate about the judicial application of ESCR involves a prior cognitive problem that concerns the form in which fundamental rights are defined and identified. What would appear to be a purely theoretical issue has important practical consequences in the Colombian context: When a right is considered *fundamental*, it can be enforced by means of an *acción de tutela* before any judge. The fundamental character of a right thus coincides with the possibility of direct enforcement. See Rodolfo Arango, *La justiciabilidad de los derechos sociales fundamentales*, 12 REVISTA DE DERECHO PÚBLICO 185 (2001).

20 To this end, the interpreter should refer primarily to title II and article 86 of the Constitution, which define the rights that may be demanded directly by means of the *acción de tutela* (see Botero, *supra* note 19). Likewise, according to the case law of the Constitutional Court, there are unnamed fundamental rights, that is, rights that are linked with human dignity and that can be reasonably deduced from a broad interpretation of the constitutional text without having to be explicitly stated, such as the right to a minimum standard of living. See case T-200 of 2011, noting that persons with disabilities

definition of fundamental rights, and it was further developed when the Court established that ESCR – while primarily rights of a provisional character whose application pertains to the legislative branch on account of their incremental nature – may be demanded through an *acción de tutela* whenever there is a connection between the violation of ESCR and the involvement of a fundamental right of immediate application.²¹

Recently, the Court changed its position on the judicial review of ESCR. The change, however, was to go even further. The new doctrine claims that a person who files an *acción de tutela* does not have to establish a connection between the impact on an ESCR and the possible violation of a clearly fundamental right, consequently being able to demand enforcement directly before the judges.²² Accordingly, the Court decreed that the right to health should be considered a fundamental right (of direct enforceability) of a provisional character (considering the

are subjects of special constitutional protection regarding access to social security, and case T-797 of 2008 and T-057 of 2011, noting that terminally ill patients are entitled to special protection regardless of their economic situation.

21 The case par excellence to illustrate this doctrine is the relationship between the violation of right to health and/or social security and the right to life and personal integrity. Thus, if a person registered with the social security system failed to receive medical treatment that was considered necessary for avoiding irreparable damage, the *acción de tutela* would act to protect the right to life in connection with the right to health. Consequently, the Court's ruling should order that the service or treatment be granted to the individual, even if he or she had not been included in the Compulsory Health Plan. See, for example, the following CCC decisions: T-271/1995; T-395/1998; C-112/1998; T-150/2000; T-1239/2001 and T-633/2002. According to recent studies, nearly 60 percent of the *acción de tutela* cases received by the CCC for review and selection address a dispute concerning ESCR. Of these, a large proportion corresponds to the right to social security and the right to health. Therefore, “more than half of the *Tutela* rulings by the Constitutional Court between 1992 and 2006 dealt with social rights.” María Paula Saffón and Mauricio García, *Derechos sociales y activismo judicial: La dimensión fáctica del activismo judicial en derechos sociales en Colombia*, 13(1) REVISTA DE ESTUDIOS SOCIO-JURÍDICOS 75–107 (2011).

22 In the case T-760 of 2008 the Court stated that “the provisional and incremental aspect of a constitutional right allows the holder of such right to demand via the judiciary at least (1) the existence of a public policy, (2), that such policy should be aimed at ensuring the effective enjoyment of the right, and (3) that such policy provide mechanisms for the participation of interested parties.”

nature of the legal action for its implementation).²³ The above doctrine, which is clearly in favor of giving more weight to ESCR, can be seen as a move toward a more progressive position on ESCR in a context of high social inequality and poverty.

This short depiction reasonably demonstrates that the development of case law can be described as progressive, in spite of equally reasonable readings that would indicate the Court's timidity in assessing certain regressive reforms concerning ESCR.²⁴ However, the Court's statements regarding the nature and enforcement of fundamental rights of prisoners do not follow the same line of reasoning. The regime defining the fundamental rights of prisoners lies in the shadows of the discussion regarding ESCR enforceability. Overwhelmed by the paramount debate on judicial application of ESCR, the special nature, scope, and enforcement of the rights of prisoners have been mistakenly mingled with the broader fundamental rights discourse. The application of the USoA doctrine to the situation of Colombian jails and prisons is an unfortunate example of this.

The above-mentioned confusion – applying categories and strategies to the enforcement of the rights of free citizens in order to address the violation and remedies regarding rights of prisoners – paradoxically produces regressive effects and the stagnation of a progressive agenda aimed at the reduction of imprisonment. Thus, a doctrine that can be considered progressive in terms of the enforceability of ESCR can produce

23 See Diego López, *El derecho fundamental a la salud y el sistema de salud: Los dilemas entre la jurisprudencia, la economía y la medicina*, in LA PROTECCIÓN JUDICIAL DE LOS DERECHOS SOCIALES 375–415 (Ministerio de Justicia y Derechos Humanos de Ecuador 2009), and Alicia Yamin and Oscar Parra, *How Do Courts Set Health Policy? The Case of the Colombian Constitutional Court*, 6(2) PLOS MED. (2009), describing the Colombian Constitutional Court enforcement of the right to health, as well as its economic impact on the social security system. It is estimated that court decisions responding to this type of litigation cost the public US\$7 million per year. Saffón and García, *supra* note 21, at 97.

24 María Paula Saffón, *Can Constitutional Courts Be Counterhegemonic Powers Vis-à-Vis Neoliberalism? The Case of the Colombian Constitutional Court*, 5(2) SEATTLE J. SOC. JUST., 533–67 (2006).

conservative effects when used to translate the situation of individuals deprived of their liberty into judicial discourse, primarily due to the type of remedies involved. This paradox has passed unnoticed by local academic production, which tends analytically to equate the case of the prisoner, the health system user, and the displaced person by categorizing them as ESCR cases, but also as cases of structural reform under the USoA doctrine that I discuss here.²⁵

2 The Unconstitutional State of Affairs

The USoA doctrine is invoked when a case meets four criteria. The first refers to a quantitative indicator, or when the Constitutional Court receives a considerable number of *acciones de tutela* to review in which the issues raised coincide with the legal status of petitioners and

25 An argument against structural reform to inadequate prison conditions and facilities does not imply opposing any form of judicial intervention. Judicial intervention in the prison world has a significant symbolic value. See Iñaki Rivera, *LA DEVALUACIÓN DE LOS DERECHOS FUNDAMENTALES DE LOS RECLUSOS: LA CONSTRUCCIÓN JURÍDICA DE UN CIUDADANO DE SEGUNDA CATEGORÍA* (José María Bosch 1997); Edward Fitzgerald, *Prison Discipline and the Courts*, in *ACCOUNTABILITY AND PRISONS: OPENING UP A CLOSED WORLD* 29–45 (Mike Maguire, Jon Vagg, and Rod Morgan eds., Tavistock Publications 1985); Geneva Richardson, *Judicial Intervention in Prison Life*, in *ACCOUNTABILITY AND PRISONS: OPENING UP A CLOSED WORLD* 46–60 (Mike Maguire, Jon Vagg, and Rod Morgan eds., Tavistock Publications 1985); Barton Ingranham and Charles Wellford, *The Totality of Conditions Test in Eighth-Amendment Litigation*, in *AMERICA'S CORRECTIONAL CRISIS: PRISON POPULATIONS AND PUBLIC POLICY* 14–36 (Stephen D. Gottfredson and Sean McConville eds., Greenwood Press 1987); Malcolm Feeley and Edward Rubin, *JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW COURTS REFORMED AMERICA'S PRISONS* (Cambridge University Press 1998). The problem is the way it intervenes and what it involved. The argument developed here is against the intervention based solely on resource allocation, which normally leads to the construction of more prisons. The prison has an expansionist nature; “the prison system as a social institution is never satisfied, it is like an animal whose appetite grows by feeding.” Thomas Mathiesen, *Argumentos contra la construcción de nuevas cárceles*, 9–10 *DELITO Y SOCIEDAD* 117–23 (1998). An argument against the prison institution can be found in Thomas Mathiesen, *PRISON ON TRIAL* (Waterside Press 2000); L. Housman and J. Bernat De Celis, *SISTEMA PENAL Y SEGURIDAD CIUDADANA: HACIA UNA ALTERNATIVA* (Ariel 1984); Massimo Pavarinni, *¿Menos cárcel y más medidas alternativas?*, 2 *DELITO Y SOCIEDAD* 75–85 (1992).

respondents. Thus, widespread use of *acción de tutela* is an indicator that a sector of the Colombian state may be violating fundamental rights in a gross and systematic fashion. For reasons of efficiency, the Court chooses to aggregate similar cases so that it can issue a single decision and thus avoid the collapse of the administration of justice.

A second criterion is the verification of the systematic and structural violation of fundamental rights in a gross and generalized manner. In this sense, the first component of the USoA doctrine refers to the dimension and extent of the damage. The third criterion has to do with the agent that perpetrates the damage. In these cases, the Court finds that the violation of fundamental rights is the result not of an individual action, but of the malfunctioning of the state as a whole. This malfunctioning, which must be structural and historical, therefore requires the adoption of measures of equal or similar scope. The fourth and last component of this doctrine is possibly the most controversial, as it involves the adoption of remedies, the content and scope of which correspond to the legislative branch under a traditional model of separation of powers, primarily because those remedies involve decreeing the design of public policies and institutional reforms that carry a significant allocation of resources.²⁶

On the basis of this, the Constitutional Court has established the existence of a USoA for circumstances such as gaps in social security for public school teachers,²⁷ for the systematic violation of the rights of beneficiaries entitled to a retirement pension,²⁸ for the absence of a system of selection for Notary and Registration (civil service) posts,²⁹ for the violation of the rights of individuals held in prisons and correctional

26 Ariza, *supra* note 1.

27 Constitutional Court of Colombia, case SU-599 of 1997.

28 Constitutional Court of Colombia, case T-068 of 1998. See also case T-891 of 2010, noting that the USoA cannot be a “perpetual situation.”

29 Constitutional Court of Colombia, case SU-250 of 1998 and case SU-913 of 2009, noting that the USoA still exists regarding the system of selection for civil service applicants.

facilities,³⁰ and for the violation of the rights of victims of forced displacement in the context of the armed conflict in Colombia.³¹

In general terms, the USoA doctrine has been well received in the local context. In fact, Rodríguez has stated:

In a paradoxical twist of social and legal history, one of the countries with the most serious violations of human rights has come to be a net exporter of constitutional case law and institutional innovations to ensure compliance with ambitious rulings on human rights. Today, the case law of the Court in general, and rulings on the USoA doctrine in particular, are cited by courts in Latin America and elsewhere, and are usually included in the comparative studies of constitutional case law.³²

The doctrine of USoA has certainly had a significant impact. On the one hand, for legal clinics and legal activists in human rights, a USoA declaration implies that the state acknowledges responsibility and can be held accountable for its poor performance in enforcing and guaranteeing rights for a significant population. In this sense, uttering a USoA declaration means claiming victory in the judiciary field.³³ On the other hand,

30 Constitutional Court of Colombia, case T-153 of 1998.

31 Constitutional Court of Colombia, case T-025 of 2004.

32 César Rodríguez, *Un giro en los estudios sobre los derechos sociales: El impacto de los fallos judiciales y el caso del desplazamiento forzado en Colombia*, in DERECHOS SOCIALES: JUSTICIA, POLÍTICA Y ECONOMÍA EN AMÉRICA LATINA 83–154 (Pilar Arcidiácono, Nicolás Espejo, and César Rodríguez eds., Universidad de los Andes, Universidad Diego Portales, CELS, LAEHR, 2010).

33 The presence and activity of legal clinics in the Colombian context is a relatively recent phenomenon. Some law schools have created these programs, including the three clinics of the University of the Andes' Law School (Global Justice, Public Interest Law Clinic, and Program of Action for Social Inclusion and Equality), and programs that have started in other universities like Rosario University. Correspondingly, nongovernmental organizations that promote advocacy have incorporated proceedings before the Constitutional Court of Colombia into their strategies. The experience of Women's Link World Wide and its litigation to achieve the decriminalization of abortion is probably the most significant case in this regard. This has been denominated in the local context as "high impact litigation." In both cases, the Constitutional Court becomes a forum for political and social discussion about the transformation of Colombian society. For an assessment of the emergence of legal clinics in the Latin American

the doctrine clearly aims to address structural problems and hardships that swamp efficient institutional performance, creating institutional and dialogical spaces for policy decision making that “unblocks” an obsolete institutional arrangement. Thus, the USoA discourse produces a complex array of effects, most of them reasonably labeled as progressive, which affect and even shape social attitudes and institutional responses toward marginalized and neglected society members.³⁴

The best example of this is the decision stating that the lack of protection for individuals forcibly displaced by armed conflict generated a gross violation of their fundamental rights. Due to the magnitude of both the problem faced and the institutional designs generated for monitoring compliance with the orders contained in the ruling, this case has become a regional benchmark of structural judicial intervention in the implementation of fundamental rights, including ESCR. In fact, Rodríguez and Rodríguez³⁵ claim that the Court has actually “changed” social and institutional attitudes toward forcibly displaced persons.

The justification of the Court’s role and its form of intervention in this case – and in the USoA cases in general – is based primarily on the argument that institutional barriers or inefficiency impede the proper implementation of ESCR. In this context, the Court seems to be an appropriate body for “unblocking” the institutional and bureaucratic problems

context, see Marta Villareal and Christian Courtis, *ENSEÑANZA CLÍNICA DEL DERECHO: UNA ALTERNATIVA A LOS MÉTODOS TRADICIONALES DE FORMACIÓN DE ABOGADOS* (ITAM 2007); Centro de Estudios Legales y Sociales (CELS), *LITIGIO ESTRATÉGICO Y DERECHOS HUMANOS. LA LUCHA POR EL DERECHO* (Siglo XXI Editores 2008); Isabel Jaramillo and Tatiana Alfonso, *MUJERES, CORTES Y MEDIOS: LA REFORMA JUDICIAL DEL ABORTO* (Siglo del Hombre Editores 2008); Daniel Bonilla, *JUSTICIA COLECTIVA, MEDIO AMBIENTE Y DEMOCRACIA PARTICIPATIVA* (Universidad de los Andes 2010); Ana Coral, Beatriz Londoño, and Lina Muñoz, *El concepto de Litigio Estratégico en América Latina: 1990–2010*, 121 *UNIVERSITAS* 49–76 (2010).

34 For a typology of the effects generated by a USoA declaration, see Rodríguez, *supra* note 2, at 1679. The typology distinguishes between direct material effects (designing public policy), indirect material effects (forming coalitions of activists), direct symbolic effects (defining the problem as a violation of rights), and indirect symbolic effects (transforming public opinion).

35 Rodríguez and Rodríguez, *supra* note 4.

that obstruct the full enjoyment of rights, which generally involves the adoption of structural reforms:

We note frequent instances in which the bureaucracies and political systems of contemporary democracies encounter structural deadlocks that frustrate the materialization of ESCR. In such circumstances of institutional “blockage,” derived from serious shortcomings such as the absence of public policies to address pressing social problems, we argue that the courts are the appropriate body for unblocking the functioning of the State and promoting the protection of rights.³⁶

However, the structural reform perspective turns out not to be so promising when it sheds light on the penitentiary field. Indeed, unblocking an institutional arrangement designed to provide education or health services is quite different from unblocking a set of institutions delivering punishment services disproportionately affecting the poorest and most marginalized sectors of Colombian society. For prisoners, paradoxically, winning the case and achieving a USoA declaration may entail a worsening of their structural situation. In the next section, I concentrate on an analysis of ruling T-153 of 1998 to show how the application of this discourse to the realm of prisons can produce unwanted effects: chiefly, the perpetuation of a state of affairs characterized by the systematic violation of the fundamental rights of a group of people in situations of structural disadvantage, in this case, those incarcerated in Colombia.

3 Structural Reform and Judicial Intervention: Case T-153 of 1998

Judicial involvement in the issue of inhumane prison conditions is generally interpreted in the local literature in terms of the framework of theory and case law on ESCR. This involves assuming an important implication

36 *Id.* at 89.

that has not been studied in detail, despite the fact that the Colombian Constitutional Court itself has articulated it repeatedly. The Court has defined the special nature of the bond uniting the prisoners and the state as a *special relationship of subjection*.³⁷ Thus, in theory, the economic and social rights of prisoners are immediately applicable, which means that the argument on the incremental implementation of these rights should be evaluated more closely, as should the role of the judiciary with respect to their effective implementation. This is precisely the basis of the “special” nature of prisoners’ rights.³⁸ On this matter the Court has stated:

Indeed, if the government does not meet the minimum standard of living of the individual deprived of his or her liberty, in terms of food, housing, sanitary supplies, the provision of health services, etc., the individual who is secluded in a detention center will be unable, precisely because of the special circumstances, to obtain such benefits for him- or herself. Poor or irresponsible performance in this matter could thus cause intolerable suffering in terms of the Social State of Law.³⁹

Thus, in the case of the incarcerated person, the traditional distinction between positive and negative rights assumes a special meaning.⁴⁰ As a direct consequence of the deprivation of liberty, the state immediately assumes active duties to provide those goods and services to the prisoner that he or she cannot obtain alone. To maintain a life with the minimum of human dignity, the state assumes a special duty to provide food, clothing, a place to sleep, and healthcare. Although the content of these

37 See Libardo Ariza, *La prisión ideal: Intervención judicial y reforma del sistema penitenciario en Colombia*, in HACIA UN NUEVO DERECHO CONSTITUCIONAL 283–328 (Daniel Bonilla and Manuel Iturralde eds., Universidad de los Andes 2005); Ariza, *supra* note 13. See also the following Constitutional Court cases defining the doctrine and its scope: case T-793 of 2008; case T-023 of 2003, and case T-023 of 2010.

38 See Richardson, *supra* note 25.

39 Constitutional Court of Colombia, case T-792 of 2005.

40 For discussions regarding the “special nature” of prisoners’ rights see, among others, Ariza, *supra* note 37; Rivera, *supra* note 25; Fitzgerald, *supra* note 25; Richardson, *supra* note 25.

rights is still economic (provisional), their enforcement is not incremental but immediate, precisely because of the confinement. The state is thus “obligated to provide the necessary conditions for a dignified life, particularly those having to do with food supply, the allocation of space for habitation, and public services, among others.”⁴¹ This doctrinal precision indicates an important difference between the case of the incarcerated and other cases of the judicial enforcement of ESCR through structural reform.

The second implication, as we shall see, has to do with the gap in the discourse when connecting the framing of the ruling and the definition and subsequent implementation of the remedies. The Court affirms in the construction phase of the T-153 case that the state has an immediate obligation to allocate goods and services, but, when it comes to defining remedies, the Court changes the situation to a traditional case of incremental application through structural reform, excluding other possible remedies. This sort of about-face can explain, in my opinion, the two opposing views on the significance of T-153 case of 1998 and the difficulties surrounding the evaluation of the Court’s performance in this matter.

4 The Impact of Ruling T-153 of 1998 and the Effects of Structural Reform in Prisons

The construction phase of a case implies, both judicially and theoretically, the framing a particular factual situation in a specific legal debate, thus indicating the type of remedy that can be given. Factual situations brought to the courtroom are translated by experts into a specific legal language that makes them intelligible for the legal discourse. Bourdieu refers to the effect that legal language exerts on reality as the *transmutation effect*.⁴² So, although the petitioner’s problem is that he is

41 Constitutional Court of Colombia, case T-615 of 2008.

42 Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987).

sleeping in a narrow cell with six others, a type of torture or cruel and unusual punishment, for local legal technicians, the case constitutes a violation of ESCR within the general doctrine of USoA. Certain transmutations, such as defining inhumane confinement conditions as a problem of ESCR and not as a case of the rights to liberty, may cause a petitioner to continue sleeping in these conditions until he has finished serving his sentence, without the judges even deigning to admit that he is a victim of a currently occurring violation of fundamental rights. Thus, the effects of constitutional discourse cannot be fully appreciated without an accompanying analysis of how the discourse was formed, the ideology that surrounds it, and the statements and remedies it contains.⁴³

According to this line of thought, a close relationship exists between the construction of a case and the remedies adopted. This relationship is affected by elements from the legal field, as well as external influences that shape the problem's emergence, the manner in which the problem should be understood, and the remedies that should be implemented in response. These elements should therefore be taken into account in order to describe a particular form of judicial intervention as progressive or not, and also to study the formation of the rulings along with their subsequent implementation phase. Otherwise, we may run into the problems mentioned at the beginning of this chapter regarding the evaluation of judicial performance.

In addition to considering the process of judicial intervention on significant social issues in a holistic manner, it is also possible to maintain the specificity of each of these situations. One problem with analyzing the definition of cases on the basis of the legal discourse of ESCR and their correlation with structural reform is that it groups the situations in the same analytical category without paying sufficient attention to the

43 James Robertson, *The Role of Ideology in Prisoner's Rights Adjudication: Habitual Prison Conditions and the Eighth Amendment*, in CRIMINAL POLICY MAKING 355–77 (Andrew Rutherford ed., Aldershot 1997); Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 UNIV. PENN. L. REV. 807–911 (1989–90).

specificity of each intervention. Thus, in terms of the USoA doctrine, forcibly displaced persons would be comparable with an incarcerated individual living in inhumane conditions. Although it is useful and reasonable to turn to comparative case studies, one should not lose sight of the fact that the intervention in criminal justice involves distinctive interests, actors, and values that are brought into play in a field of institutions and legal doctrines distinctive to incarceration, despite shared features with other cases interpreted through the lens of the USoA doctrine. Judicial intervention in prisons alone entails a multitude of positions on how a case may be constructed, the role of the judiciary in this process, and the definition of remedies and their subsequent implementation.⁴⁴

4.1 *The Construction of the Case*

In 1998, a number of people detained in the prisons Bellavista in Medellín and La Modelo in Bogotá filed *acciones de tutela* “to prevent irreparable injury from having to continuously withstand this torture.”⁴⁵ The torture to which the claimants were referring was none other than the living conditions in Colombian prisons. At the time when the case was brought, the penitentiary system had reached the worst of its crisis. Jails were governed by gangs; overcrowding had reached 40 percent; 44 percent of the prison budget was spent on operational costs, leaving only US\$5 a day to spend on each prisoner; only 34 percent of inmates

44 Judicial intervention in prisons has been widely studied. See Malcolm Feeley and Roger Hansen, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in COURTS, CORRECTIONS AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISON AND JAILS 12–46 (John DiIulio ed., Oxford University Press 1990); Robert Bradley, *Judicial Appointment and Judicial Intervention: The Issuance of Structural Reform Decrees in Correctional Litigation*, in COURTS, CORRECTIONS AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISON AND JAILS 249–67 (John DiIulio ed., Oxford University Press 1990); Feeley and Rubin, *supra* note 25; Robertson, *supra* note 43; Ted Storey, *When Intervention Works: Judge Morris E. Lasker and New York City Jails*, in COURTS, CORRECTIONS AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISON AND JAILS 138–72 (John DiIulio ed., Oxford University Press 1990).

45 Constitutional Court of Colombia, case T-153 of 1998.

were enrolled in study or work programs; there was one guard for every 14 prisoners; one person died every four days; and 364 prisoners were injured every year.⁴⁶

The Court must translate those facts to the language of constitutional adjudication. To do so, to build a case, the Court chooses a particular scale of approach. Its response will vary according to the scale of approach used to address the reality under review and the size of the case.⁴⁷ On this occasion, the Court chose a scale that eliminated detail, focusing on the institutional and structural aspects of the situation and on the historical context that would explain why prisoners were sleeping on top of each other in the prison's hallways. This scale enables us to see the prison and its functional needs clearly, but it also makes us lose sight of the individuals and their suffering.

The scale of approach also implies a specific management of *time*. The Court relies on a time frame in which the current situation is nothing but the inevitable continuity between different stages of institutional crisis. This crisis is caused by the “age of the prisons”⁴⁸ and by the fact that “prisoners are not a political group that can make their voices heard,” as “their demands and complaints are lost among all the needs that plague underdeveloped societies like Colombia.”⁴⁹ Paradoxically, the Court assumes the voice of the “people marginalized by society” in order to mandate the construction of more and better prisons in which to lock them up.⁵⁰

46 INPEC (National Penitentiary and Prisons Institute), *Penitentiary Statistics* (1999).

47 Boaventura de Sousa Santos, *Law: A Map of Misreading; Toward a Post-Modern Conception of Law*, 14(3) J.L. Soc. 279–302 (1987).

48 Constitutional Court of Colombia, case T-153 of 1998.

49 *Id.*

50 There is no doubt that in giving voice to the demands of minority social groups the Constitutional Court's “performance of social transformation, using Glopén's terms, has been notable in denouncing the situation of human rights violations suffered by prisoners. However, the situation is legitimized through the announcement that it is inevitable that prisoners will continue to suffer the negative consequences arising from this state of affairs while the system is being reformed.” Siri Glopén, *Courts and Social Transformation: An Analytical Framework*, in COURTS AND SOCIAL

Once the case is constructed as the manifestation of a historical reality, it is easier to avoid the discussion of policies dedicated to present-day situations in the case law. Perhaps the biggest gap in this ruling is the fact that it does not explain – or even discuss – why people currently imprisoned must bear the burden of inhumane living conditions, or why they should spend years in “centers where fundamental rights are systematically violated”⁵¹ *while the system is being reformed*, given the clarifications made on the implications for the immediate enforceability of prisoners’ rights. It is here that we can observe the sizable gap between the construction of the case and the definition of the remedies that would lead to the immediate protection of rights.

The third factor that delineates the constitutional discourse is therefore the definition of the remedies. If the situation described by those incarcerated in La Modelo and Bellavista penitentiaries is the manifestation of a historical problem, the solution must require an effort of equal proportions. To the extent that the prison is the protagonist of this sad story, all measures adopted in the ruling are oriented towards its modernization, to improving its administrative structure, ensuring its good governance, and expanding its capacity and safety because it is understood that the rights of prisoners will be respected when these elements are in place. The remedies adopted by the Constitutional Court are revealing:

Third.- THE COURT ORDERS INPEC [National Penitentiary and Prison Institute], the Ministry of Justice and Law, and the National Planning Department to develop, within a period of three months from the notification of this decision, a plan for the construction and renovation of prisons aimed at ensuring prisoners a dignified way of living.

Fourth.- THE COURT ORDERS the Ministry of Justice and Law, INPEC and the National Planning Department...to complete the

TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 35-52
(Roberto Gargarella, Pilar Domingo, and Theunis Roux ed., Ashgate 2006).

51 Constitutional Court of Colombia, case T-153 of 1998.

plan for the construction and renovation of prisons within a maximum of four years, in accordance with the provisions of the National Development and Investment Plan.

The main symbolic effect of constructing the legal discourse in this way is the recognition and acceptance that the prisoners must stoically endure the conditions that the Court has described as inhumane while the system is reformed. One does not need to rely solely on the rhetoric of rehabilitation that nourishes the ruling as a dictum in order to understand the ideology defended by the Court. In this sense, it is arguable to describe the content of the ruling as highly protective of fundamental rights.⁵²

As for the symbolic effects, constructing the legal case in the terms set forth above strengthens the concept of crime as a phenomenon resulting from free will, with no relation to the social and economic context, and it therefore assumes that the prisoner must accept and serve his or her term of imprisonment under inhumane conditions while the state of affairs imagined by the judges is achieved. This seems to be a discourse in which the prisoner is told that what is happening to him or her is unfair, but that it is nonetheless fair for him or her to assume the burden of structural reform. In this regard, two of the assumptions of neoliberal penalization – the explanation of misconduct as a result of free will and the concept of incapacitation as punishment – are reinforced by this constitutional discourse.⁵³

4.2 The Effects of the Ruling

Although neither causal nor deliberate, this structural judicial intervention in the field of criminal justice fosters the arrival of neoliberal policies for the treatment and punishment of social conflict resulting from

52 Rodríguez, *supra* note 2; Uprimny, Guarnizo, and Jaramillo, *supra* note 6.

53 Malcolm Feeley and J. Simon, *La nueva penología: Notas acerca de las estrategias emergentes en el sistema penal y sus implicaciones*, 6–7 DELITO Y SOCIEDAD 33–58 (1999); Löicq Wacquant, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (Duke University Press 2009).

social and economic inequality. In this context, the so-called institutional blockage – one of the main principles articulated in the discourse that supports this type of legal action – can turn into an argument or even an excuse for the horizontal expansion of the penal network and the mechanisms of social control aimed at the containment of common crime. In this regard, the Colombian Constitutional Court seems to be a facilitator for hegemonic, neoliberal policies shaping the penitentiary field.⁵⁴

The structural effects of the ruling have been enormous, so studies that speak of a minimal level of impact are confusing. Even if one reduces the discussion to a debate on empirical evidence, on its availability and interpretation, or to establishing relationships of causality between a particular ruling and the transformation of a specific area, it is worth mentioning some data that show a more than reasonable relationship between the T-153 case of 1998 and the expansion of the Colombian penitentiary system.

There is a relationship between the T-153 case of 1998 and the programs developed in recent years for the reform and expansion of the Colombian penitentiary system. To track the effects of this decision, it is best to begin with a document prepared by the National Penitentiary and Prison Institute (INPEC), entitled “General Program to Comply with Constitutional Court Ruling T-153 of April 28, 1998,” developed a few months after the announcement of that decision. This program suggests two fronts of action: first, the construction of prefabricated modules attached to existing facilities to generate space for 2,000 additional prisoners, and, second, the construction of three “incarceration complexes” to create 5,600 new spaces.

This document was sent to the National Planning Department (NPD), the entity that took the lead in coordinating the various public bodies involved in the implementation of the ruling.⁵⁵ I do not

54 Saffón, *supra* note 24.

55 National Planning Department, Justice and Security Department, Actions Developed to Comply with the T-153 Decision (March 2002) (unpublished manuscript, on file with author).

Table 3.1. *Colombian Penitentiary System Expansion after the T-153 Case of 1998*

Prison and Jail Facilities	Inmate Capacity	Budget (Millions of US\$)
Medellín	2,100	49.58
Puerto Triunfo	1,200	27.02
La Picota	3,200	47.40
Guaduas	2,600	40.23
Acacías	800	20.32
Yopal	800	27.69
Florencia	1,400	31.30
Jamundí	4,000	77.75
Cartagena	1,600	7.97
Cúcuta	1,200	33.40
Ibagué	2,700	72.69
Total	21,600	435.33

Source: Ariza, *supra* note 13, at 66.

wish to provide a detailed description of the process of “institutional unblocking” that led to a consensus on the compliance with the ruling in terms of building and expanding space in the prisons. It is worth noting, however, that the overall effects of the decision on the prison system are evident in the key policy documents on the recent history of jails in Colombia.⁵⁶ These documents initially established that the appropriate response for implementing ruling T-153 of 1998 was the creation of space for 24,628 inmates at a total cost of 363.4 billion pesos. From that moment on, a process of expansion was triggered, resulting in the creation of eleven new prisons (see Table 3.1).⁵⁷

56 National Planning Department. CONPES 3086, “Expanding prison infrastructure,” Bogotá, July 14, 2000. CONPES 3277, “Strategy for the Expansion of the Domestic Penitentiary and Prison Capacity,” Bogotá, March 15, 2004. CONPES 3412, “Strategy for the Expansion of Domestic Prison Quota Supply and Prison Monitoring,” Bogotá, 2006, and CONPES 3575, “Strategy for the Expansion of the Domestic Penitentiary and Prison Capacity,” Bogotá, 2009.

57 Iturralde, *supra* note 13; Public Interest Law Group and Carlos Costa, *Immigration and Human Rights Clinic, Situación Carcelaria en Colombia: Informe Presentado Al Cidh de las Naciones Unidas* (Universidad de los Andes 2010). See, for example, Acto Administrativo No. 1286, May 4, 2001, creating the Acacías facility as a measure adopted to comply with the T-153 decision of 1998.

The second direct effect of the ruling has to do with the process of institutional and bureaucratic reinforcement of the local prison system by transplanting globally hegemonic models. In this regard, the NPD notes that one of the measures adopted to implement the ruling was the conclusion of a bilateral agreement to introduce reforms in the administration of prisons:

Second, the NPD continues supporting efforts to reinforce the Integrated Information System of the Penitentiary and Prison System, as well as the bilateral program for improving the Penitentiary System brokered in 2000 between the Ministry of Justice and Law and the United States Government, which aims to collaborate with the Ministry of Justice and Law in the design and implementation of a prototypical system of management and operation to ensure the quality of penitentiaries and prisons. This program is being implemented with satisfactory results in prisons and high security wards in various administrative units.⁵⁸

There is widespread debate about whether the results of this process are “satisfactory” or not. Reports issued by various institutions indicate, however, that the rights of the incarcerated continue to be violated in a systematic and generalized manner, both in the older prisons that led to the initial complaint resulting in the T-153 ruling of 1998 and in the newer prisons created as a result of this decision.⁵⁹ Thus, the T-153

58 National Planning Department, Justice and Security Department, Actions Developed to Comply with the T-153 decision (March 2002) (unpublished manuscript, on file with author).

59 See the following report of the situation in Colombian prisons: Public Interest Law Group and Carlos Costa, *Immigration and Human Rights Clinic*, *supra* note 57. Prisons and jails that have been built as a result of ruling T-153 of 1998 do not guarantee the rights of prisoners. In fact, certain prisons, such as the high-security prison in Valledupar, have become notorious for their hardness and restriction of the fundamental rights of prisoners. The United Nations mission noted that the Valledupar prison evidences “cruel treatment to the inmates and beatings by the prison guards,” and that the prison has “inadequate basic services, including fecal contamination of food and services of insufficient and inadequate medical care.” Recently, the ombudsman recommended the closing of the Women’s Annex of the Valledupar prison “while adequate physical infrastructure, especially the cells, sanitary facilities, areas for intimate

case of 1998 has had a very strong structural impact, but it has failed to result in the effective enjoyment of rights for prisoners, on account of the way the case was constructed. Conversely, the situation has worsened, and the full weight of structural reform rests on the shoulders of a prison population whose fundamental rights are violated on a daily basis.

5 Conclusion

Although “institutional blockage”⁶⁰ can justify and even create the need for structural judicial intervention in the delivery and allocation of goods and services in arenas such as social security, healthcare, or the forcibly displaced population, it is not clear that this argument – which is descriptive as well as normative – is applicable to the situation of individuals deprived of their liberty.

The penitentiary is a peculiar institution.⁶¹ In a context in which the penitentiary system functions as a tool for punitive segregation that treats impoverished people in a distinct fashion, its reinforcement may

visits and receiving sites are improved properly.” Defensoría del Pueblo de Colombia, *Resolución Defensorial No 21: “Muerte de un recluso en la penitenciaría de Valledupar,”* Bogotá April 12, 2002; Defensoría del Pueblo de Colombia, *Resolución Defensorial no. 40,* Bogotá, June 3, 2005. In this sense, the Constitutional Court itself has acknowledged that, despite its intervention, the situation has not improved significantly. See case T-1134 of 2004 and case T-1030 of 2003 regarding the systematic violation of rights in the new maximum-security prison of Cóbita.

60 Rodríguez, *supra* note 2.

61 See Löicq Wacquant, *The New “Peculiar Institution:” On the Prison as a Surrogate Ghetto*, 4, 3 THEOR. CRIMINOL. 377 (2000); for classics accounts regarding prison institution, see Michel Foucault, *DISCIPLINE AND PUNISHMENT* (2nd ed. 1991); George Rusche and Otto Kirchheimer, *PUNISHMENT AND SOCIAL STRUCTURE* (Transaction Publishers 2003). The prison system has been also an instrument of racial and cultural domination. The so-called disproportionate incarceration – the excessive representation of minority groups in the prison system – and its close links with massive imprisonment, have been addressed by academic and political debates, which have discussed the relationship between punishment, on the one hand, and cultural and racial identification, on the other hand. On the academic analysis of disproportionate incarceration in the United States, see Alfred Blumstein, *On the Racial Disproportionality*

have conservative effects, reaffirming the situation of precariousness and exclusion of a socially disadvantaged group. By this, it must not be understood that INPEC, the National Penitentiary and Prison Institute, is free from institutional problems – corruption, administrative shortcomings, the lack of coordination between official entities – that affect rights of prisoners. Rather, my interpretation attempts to demonstrate that the argument of institutional blockage does not answer the question of the effective protection of prisoners by situating the issue in the context of institutional reform to ensure the incremental implementation of social and economic rights. Once the problem has moved toward defining the mechanisms and procedures for clearing the institutional blockage of the penitentiary system, it would seem reasonable that the remedy for the violation of fundamental rights should also include the modernization of the prison bureaucracy; the strengthening of security guard and custodial services; and, in brief, the transplant of the penitentiary models from the global centers of production.⁶² This is precisely what has happened.

of United States Prison Populations, 73(3) *J. CRIM. L. CRIMINOL.* 1259–81 (1982); Michael Tonry, *Racial Disproportion in US Prisons*, in *PRISONS IN CONTEXT* 97–115 (Roy D. King and Mike Maguire ed., Clarendon Press 1994); Löicq Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3(1) *PUNISH. SOC.* 95–134 (2001). Precisely, Wacquant considers that the prison must be included in the group of “peculiar institutions” that have been deployed historically to uphold the cultural and racial status quo in the United States. More recently, Alexander has claimed that the prison system has turned into the new “Jim Crow” – a caste system that perpetuates the racial subordination of African Americans through their stigmatization as criminals: “In the era of colorblindness, it is no longer permissible to hate blacks, but we can hate criminals.” See Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 199 (The New Press 2010). On the analysis of disproportionate incarceration of immigrants and foreigners in Western Europe, see Löicq Wacquant, *Suitable Enemies: Foreigners and Immigrants in the Prisons of Europe*, 1(2) *PUNISH. SOC.* 215–22 (1999); Kitty Calavita, *A Reserve Army of Delinquents. The Criminalization and Economic Punishment of Immigrants in Spain*, 5(4) *PUNISH. SOC.* 399–413 (2003); Dario Melossi, *In a Peaceful Life: Migration and the Crime of Modernity in Europe/Italy*, 5(4) *PUNISH. SOC.* 371–97 (2003).

⁶² See Ariza, *supra* note 13, for an account of the implementation of United States managerial techniques for governing prisons in the Colombian penitentiary system.

It is, of course, vital that efficient institutional procedures exist for the provision of services to the incarcerated population, in health and nutrition especially. Nevertheless, this cannot be treated as the single and leading remedy for the damage caused by inhumane conditions of detention. What begs highlighting is, first, that the ever-present questions of whether the horizontal and vertical expansion of the prison system is the proper way to ensure the rights of inmates (despite the doctrinal clarifications outlined above) and also whether removing the institutional blockage does not necessarily imply a remedy for the violation of the fundamental dignity of the prisoner. Conversely, it can lead to the perpetuation of the state of affairs characteristic of the current penitentiary system.

In a perfect world, clearing an institutional blockage could generate complete and austere penitentiary institutions that exert forceful control over inmates. Thus, the prisoner's problems would switch from the conditions of detention to the exercise of bureaucratic power and defining the limits of the penitentiary system. Experiments in modern and efficient jails with strong internal bureaucracies show that the situation has not changed much in terms of the prisoners' enjoyment of rights.⁶³ Prisoners' rights have undeniably been violated in new ways.

The existing penitentiary system demonstrates that structural reform focused on the building and reinforcement of institutions is not the best

63 The implementation of the expanded prison system has generated a new wave of prison litigation before the constitutional jurisdiction. Inmates, their families, and human rights activists had again used the *acción de tutela* to challenge the harshness of the new penitentiary order. There are various examples showing that enforcing prisoners' rights through the construction and modernization of facilities paradoxically generates new and different forms of violations of fundamental rights. These include the use of handcuffing for moving ill inmates to hospitals (case T-879 of 2001); restrictive visitor regimes limiting relatives' and family members' access to prisons and jails (cases T-269 of 2002 and T-399 of 2002); complaints against chain gang inmates moving to other facilities (case T-1308 of 2001); protection of children facing restrictive contact with incarcerated parents (case T-1045 of 2004); insufficient delivery of food, clothing, and healthcare (case T-490 of 2004); complaints against intrusive searching of visitors (case T-702 of 2001); and complaints involving holding inmates in new facilities lacking electricity (case T-023 of 2003).

way to ensure the rights of prisoners, nor does it address the criticism on how to justify the continued violation of rights during the period it takes for the reform to be completed.⁶⁴ The only logical option for maintaining a structural reform approach in terms of consistency and coherence is to frame the case within the discourse of ESCR, the main feature of which, in terms of enforceability, is its programmatic and deferred nature and its disregard for the Constitutional Court's doctrine of the *special relationship of subjection* between state and inmate.

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64 The judicial responses to the “prison crisis” are not monolithic – as a matter of fact, they vary according to the particular context in which they are developed. In a different article, I have discussed the diverse judicial responses in Latin America to the prison crisis, which include three main alternatives: no intervention, structural reform, and reduction of the prison population. See Ariza, *supra* note 13. Precisely, one of the main points of this chapter is that the judicial emphasis on structural reform does not address the pressing problems of the prison population – which faces a systematic and massive violation of human rights – and that other forms of building a legal case and designing judicial remedies are needed. In this sense, the route of judicial remedies that has been followed in the United States, and that led to the *Brown v. Plata* (2011) U.S. Supreme Court decision, which adopts as a remedy the reduction of the prison population of the State of California to 137.5 percent of design capacity, highlights the challenges regarding the building of a legal case and the design of suitable judicial remedies to address the massive violation of human rights of the prison population: “The court also did not err when it concluded that, absent a population reduction, the Receiver’s and Special Master’s continued efforts would not achieve a remedy. Their reports are persuasive evidence that, with no reduction, any remedy might prove unattainable and would at the very least require vast expenditures by the State. The State asserts that these measures would succeed if combined, but a long history of failed remedial orders, together with substantial evidence of overcrowding’s deleterious effects on the provision of care, compels a different conclusion here.”

Part II CULTURAL DIVERSITY

4 Cultural Diversity, “Living Law,” and Women’s Rights in South Africa

Catherine Albertyn

TROUGHOUT SOUTH AFRICA’S HISTORY RACIAL, CULTURAL, ethnic, linguistic and religious differences have been a source of inequality, exclusion, and subordination. Under colonialism and apartheid, race determined political rights, economic opportunities, and social status; Western, Christian norms prescribed moral standards, and legal rights; and ethnicity was manipulated to relegate the majority of black South Africans to “citizenship” of “independent” ethnic homelands. The new democratic Constitution imagines a different country, one that embraces diversity and legal pluralism, and affirms difference as a positive source of individual and collective identities within the new democracy. This idea of diversity in the Constitution takes account of religious, linguistic, and cultural difference. It includes historically marginalized minority religions,¹ recognizes eleven official languages (including all African languages, as well as those of the Indian and Asian community),² and acknowledges the variety of cultural

1 In 2012, South African was largely Christian (80 percent), although with a significant number of “traditional” Christian churches (Christianity influenced by African traditions). Islam, the largest minority religion, accounts for about 1.5 percent of the population, and adherents of the Hindu religion account for 1 percent. Judaism is a significant minority, but only accounts for 0.2 percent of the population. Statistics South Africa, Primary Tables South Africa: Census 1996 and 2001 Compared, available at www.statssa.gov.za/census01/html/RSAPrimary.pdf 24 (2004).

2 Section 6 of the Constitution recognizes the former official (colonial) languages of English and Afrikaans (a development of colonial Dutch), as well as nine ethnic

communities within South Africa.³ Although religion, language, and culture might overlap within particular groups, they also cut across different groups, thus creating pathways of similarity across difference. In addition, commonalities and divisions of gender, class, and urban-rural location contribute to a complex social fabric.

This chapter considers one part of this complex diversity: the constitutional recognition of cultural diversity, especially as it is manifest through the recognition of customary law, and its relationship to the constitutional guarantee of gender equality. As the supreme law, the South African Constitution subjects all law (customary, common, and statutory) to the rights and values of the Constitution, including the primary democratic values of dignity, equality, and freedom. This chapter rejects the idea that the Constitution provides a “liberal democratic” framework that constitutes the basis for a “top-down” universalism that tests culture and custom against irretrievably external, liberal standards. Although the Constitution is capable of this, among other, interpretations, the chapter argues that the best – and most transformative – interpretation of the constitutional text is one that enables a deep respect for cultural identity and diversity and consequent recognition of positive cultural norms and practices, while also addressing crosscutting, intragroup inequalities, such as gender. This interpretation recognizes that transformation under the South African Constitution requires courts to address multiple and intersecting inequalities, and that culture and custom – long ossified in official law – face particular challenges in adapting to contemporary political, economic, and social conditions. Although democratic and cultural values might be rooted in different contexts, South Africa’s history of colonialism, apartheid, and political struggles, as well as its

languages. In addition, the Constitution requires the state to promote and show respect for a variety of other languages used by different communities within South Africa.

³ This not only refers to the ethnically based cultures of the black African majority, but also to cultural differences within the white, coloured, and Indian and Asian communities that are linked to places of origin and language.

socioeconomic development, mean that there is considerable common ground within and across communities for harmonizing customary law and the Constitution.

This interpretation starts from the idea that cultures (including the culture of human rights) are contested, flexible, and permeable, capable of varying meanings and of being responsive to socioeconomic changes. So, too, are democratic values of equality and dignity contested and capable of different meanings. Neither operate in silos, and the meanings afforded to culture and custom, in practice, often draw on variable sources to determine what is just in a particular setting. This does not mean that all meanings are possible, nor does it mean that historic and current power relations can be easily overcome. However, once it is recognized that democratic values can extend to indigenous values, and vice versa, and can form a basis for deliberation by all South Africans, then the Constitution can provide a framework for real debates about meaning, justice, diversity, and equality. In the end, the constitutional limits that courts impose on cultural and religious diversity should be ones that seek to balance this diversity with the constitutional need to overcome entrenched power hierarchies and socioeconomic inequalities to "improve the quality of life of all South Africans."⁴

The chapter explores how, and the extent to which, the Constitutional Court has sought to balance the recognition of culture and custom with overarching constitutional rights and values (especially gender equality) by prioritizing an idea of living law and custom that is responsive to change. It explores this jurisprudence (as it relates to culture and customary law) both to emphasize the value of such an approach and to point to its limitations and difficulties. The chapter concludes that the Court has been correct, even innovative, in its overall conclusions on gender within customary law. However, it has perhaps not always drawn sufficiently on positive examples of living law and cultural norms in doing so.

4 South African Constitution, preamble.

This is particularly apparent in its use and understanding of “living law,” the tensions between rule making and flexibility, and the choice of civil over more open-ended (and uncertain) customary remedies. As a result, some opportunities for a more robust, albeit open-ended, engagement with custom and culture, or a more sensitive interpretation of cultural norms and living law, have possibly been lost. These possibilities remain and can be enhanced through a more open-ended and deliberative approach in which courts take an active role in mediating all voices within “intracultural” disputes. In the end, however, the fundamental question remains the extent to which a reliance on “living law” can overcome the unequal power relations that subsist in all communities.

1 The Constitutional Context

Turning away from the cultural and religious inequality that characterized South Africa’s past, the democratic Constitution envisages a new South Africa that “belongs to all who live in it, united in our diversity”⁵ and encompasses a rights-based framework that reflects, protects and nurtures diversity and pluralism.

1.1 *The Constitutional Text and a Transformative Constitution*

The Bill of Rights recognizes a number of individual rights, including freedom of religion, of belief and conscience,⁶ and of association,⁷ as well as the “right to use the language and to participate in the cultural life of [one’s] choice.”⁸ Freedom from unfair discrimination based on religion, conscience, culture, ethnic and social origin, language, and belief is also entrenched.⁹ In addition, “persons belonging to cultural,

⁵ *Id.*

⁶ *Id.*, at section 6.

⁷ *Id.*, at section 18.

⁸ *Id.*, at section 30.

⁹ *Id.*, at section 9.

religious and linguistic communities may not be denied the right, with other members of that community," to enjoy and practice their culture, religion and language and to participate in cultural, religious and linguistic associations.¹⁰

Taken together, these rights both "positively enabl[e] individuals to join with other individuals of their community, and negatively enjoin ... the state not to deny them the rights collectively to profess and practise their own religion (as well as enjoy their culture and use their language)":¹¹

They underline the constitutional value of acknowledging diversity and pluralism in our society and give a particular texture to the broadly phrased right to freedom of association ... [T]hey affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different." In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.¹²

The Constitution also enables a legal pluralism that recognizes religious and cultural rules and practices. Section 15(3) of the Constitution permits the South African parliament to enact legislation that recognizes traditional and/or cultural and religious systems of personal and family law. The Constitution acknowledges that customary law is a system of law equivalent to statutory and common law,¹³ and recognizes

¹⁰ *Id.*, at section 31. This includes the right to establish independent educational institutions, as acknowledged in section 29(3).

¹¹ *Christian Education of SA v. Minister of Education* 2000 (10) BCLR 1051 (CC), at para. 23.

¹² *Id.*, at para 24.

¹³ *Const. supra* note 4, at sections 2, 8(1), 39(2), 211(3).

the institution, role and status of traditional leadership.¹⁴ Important, although underutilized, is section 39(3), which recognizes “rights or freedoms that are recognised or conferred by…customary law,” over and above those conferred in the Bill of Rights.

This detailed recognition of cultural and religious diversity is not absolute but is “subject to the Constitution.” In terms of sections 30 and 31, individual rights to participation in collective cultural and religious life “may not be exercised in a manner inconsistent with any provision in the Bill of Rights.” In addition, the legal recognition of religious, personal and family law “must be consistent with…the Constitution,”¹⁵ and the recognition of traditional leadership and customary law is subject to the Constitution in all respects.¹⁶

South Africa’s constitutional framework thus suggests a cultural and religious diversity and pluralism that is mindful of, and limited by, other constitutional rights and principles. Although the Constitution recognizes the fundamental importance of “the right to be different” according to one’s cultural and religious context, and not always to be subject to the general or dominant norm, this is not an untrammeled set of rights. It is clear that the constitutional recognition of cultural and religious diversity neither creates nor protects cultural and religious communities that are insulated from potentially conflicting constitutional rights. Although some traditional and religious leaders rely on rights to cultural and religious freedom and a strongly negative conception of liberty to argue for the right to be left alone as custodians of customary and religious law, this interpretation has not found significant judicial support.¹⁷ Part of the

¹⁴ *Id.*, at section 211(1).

¹⁵ *Id.*, at section 15(3)(b). In addition, the recognition of customary rights under section 39(3) must be consistent with the Constitution.

¹⁶ *Id.*, at section 211(1) in respect of traditional leadership; at sections 2, 8(1), 39(2), and 211(3) in respect of customary law.

¹⁷ The right to be different, asserted by Justice Sachs in *Christian Education*, *supra* note 11, is not the same as the right to be left alone, a more liberty-based interpretation of cultural and religious rights. Scholars in South Africa express different views on this and the nature of the “inner core” of religious or cultural freedom. For examples of

reason for this is the early recognition by the Constitutional Court that the Constitution seeks to "transform" South African society from a "past which is disgracefully racist authoritarian, insular and repressive ...[to] a commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution."¹⁸ This idea of transformation has a strong element of social justice, committed to redress and restitution, and seeking to address material disadvantage.¹⁹ It is a complex and multifaceted concept, engaging personal and national identity, social and cultural diversity, material conditions and economic justice. It means that the recognition of cultural diversity is one of several constitutional imperatives and must be interpreted within a reading of the overall transformative vision of the Constitution.

In the end, by making cultural and religious rights "subject to the Constitution" (a phrase not used in relation to other rights), the Constitution creates room to affirm cultural identity *and* to address cross-cutting and conflicting rights and values (such as the right to equality based on gender or sexual orientation, and the right to free expression), *and* to be mindful of the reality of disadvantage, poverty, and inequality in many communities. The Constitution envisages a complex tapestry in which cultural and religious rules and norms do not operate in discrete communities, but rather are subject to other claims and rights, and to the

a more or less liberty-based approach to culture or religion, see Patekile Holomisa, *A Traditional Leadership Perspective of Gender, Rights, Culture and the Law*, 48 AGENDA SPECIAL FOCUS (2005); Patrick Lenta, *Religious Liberty and Cultural Accommodation*, 122 S. Afr. L.J. 352 (2005). See also Stuart Woolman, *On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta* 25 S. Afr. J. HUM. RTS. 280 (2009). For an example of more egalitarian approaches, see Catherine Albertyn, *The Stubborn Persistence of Patriarchy? Gender Equality and Cultural Diversity in South Africa*, 2 CONST. COURT REV. 165 (2009); David Bilchitz *Should Religious Associations Be Allowed to Discriminate?*, 27 S. Afr. J. HUM. RTS. 219 (2011).

18 S. v. Makwanyane 1995 (3) SA 391 (CC), at para. 262 (per Mohamed DJP).

19 The Preamble to the Constitution also signals that it is a self-consciously "transformative" document, one that seeks to advance a united, yet diverse, society; "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights," and "[i]mprove the quality of life and free the potential of every person." Constitution, *supra* note 4, preamble.

development of common norms and processes that bind – norms that emanate from the Constitution.

2 Between Text and Context – Contested Values and the Possibility of “Indigenous” South African Interpretations

South Africa’s Constitution has been described as a “universalist” model that makes customary law subject to a “top-down” liberal framework.²⁰ Within this framework, scholars debate the extent to which the Constitution does, and should, prioritize liberty (and cultural autonomy) or adopt a more egalitarian approach (across and within cultural groups).²¹ However, this description often assumes that the Constitution establishes universal and uncontested “liberal” values that are incompatible with (fixed) customary norms and practice. Discriminatory customary norms will thus always be subject to the test of “liberal equality” and should be struck down when they fail this test (and replaced with civil law). Alternatively, they will be permitted where liberty and freedom of association values are deemed to be more important than egalitarian ones. Although the simple subordination of customary law to liberal values is a possible interpretation of the South African Constitution, this chapter suggests a more nuanced, overlapping, and contested approach to the interpretation of, and relationship between, gender equality and cultural diversity: one that resists the idea that equality and customary law are necessarily incompatible, that customary norms and practices that exclude women are irretrievably discriminatory and that civil standards are the necessary antidote.

The starting point for this argument is a familiar one. Culture is neither monolithic nor preordained, but is contested, permeable,

20 See, for example, Fareda Banda, *WOMEN, LAW AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE* 34–35 (Hart Publishing 2005); Johan Van der Vyver, *The Right to Self-Determination of Cultural, Religious and Linguistic Communities in South Africa*, 14 POTCHEFSTROOM ELECTR. L.J. 1–12 (2011).

21 See the articles cited *supra* note 17.

flexible, and shaped through practice in response to changing socio-economic conditions.²² Cultural communities live in the world. In South Africa, colonialism, Christianity, apartheid, and migrant labor have provided the context for social and economic life. There is significant evidence, for example, of how black South Africans have negotiated and moved between a variety of socioeconomic settings – urban-rural, traditional-modern, work-home – all of which shaped their identity and way of life. Belinda Bozzoli has demonstrated how changing economic relations of migrancy and urbanization allowed women to challenge and resist patriarchal cultural subordination in traditional communities by moving in and out of these communities, and by demonstrating resourcefulness and independence in building lives in urban areas that retained valued parts of their cultural identities (as respectable women), but enabled a degree of freedom from its (negative) patriarchal constraints.²³

As discussed in more detail in the next section, South Africa has always seen competing versions and interpretations (as well as the use and misuse) of culture and custom in search of different legal, political and economic goals. Although customary law has an “official” status in codified law, there is considerable evidence of a “living” version of custom that is far more responsive to the changed social and economic conditions of contemporary South Africa, including the changed position of women (as discussed in the next section). This living law is rooted in a permeable and flexible idea of culture in which practice is influenced by a

22 Raymond Williams, *CULTURE* (Fontana 1981); Nira Yuval Davis, *GENDER AND NATION* (Sage Publications 1997).

23 Belinda Bozzoli (assisted by Mmantho Nkotsoe), *WOMEN OF PHOKENG: CONSCIOUSNESS, LIFE, STRATEGY AND MIGRANCY IN SOUTH AFRICA, 1900–1983* (James Curry 1991). There is important evidence about how women managed changing socioeconomic conditions and gender roles in Virginia van der Vliet, *Traditional Husbands, Modern Wives?*, in *TRADITION AND TRANSITION IN SOUTHERN AFRICA* (Andrew Spiegel and Pat McAllister eds., Wits University Press 1991); David Webster, *Abafazi Bathonga Bafuhlakala: Ethnicity and Gender in a Kwa Zulu Border Community*, in Andrew Spiegel and Pat McAllister, *id.* Anne Kelk Mager, *GENDER AND THE MAKING OF A SOUTH AFRICAN BANTUSTAN* (David Philip 1999).

variety of norms, including equality,²⁴ and local understandings of need, reciprocity, and responsibility.²⁵

Although the concept of equality has strong liberal roots, South African ideas of equality are also rooted in local political struggles for national liberation and the emancipation of women.²⁶ As discussed later, contemporary South African equality jurisprudence has moved beyond simple liberal notions of sameness to embrace ideas of context, difference, and purpose that can enable a nuanced approach to discrimination claims and the recognition of women within customary law, thus often affirming emergent or established custom or practice while rejecting out-of-date or inflexible codified law. South African equality jurisprudence does not insist that women are treated the same as men or as each other; it does insist, however (in its best interpretation), that differential treatment should never result in disadvantage and subordination.²⁷

This more nuanced and contextual understanding of culture and custom, and of constitutional rights and values, enables a constitutional and jurisprudential framework that develops and affirms “indigenous”²⁸ and localized understandings of customary law that respect cultural diversity and gender equality. Rather than a “trumping” relationship, one

24 Likhapha Mbatha, *Reforming the Customary Law of Succession*, 18 S. AFR. J. HUM. RTS. 259 (2002); Aninka Claassens and Sizani Ngubane, *Women, Land and Power: The Impact of the Communal Land Rights Act*, in *LAND, POWER AND CUSTOM: CONTROVERSIES GENERATED BY SOUTH AFRICA'S COMMUNAL LAND RIGHTS ACT*, chapter 7 (Aninka Claassens and Ben Cousins eds., University of Cape Town Press 2008).

25 Claasens and Ngubane, *id.*: Aninka Claassens and Sindiso Mnisi, *Rural Women Redefining Land Rights in the Context of Living Customary Law*, 25 S. AFR. J. HUM. RTS. 491 (2009).

26 Shireen Hassim, *WOMEN'S ORGANISATIONS AND DEMOCRACY IN SOUTH AFRICA*, chapter 5 (University of KwaZulu-Natal Press 2006).

27 Although this interpretation is reflected in the Constitutional Court's jurisprudence, academics have noted that the Court does not necessarily always follow this “best interpretation.” See, for example, Catherine Albertyn, *Substantive Equality and Transformation in South Africa*, 23 S. AFR. J. HUM. RTS. 253 (2007).

28 I use “indigenous” here to refer to a “South African” notion of equality (rather than one solely emanating from indigenous or customary law), one that is rooted in the history and experiences of South Africans.

can strive for an interpretation that is sensitive to practice, to cultural norms and values, and to a more "vernacular"²⁹ understanding of rights. Arguably, this more nuanced interpretation would draw support from scholars who criticize the "Westernization" of customary law, while recognizing the importance of rights.³⁰ Constitutional rights are not disputed in South Africa, merely their interpretation and application. Properly understood, therefore, the relationship between equality and customary law is not one of culture versus equality, but one of how best courts can recognize and interpret customary law within a contextual and transformative reading of the Constitution that recognizes the permeable, changing, and intersecting nature of different cultures (including the culture of human rights).³¹

3 Cultural Diversity in the Context of Multiple Inequalities in South Africa

Moseneke has argued that transformative jurisprudence must be grounded in a court's understanding of the actual conditions in which people are living.³² Thus, case law that addresses cultural and customary issues should take account of the historical, social, and economic context in which cultural diversity is prevented or realized. This section briefly considers the context in which culture and customary law is practiced

29 Sally Engle Merry uses this term to describe how activists translate rights into frameworks that are relevant to the life situations of people at the grass roots. Sally Engle Merry, *HUMAN RIGHTS AND GENDER VIOLENCE* 216 (University of Chicago Press 2006). She argues that this is more likely to occur in a "top-down" manner. However, there is some evidence of more "bottom-up" processes in South Africa and of rights developed within customary systems. See Claassens and Mnisi, *supra* note 25.

30 See, for example, Chuma Himonga, *The Advancement of African Women's Rights in the First Decade of Democracy in South Africa*, in *ADVANCING WOMEN'S RIGHTS* 82 (Christina Murray and Michelle O'Sullivan eds., Juta 2005).

31 Banda, *supra* note 20, at 247–62, discusses different views on the overlapping and pluralistic nature of values in culture and human rights.

32 Dikgang Moseneke, *Transformative Adjudication*, 18 S. Afr. J. Hum. Rts. 309, 318–19 (2002).

and the contested and changing nature of custom, especially for women, as well as the gendered forms of power and inequality that shape status, power, and access to resources within and across different cultural communities.

3.1 History, Cultural Inequality, and Constitutional Supremacy

African culture and tradition (as well as the culture and religion of Muslim, Hindu, and other minority groups) were unequally recognized under colonialism and apartheid, with customary and religious marriages accorded an unequal and inferior status as unions.³³ This arose from the idea that such marriages – as potentially polygynous – were “contra bonos mores.”³⁴

At the same time, culture was “essentialized” as colonial and apartheid governments sought to justify policies of racial inequality and subordination on the basis that racial and cultural differences were fixed, impermeable, and even “God-given.”³⁵ The idea that culture was “distinct, incommensurable and essentially linked to tribal members” also appealed to traditional leaders and male elders, who were able to retain authority over male migrants and the women who remained at home.³⁶

33 By contrast, Muslim marriages remained completely outside of the law, with no legal rights or benefits accruing to partners in a marriage concluded according to Muslim rites. This was justified on the basis of the polygynous nature of Muslim marriages. See *Ryland v. Edros* 1997 (2) SA 690 (C).

34 For the colonial treatment of culture and custom, see Martin Chanock, *LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* (Cambridge University Press 1985). See also Thomas W. Bennett, *A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA* (Juta 1991) for a wider discussion of the status of customary law under colonialism and apartheid.

35 Ultimately, the legitimacy of apartheid rule and its homelands policy was “predicated on denying the complex and shifting nature of cultural identity, both of Black and of White” and of emphasising an “essential and unchanging connection to a particular tribal group, in a limited geographic territory, in a time outside history.” Lisa Fishbayn, *Litigating the Right to Culture: Family Law in the New South Africa*, 13 INT’L J.L., POL’Y, & FAM. 147, 155–56 (1999).

36 Fishbayn, *id.* at 154. For a discussion of the status of women, see Chanock, *supra* note 34; Sandra Burman, *Fighting a Two-Pronged Attack: The Changing Legal Status of*

Ethnic segregation in city hostels deepened "tribal" differences at the same time that it provided vital ethnically based social networks.³⁷ In law, this meant that black South Africans were irretrievably "cultural subjects": both in terms of the fixed application of customary law to many aspects of their lives (regardless of their actual wishes)³⁸ and, eventually, after 1948, in terms of their "citizenship" in ethnic homelands, rather than of South Africa.³⁹ Of course, resistance to the fixedness of tribal and racial identity as a source of segregation and exclusion was central to the national liberation struggle, in which black South Africans fought for the right to be citizens of a united South Africa, not tribal subjects tied to "homelands," traditional leaders, and custom.

Customary law (for centuries an unwritten set of rules and practices) was codified by colonial and apartheid authorities – often with the assistance of male elders – to entrench a distorted and inflexible version of custom.⁴⁰ One of the consequences of this was that it deepened the inequality of women within customary law. Bennett suggests that this was as much due to the inability of the common law to capture the "sympathetic flexibility" accorded women under customary law as it was to the colonial tendency to endorse the indigenous system of patriarchy.⁴¹ However, the official code relegated women to a lower status and limited access to resources and benefits because of their position as women.⁴² Thus, by 1990, women were still minors under customary law, under the guardianship of their husbands, or fathers. In marriage,

Women in Cape Ruled Basutoland, 1872–1884; and Jeff Guy, *Gender Oppression in Southern Africa's Precapitalist Societies*, both in WOMEN AND GENDER IN SOUTHERN AFRICA TO 1945 (Cherryl Walker ed., David Philip and James Curry 1990).

37 Fishbayn, *supra* note 35.

38 For example, in the absence of a will, the estates of all black people were distributed in accordance with customary law.

39 The policy of "separate development" introduced by the National Party government after 1948 envisaged that all black South Africans would eventually lose their South African citizenship and become citizens of ethnic homelands. See John Dugard, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 89–104 (Juta 1978).

40 Chanock, *supra* note 34; Burman, *supra* note 36; Guy, *supra* note 36.

41 Bennett, *supra* note 34, at 31.

42 Chanock, *supra* note 34; Burman, *supra* note 36; Guy, *supra* note 36.

they had few, if any, rights to property and over children. The entrenchment of the rule of male primogeniture (inheritance by the eldest male heir) meant women had no enforceable rights to inheritance and were often left destitute after the death of their husbands, as male relatives took over property.⁴³ Women also had little independent access to land (especially under communal tenure), and traditional power was predominantly the preserve of men.

This past – of cultural manipulation and gendered subordination – had several consequences for the development of a democratic Constitution in the early 1990s. Despite a general consensus on the equal status and recognition of culture and customary law as positive attributes of the South African community, different views of the nature and place of culture set the stage for contestation over the relationship among culture, customary law, and the Constitution. Traditional leaders argued for the explicit protection of culture and the insulation of its practices (including its patriarchal forms of law and leadership) from human rights and equality guarantees.⁴⁴ The majority of organizations and groups, including women living under customary law, argued that, important as culture is, ideas of equality and democracy should temper, and sometimes override, claims to cultural autonomy.

In the end, the Constitution recognizes all South Africans as equal, rights-bearing citizens under the Constitution, and it subjects all law, including customary law, to the Constitution.⁴⁵ However, there remain multiple political and legal interpretations of the relationship between gender equality and cultural diversity. For example, traditionalists continue to argue for a strongly libertarian interpretation of cultural autonomy and thus of the “protection” of customary law from “Western,”

43 Kim Robinson, *The Minority and Subordinate Status of African Women under Customary Law*, 11 S. Afr. J. HUM. RTS. 495 (1995).

44 Catherine Albertyn, *Women and the Transition to Democracy in the New South Africa*, ACTA JURIDICA 39 (1994); Felicity Kaganas and Christina Murray, *The Contest between Culture and Gender Equality under South Africa’s Interim Constitution*, 21 J. L. Soc’Y 409 (1994).

45 Albertyn, *id.*

human rights values. These arguments are also implicated in struggles by traditional leaders for more power and authority, especially in relation to land, rural development, and traditional courts.⁴⁶ They speak to the idea that women are protected by customary law in their traditional roles as wives and mothers. Conversely, scholars concerned with women's rights have argued for greater rights for women living under customary law, albeit in different ways. Some have tended toward a "trumping" relationship that prioritizes equality rights, as found in civil and common law, often because this is the only way to protect vulnerable women and children. Others have sought a different path: one that endorses customary law as an important way of life for many South Africans but recognizes women's changing place within it. This position seeks to understand how women's socioeconomic position has changed and how this has influenced, and should continue to influence, customary practices within the "living law."⁴⁷ This is discussed in more detail in the next section.

3.2 Customary Law, Crosscutting Social and Economic Inequalities, and "Living Law"

Communities that practice customary law are predominantly found within the 45 percent of South Africa's population that lives in rural areas, populated largely by women and children as men seek work in urban areas. Many, but not all, of these communities live under traditional leadership and engage in subsistence farming on communal land. Among these communities are the poorest families and areas in South Africa.⁴⁸ Crosscutting inequalities within and across these communities

46 Cherryl Walker, *Women, Gender Policy and Land Reform in South Africa*, 32 *POLITIKON* 297 (2005); Aninka Claassens, *The Resurgence of Tribal Taxes in the Context of Recent Traditional Leadership Laws in South Africa*, 27 *S. Afr. J. HUM. RTS.* 522 (2011).

47 Mbatha, *supra* note 24; Claassens and Ngubane, *supra* note 24.

48 Official statistics reveal the poverty and inequality of rural communities. See Ben Cousins, *Contextualising the Controversies: Dilemmas of Communal Tenure Reform*

mean that poverty and economic inequality are also shaped by factors such as class, gender, location, and social origin.

Customary law and culture emphasize the importance of family and community for the individual, as well as family and community relationships. In the past, and today, customary law has retained significant value not only among rural communities but also for many black South Africans. There is positive support for its techniques of social control based on “obligation and reciprocity, mediation, and conciliation”; the “healing force of ritual”; and the importance of family in providing for an individual’s “material, social, and emotional needs.”⁴⁹ Although a patriarchal system (as are most legal systems), there was an expectation that women would be protected and maintained within the family unit (of their father or husband). Customary obligations of maintenance and support meant that women should not be left destitute. The submerging of individual interests to the collective was premised on the notion that the collective would nurture, protect, and sustain the individual. More broadly, the idea that an individual was part of, dependent upon, and responsible for others was captured in the notion of *ubuntu*. In the words of (then) deputy Chief Justice Pius Langa, in the case of *Bhe v. Magistrate Khayalitsha*:

The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy

in Post-Apartheid South Africa, in LAND, POWER AND CUSTOM: CONTROVERSIES GENERATED BY SOUTH AFRICA’S COMMUNAL LAND RIGHTS ACT 1 at 8 (Aninka Claassens and Ben Cousins eds. (University of Cape Town Press 2008).

49 Thomas W. Bennett, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 3–5 (Juta 1995).

communitarian traditions such as ubuntu. These valuable aspects of customary law more than justify its protection by the Constitution.⁵⁰

Although these were and remain powerful values, it has long been clear that colonialism, capitalism, Christianity, migrant labor, and apartheid have eroded the ability of the family to sustain a customary way of life, at least as practiced under different socioeconomic conditions of precapitalism and early capitalism. The official code of customary law, reflected in judgments, legislation, and regulations, does not match the reality of modern South Africa. In practice, therefore, customary practices have shifted and declined. The payment of *lobola*, or bride-price, is increasingly unaffordable, polygyny has declined, and family property is limited, together with its ability to provide the customary security net for needy family members. Official laws based on male-headed households no longer make sense when the majority of households in rural areas are, in fact, woman headed. The customary idea of women as limited by their roles as wives and mothers, as vulnerable and dependent, requiring protection from men,⁵¹ is not reflected in how people actually live and survive.

The changing shape and form of families, and the changing position of women, has resulted in a range of strategies by women to escape the strictures of official law. This includes movement between different systems of law in search of better protection. There are many examples in Southern Africa of women constantly negotiating civil and customary legal systems to improve their rights and access benefits within marriage (or, put another way, to secure equality).⁵² There is also growing evidence that women work within customary law to secure rights through

50 Bhe v. Magistrate Khayalitsha; Shibi v. Sithole; SAHRC v. President of the RSA 2005 1 SA 580 (CC); 2005 1 BCLR 1 (CC), at para. 45.

51 Albertyn, *supra* note 17; Holomisa, *supra* note 17.

52 Likhapha Mbatha's work on marriage showed women moving between the two systems to seek forms that offered most protection – often seeking both customary and civil marriages. Likhapha Mbatha, *Marriage Practices of Black South Africans* (Centre for Applied Legal Studies Research Report 1997). Writing about the kinds of claims that women in a Bakwena village in Botswana are able to make to their male

changed customary practice. This evidence emerges from ethnographic studies of the “living law” – the law that people actually live. This “living law” is influenced by a range of needs and values, including, since 1994, constitutional values.

Likhapha Mbatha’s work on inheritance has shown that, contrary to the official rule of male primogeniture, women do inherit in practice: Communities that live a customary life have “no problem” in permitting women to inherit property on the basis of the cultural norms of responsibility and family welfare.⁵³ There is also evidence that these changes are, at least partly, justified by “external” ideas, values, and rules. Mbatha’s work suggests that the introduction of the Constitution has provided an “enabling environment” for the development of customary practices that improve the social and economic position of women.⁵⁴ Research by Aninka Claassens and Sizani Ngubane also illustrates how women have drawn on principles of democracy and equality to enhance their ability to negotiate rural power struggles and gain access to customary land and resources.⁵⁵ Thus, single mothers and women trying to access or retain land, in the absence of a male relative, have made successful claims based on a combination of equality and custom:

In many instances, arguments about the values underlying customary systems (in particular the primacy of claims of need) and entitlements of birthright and belonging are woven together with the right to equality and democracy in the claims made.⁵⁶

Celestine Nyamu-Musembi has argued for the realization of women’s human rights in Africa within local practice and custom, and not merely

partners, Anne Griffiths reveals how women seek to negotiate the civil and customary systems to achieve fair results. Anne Griffiths, *IN THE SHADOW OF MARRIAGE: GENDER AND JUSTICE IN AN AFRICAN COMMUNITY* (University of Chicago Press 1997). See also Alice Armstrong, Chaloka Beyani, Chuma Himonga, Janet Kaberi-Macharia, Athaliah Molokomme, Welshman Ncube, Thandabantu Nhlapo, Bart Rwezaura, and Julie Stewart, *Uncovering Reality: Excavating Women’s Rights in African Family Law*, 7 INT’L J.L. FAM. 314 (1993).

53 Mbatha, *supra* note 24, at 282.

54 *Id.* at 283.

55 Claassens and Ngubane, *supra* note 24.

56 *Id.*

in national legislation or international human rights regimes.⁵⁷ She argues that we should "recognise that local norms and practices... produce and refine ideas about human rights, part of the process that Sally Engle Merry has called the 'venacularisation' of human rights."⁵⁸ Recent work by Claassens and Sindiso Mnini has explored this in South Africa in relation to land, demonstrating how women secure rights through negotiation and struggle within customary communities, drawing on deeply rooted values to "venacularize" land rights from the "bottom-up."⁵⁹

The "living law" – like culture – is rich, varied, and flexible, changing in response to changing conditions. Nyamu-Musembi argues that its flexibility, its affordability and accessibility for rural communities, the fact that it is within the "control" of community members (not imposed from outside), and the fact that it can grant recognition to moral claims not otherwise recognized as rights, make it a rich source of meaningful cultural transformation in which women's rights can be affirmed.⁶⁰ She warns, however, that differences in power and knowledge (especially in terms of gender and socioeconomic status) can reinforce the status quo, in particular within families where "embedded ideas about authority and gender roles" tend to produce outcomes that disadvantage women.⁶¹ In addition, women's participation within decision-making fora is limited.⁶²

In South Africa, although the "living law" does not always guarantee egalitarian ends or always benefit women and other vulnerable members of communities (it has its own power dynamics), it must be seen as an important site of change, a place where rights can be won through struggle and negotiation, and even more so in the "new"

⁵⁷ Celestine Nyamu-Musembi, *Are Local Norms and Practice Fences or Pathways? The Example of Women's Property Rights*, in CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 126 (Abdullahi A. An-Na'im ed., Zed Books 2002).

⁵⁸ *Id.* at 127.

⁵⁹ Claassens and Mnisi, *supra* note 25.

⁶⁰ *Supra* note 57, at 127.

⁶¹ *Id.* at 128.

⁶² *Id.*

constitutional setting, which provides additional value resources for negotiating, resisting, and justifying customary and cultural practice. An important question is how this can be harnessed further to develop a legal and jurisprudential approach to customary law that is respectful of cultural diversity and cannot be dismissed merely as liberal values or civil law replacing customary norms and rules.

The next section explores the courts' adoption of "living law" and the extent to which this can result in a meaningful recognition of cultural diversity and gender equality.

4 Legal Struggles over and about Culture and Custom: A Complex Jurisprudence of Cultural Diversity Based on "Living Law"

Legal cases that address issues of culture and cultural diversity in South Africa tend come before the courts in two broad overlapping categories. The first set of claims are explicitly "internal" to customary law and seek to rely upon, recognize, or develop a customary right or interest (usually with reference to the Constitution). The second set of claims relate to "external" equality challenges (based directly on constitutional rights) against an allegedly discriminatory customary rule (largely based on gender) or against the discriminatory treatment of a cultural practice (thus based on culture). These cases illustrate the manner in which the courts, especially the Constitutional Court, have given recognition to culture and custom and have sought to reconcile it with constitutional values and rights. They reveal the centrality of the idea of living law (and an underlying idea of culture as permeable, responsive and dynamic) within this jurisprudence.

4.1 *Customary Claims*

Customary claims are brought within the parameters of customary law and seek to rely on customary law and/or practice to secure rights and interests. Such cases enable the courts to interrogate customary rules and practice in terms of an evolving customary law and constitutional norms.

As stated earlier, customary law is fully recognized by,⁶³ and subject to,⁶⁴ the South African Constitution. In terms of section 39(2) of the Constitution, a court must "promote the spirit, purport and objects of the Bill of Rights" when "developing customary law," and section 211(3) requires courts to apply customary law when it is applicable.

The key questions in customary claims revolve around determining the nature and content of customary law and practice and deciding whether the rule or practice should be recognized or developed in line with the Constitution. Recognition, in this sense, suggests that the rule or practice is already part of customary law (and is endorsed by the courts), whereas "development" is a court-initiated process of making a "new" rule. The distinction is not always clear in the jurisprudence. Nevertheless, the adjudication of these claims is an indicator of the courts' approach to customary law, diversity and pluralism under the democratic Constitution, in particular, how the idea of "living law" has provided a normative platform for affirming custom and culture, while testing and shaping its compliance with overarching constitutional values.

This section briefly considers the leading cases of *Alexkor Ltd. v. Richtersveld Community*,⁶⁵ *Mabena v. Letsoale*,⁶⁶ and *Shilubana v. Nwamitwa*,⁶⁷ and evaluates the manner in which they use the idea of "living law" to reconcile customary norms and practices with constitutional values.

4.1.1 Alexkor Ltd. v. Richtersveld Community: *Recognizing Customary Law as "Living Law" and Opening the Way to Challenge Official Law*

The case of *Alexkor Ltd. v. Richtersveld Community* concerned a claim for restitution of diamond-rich land by the Richtersveld community

⁶³ South African Const., at section 39(3) (rights in customary law recognized, if consistent with Constitution).

⁶⁴ South African Const., at section 2 (law or conduct inconsistent with the Constitution is invalid); at section 8 (The Bill of Rights applies to all law).

⁶⁵ 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para. 46.

⁶⁶ 1998 (2) SA 1068 (T).

⁶⁷ 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC).

under the provisions of the Restitution of Land Rights Act 22 of 1994. To succeed, the community had to show that it had been “dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices.”⁶⁸ One of the core issues in the case was the nature of the community’s original right to the land.⁶⁹ The Court concluded that the community had originally held a “right of communal ownership under indigenous law,” including “the right to exclusive occupation and use of the subject land by members of the Community . . . , the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface.”⁷⁰ The recognition of this customary right or interest was the critical first step that enabled the community to claim restitution.

Alexkor was the first Constitutional Court case that addressed customary law. Other than the significance of recognizing a customary interest in land for the community’s successful land claim, the case is important in that the Court sketched out its approach to customary law. This was particularly significant after the judgments of the High Court and the Supreme Court of Appeal (SCA) in *Mthembu v. Letsela*.⁷¹ Both these judgments had accepted the official version of customary inheritance law (and its rule of primogeniture). The courts concluded that limiting inheritance to male heirs was justified by the concurrent customary obligation of the heir to “support and maintain” women and children, “if necessary from their own resources, and not to expel them from their home.”⁷² This outcome had disappointed advocates for women’s rights, especially as the courts had failed to consider that, in reality, women were routinely

68 Section 2(1) of the Act.

69 At issue was, first, the nature of the right to land, and then, whether this right had survived the annexation by the British Crown so that it still existed in 1913 (at para. 46).

70 *Supra* note 65, at para. 46.

71 *Mthembu v. Letsela* 1997 (2) SA 936 (T); *Mthembu v. Letsela*, [2003] All SA 219 (A).

72 SCA (2003) judgment, *id.* at para 8. See also the High Court (1997) judgment, *id.* at 945H-946C.

evicted from their homes and had no enforceable right to maintenance under customary law.⁷³

In *Alexkor*, a unanimous Constitutional Court noted that customary law was

a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.⁷⁴

The Court distinguished this "living law" from "the official body of law employed in the courts and by the administration (which...diverges most markedly from actual social practice)...[and] the law used by academics for teaching purposes,"⁷⁵ thus giving it precedence over its official and codified forms. In doing so, the Court also (if indirectly) affirmed the idea that culture and custom are flexible and responsive, adapting to changing circumstances, and rejected a more essentialist and rigid approach. Importantly, the Court emphasized the fact that indigenous, or customary, law generates its own norms and values, and that these would continue to have force and evolve under the overall standard of the Constitution.

At the same time, the Court recognized that customary law was not "a fixed body of formally classified and easily ascertainable rules."⁷⁶ It is this characteristic of customary law that is both enabling and limiting in the Court's approach and jurisprudence. On the one hand, it enables the

⁷³ See Mbatha, *supra* note 24. *Mthembu* was never a good test case for customary inheritance. From the start, the marriage was disputed by the heir (even though part of the *lobola* had apparently been paid). In the absence of evidence proving the marriage, the matter eventually turned on whether the illegitimate child of the deceased should be protected. Both courts found no basis in customary law to do so.

⁷⁴ 2003 (12) BCLR 13021 (CC), at para. 53.

⁷⁵ See footnote 51 of the *Alexkor* judgment, *id.*, citing Thomas W. Bennett, A SOURCE-BOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA preface, vi (Juta 1991).

⁷⁶ *Alexkor*, *supra* note 65, at para. 52.

Court to affirm cultural norms and practices that align with the Constitution, and shape, meld, or even reject those that do not. It does this in two ways: by *recognizing* existing, evolved practices and rules as part of customary law and by *developing* practices and rules to bring them in line with the Constitution.⁷⁷ On the other hand, difficulties of proof and the variable nature of practices across communities have meant that the courts have retreated from a full endorsement of “living law” at the recognition and remedial stages (as discussed later). An important underlying reason for this appears to be the inherent inflexibility and thus uncertainty of “living law,” which may undermine a more formal approach to the rule of law. In addition, the living law is permeated with gendered inequalities, and courts need to find ways of managing and overcoming these.

4.1.2 Mabena v. Letsoale and Shilubana v. Nwamitwa: *Recognizing and Developing Women’s Rights within the “Living Law”*

Several cases that have addressed women’s rights within customary law have directly or indirectly touched on the “living law” as the basis for the claim. This section briefly addresses issues of family law and traditional leadership.

The question of when a customary marriage can be said to be concluded has arisen in several cases, especially when there is a dispute over inheritance. Here, the male heir and family might seek to argue that the customary requirements of *lobola* or the requisite traditional ceremony have not been concluded and therefore the “wife” and children have no rights. This has given rise to debate about when a customary marriage may be said to be concluded. For example, is part or full payment of *lobola* required? Or is mere agreement on the amount sufficient? Given that the 1998 Recognition of Customary Marriage Act is silent

⁷⁷ Section 211 recognised customary law. Section 39(2) requires a court to “promote the spirit, purport and objects of the Bill of Rights” when “developing customary law.” As discussed later, the difference between recognition and development is not always clear in the judgments.

on this, requiring merely that a marriage be "celebrated according to customary law,"⁷⁸ evidence of what customary law is, in practice, is significant. Here, some scholars have argued for full payment of *lobola*, others have argued that customary practices are variable and shifting, and that account should be taken of changing socioeconomic circumstances in which payment of *lobola* is often unaffordable.⁷⁹ The Constitutional Court's endorsement of living law suggests that actual practice should dictate and shape judicial outcomes, yet few cases have been able to do this.⁸⁰

One exception to this is the high court case of *Mabena v. Letsoalo*,⁸¹ decided before *Alexkor*. *Mabena* is a positive example of the judicial recognition of "living law." It concerned the issue of whether a customary marriage existed in circumstances where, *inter alia*, the bride's father had not been involved in *lobola* negotiations. In finding a valid customary marriage, the Court accepted that culture was capable of evolving to reflect changed economic and gender relations (in this case an urban-based, woman-headed household), so that a woman could legitimately consent to customary marriage and negotiate and receive *lobola* on behalf of her family:

According to traditional customary law the mother of the bride could not be the guardian of her daughter, she herself was under the guardianship of her husband... The evidence is that the respondent's father had abandoned the family. The evidence further is that the respondent's mother as a matter of fact functioned as head of the family... [T]here are authorities which indicate that their case is not unique. It must therefore be accepted that there are instances in practice where mothers negotiate for and receive lobolo and consent

78 Section 3(1)(b).

79 Mbatha, *supra* note 52, at chapter 6.

80 Bennett argues that the content and meaning of *lobola* should be determined by the legislature. Thomas W. Bennett *The Equality Clause and Customary Law*, 10 S. Afr. J. HUM. RTS. 124 (1994). Likhapha Mbatha finds the paucity of cases a problem and argues strongly for court intervention to give meaning to the living practices of *lobolo*, thus affording women greater certainty and better rights (*id.*).

81 *Supra* note 66.

to the marriage of their daughters... Customary law exists not only in the “official version” as documented by writers, there is also the “living law,” denoting “a law actually observed by African communities” ...[The] courts should accordingly recognise the rule.⁸²

There was no explicit reference to gender equality in *Mabena v. Letsoalo*, although the case was a clear recognition of women’s changing position in society.

In *Bhe v. Magistrate Khayalitsha*, Justice Ngcobo describes this as the “development of indigenous law by incorporating the changing context in which the system operated,” rather than development in compliance with the Constitution.⁸³ By comparison, the majority judgment noted that when “a principle of living, actually observed law ... is recognised by the court ... it would constitute a development in accordance with the ‘spirit, purport and objects’ of the Bill of Rights contained in the ... Constitution.”⁸⁴ Generally, the approach seems to be that the evolved rule or practice required Court recognition (and thus development) before becoming valid. Living law thus seems to require court endorsement.

The case of *Shilubana v. Nwamitwa* is the leading Constitutional Court case on “living law” and the place of gender equality within culture and custom.⁸⁵ The case dealt with recognition and/or development of customary law by traditional leaders, communities, and courts. It concerned a dispute between a female and male candidate over chieftainship of the Valoyi traditional community in Limpopo.⁸⁶ The appellant, Ms. Shilubana, was a direct descendant within the chiefly lineage. She had been previously passed over in favor of her younger brother,

82 *Id.* at 1073I –1075B.

83 *Bhe, supra* note 50, at para. 217.

84 *Id.* at para. 111. See *Mabena, supra* note 66, at 1075B, where the court notes that [s]uch as *recognition* would constitute a development in accordance with the “spirit, purport and objects” [of the Bill of Rights]” (my emphasis).

85 *Supra* note 67.

86 Limpopo is one of nine provinces in South Africa. It is predominantly rural and poor, situated in the north of the country.

according to the principle of male primogeniture, but was subsequently chosen by the community to succeed her brother. After her brother's death, her appointment was challenged by the respondent, Mr. Nwamitwa, the son of the deceased who wished to be installed as traditional leader. A major point of dispute was sex or gender, as both the respondent and the Congress of Traditional Leaders in South Africa (CONTRALESA) sought to argue that the exclusion of women (and thus the applicant) from chieftainship was required under custom and was fair discrimination under the Constitution.⁸⁷ The Court did not engage with the question of discrimination under section 9 of the Constitution, thus avoiding a clear precedent that the exclusion of women from accession to traditional leadership was, in itself, unfair discrimination. Instead, it found that the *de facto* appointment of a woman traditional leader by a majority of the community was a constitutionally compliant development of customary law, bringing "an important aspect of their customs and traditions into line with the values and rights of the Constitution."⁸⁸ A number of important points arise from this case.

The first point of significance is that the Court phrased the issue not as a conflict between equality and culture (or between the Constitution and customary law), but as one of the authority of traditional leadership (as representatives of the community) to promote gender equality in the succession to leadership. The simple question was thus whether custom and culture allowed female leadership (not whether the Constitution required it). This directly raised the prospect that gender equality – the possibility of women as traditional leaders – was an internal cultural possibility (within the overall idea of flexible and intersecting cultures) rather than an external imposition.

The second important point concerns the authority to overturn decades or centuries of apparently "male-only" leadership. What does it take to change custom? This deceptively simple question goes to the

87 *Supra* note 76, at paras. 30–31, 40.

88 *Id.* at para. 68.

very heart of what is meant by “living” customary law. Both the High Court and the SCA had found that this single decision to appoint a woman was insufficient to overturn a much older custom of succession of the eldest son.⁸⁹ The SCA was particularly concerned with the effect that such an apparently *ad hoc* decision would have on legal certainty and vested rights.⁹⁰ The Constitutional Court seemed to endorse a much more flexible understanding of customary law, one that acknowledged the free development of law by the communities that live it and the ability to move away from past practice.⁹¹ However, the Court requires this flexibility to be balanced against legal certainty, vested rights, and constitutional rights:

The outcome of this balancing act will depend on the facts of each case. Relevant factors in this enquiry will include, but are not limited to, the nature of the law in question, in particular the implications of change for constitutional and other legal rights; the process by which the alleged change has occurred or is occurring; and the vulnerability of parties affected by the law.⁹²

Overall, however, the Constitution must be respected and traditional authorities, while free to develop and change their law, must do so with due regard to section 39(2), and the need to “act so as to bring its customs in line with the norms and values of the Constitution.”⁹³

The Court thus affirms customary law as an “independent and original source of law”⁹⁴ and clearly envisages it as able to generate its own norms and values independent of civil law, although consistent with the Constitution. Yet, as Driscilla Cornell argues, it stops short of a full endorsement of custom’s inherent flexibility and responsiveness

⁸⁹ Nwamitwa v. Phililia 2005 (3) SA 536 (T); Shilubana v. Nwamitwa 2007 (2) SA 432 (SCA).

⁹⁰ *Supra* note 76, at paras. 50–51.

⁹¹ *Id.* at paras. 51–57.

⁹² *Id.* at para. 47.

⁹³ *Id.* at para. 73.

⁹⁴ *Id.* at para. 54.

to community needs.⁹⁵ This is apparent in the Court's finding that the appointment of a woman traditional leader was a "development" of customary law in line with the Constitution, including its strong commitment to gender equality.⁹⁶ The Rural Woman's Movement, an *amicus curiae* in the case, had argued, correctly in Cornell's view, that this appointment not a new "development" but merely an expression of custom's inherent flexibility, one that had previously recognized women as traditional leaders.⁹⁷ The Court had rejected this argument on the basis of insufficient evidence. It thus remains a question as to whether it might have endorsed a more flexible notion of living law that required "recognition" rather than development. Had it done so, it would have been an important recognition of gender equality issues within custom.

This case has significant value in its recognition of the dynamic and adaptable nature of customary law and the power of communities to amend their customs and traditions to reflect changed circumstances. It shows that culture and tradition do not constitute absolute barriers to women's accession to the position of traditional leader. Culture and custom can accept a variety of rules for women in different contexts and according to different needs. *Shilubana* suggests that there is a place for cultural change within communities and that there is no inherent value barrier to what we might call "gender equality" or women's rights. It thus suggests, in line with the work of Nyamu-Musembi, that local norms and practices can be pathways, rather than barriers, to greater justice for women.⁹⁸ Rather than eschewing customary law and traditional authorities, it is important to understand and engage the norms and practices of living law and to find ways of deepening conversations about rights, norms, and values in customary law and the Constitution.

⁹⁵ Drucilla Cornell, *The Significance of the Living Customary Law for an Understanding of Law: Does Custom Allow for a Woman to Be Hosi?* 3 CONST. COURT REV. 395 (2009).

⁹⁶ For example, *supra* note 76, at para. 47.

⁹⁷ *Id.* at para. 35. Cornell, *supra* note 95, at 403–04.

⁹⁸ *Supra* note 57.

Cornell highlights the potentially radical nature of this notion of “living law,” away from certainty and rule-making power and toward communal determination, to practices, processes, and ethical principles that differ from the “Western” view of law.⁹⁹ Much of this is unknown, or, at best, unfolding. To be faithful to cultural diversity, more work needs to be done in understanding the nature and content of living law. This suggests the need for ongoing ethnographic research, as well as engagement of communities, traditional leaders and courts at different levels.

4.1.3 The Living Law in Practice: A Vehicle for Change?

The cases discussed here illustrate how courts can confirm and recognize norms and practices that benefit women and have already developed within communities. Such cases are positive examples of how the “living law” can be less rigid and less defensive of traditional ideas of women’s place in society than the official or codified version – although the pattern of this is uneven across the country.¹⁰⁰ They also demonstrate the permeability of cultural norms and values, how culture and custom are influenced by “external” norms, including the Constitution, while simultaneously maintaining cherished “internal” cultural principles and objectives. These cases suggest that the recognition of culture and custom by the Constitutional Court will not inevitably generate a checklist of culture against universal constitutional rights. On the contrary, careful constitutional dialogue is possible, especially one that takes account of a variety of normative sources. The “living law” – in its best interpretation – provides a powerful platform of ongoing change and transformation under the Constitution.

99 Cornell, *supra* note 95.

100 In a fascinating paper, David Webster writes about differing approaches to gender identity arising out of Zulu and Tsonga tradition, in which the latter is more flexible in relating to women’s changing roles. David Webster, *Abafazi Bathonga Bafuhlakala: Ethnicity and Gender in a KwaZulu Border Community*, in TRADITION AND TRANSITION IN SOUTHERN AFRICA (Andrew Spiegel and Pat McAllister eds., Wits University Press 1991).

4.2 Equality and Other Rights-Based Claims Challenging Inequality within (Codified) Customary Law

In 1994, traditional leaders strongly objected to the application of the equality right (and protection against unfair discrimination) to customary law.¹⁰¹ They were unsuccessful, and equality has formed the basis for law reform and litigation to secure women's rights within customary law. More often than not, this has been done in a manner that seeks to affirm culture and cultural diversity at the same time that it removes gender discriminatory rules and practices.

In recommending the reform of the law regulating customary marriage, the South African Law Reform Commission (SALRC) noted that the "Constitution has sent a clear message to the country that discrimination will no longer be tolerated and that women...can expect the law to be changed in their favour."¹⁰² However, it also endorsed a separate marriage law to rectify the historic inequalities between civil marriages and customary unions (and thus between the dominant "white" culture and African cultures). After a lengthy consultation process, the SALRC and Parliament discounted the objections of traditional leaders to the idea of equality in customary marriage¹⁰³ and secured women's equal rights to status, property, decision making, and children in the Recognition of Customary Marriages Act 110 of 1998. At the same time, the law reform process was guided by the notion of "living law," thus leaving the

101 See Albertyn, *supra* note 44.

102 South African Law Reform Commission, *Discussion Paper 74 Customary Marriages* (Project 90, The Harmonisation of the Common Law and Indigenous Law) para. 2.1.1 (August 1997).

103 For example, Likhapha Mbatha argues the following about the submissions of the Houses of Traditional Leaders from the Eastern Cape and Northern Province to the SALRC: "[w]omen who challenged customary practices of marriage as discriminatory were labeled westernized... They condemned endeavours to liberate African women from male domination as westernization." Likhapha Mbatha, *The Content and Implementation of the Recognition of Customary Marriages Act 120, 1998: A Social and Legal Analysis*, chapter 3 (unpublished LLM thesis, University of the Witwatersrand, 2006).

cultural forms of entering into marriage undefined,¹⁰⁴ and recognizing polygyny¹⁰⁵ without the formal consent of first wives to polygyny.¹⁰⁶

However, legislation has also proved an inadequate response to discrimination within customary law, either because law reform itself was subject to delays or because newly enacted legislation did not fully protect women and communities against discriminatory customary practices. This, in turn, was a result of the difficulties of translating complex customary ideas into legal provisions,¹⁰⁷ and because of power struggles among traditional leaders, women, and communities. Although the interests of women were dominant in areas of family law, the interests of traditional leaders have been far more prominent in law reform, affecting the institution of traditional leadership, land ownership, and traditional courts.¹⁰⁸

In the absence of legislation, or as a result of problems in newly legislated customary law, women and communities have gone to court to secure rights. This section considers the three main cases on these issues: *Bhe v. Magistrate Khayalitsha*,¹⁰⁹ which saw the applicants successfully challenge the customary rule of primogeniture (inheritance by the eldest male relative); *Gumede v. President of the RSA*,¹¹⁰ a claim of unfair

104 To enable living law in all its diversity to prevail, the Act merely refers that customary marriage is “celebrated in accordance with customary law” (section 3(1)(b) of the Act).

105 The call for the recognition of polygyny was not merely the preserve of traditionalists. Several women’s groups supported the legalization of polygyny insofar as it would provide rights to vulnerable women and children in these relationships. See Beth Goldblatt and Likhapha Mbatha, *Gender, Culture and Equality: Reforming Customary Law*, in ENGENDERING THE POLITICAL AGENDA: A SOUTH AFRICAN CASE STUDY 83, 104 (Catherine Albertyn ed., Centre for Applied Legal Studies 1999).

106 “The “living law” suggested that when women were in polygynous marriage, the consent of first wives was not required. South African Law Reform Commission, *supra* note 101. Of course, this is an example of the living law neglecting women’s rights.

107 Likhapha Mbatha, *Reflection on the Rights Created by the Recognition of Customary Marriages Act*, AGENDA SPECIAL FOCUS (2005); Himonga, *supra* note 30, at 84.

108 Walker, *supra* note 46; Claassens, *supra* note 46.

109 *Supra* note 50.

110 2009 (3) SA 152 (CC).

gender discrimination against provisions of the "old order" customary law (codified in the KwaZulu Act and the Natal Code) and the Recognition of Customary Marriages Act 120 of 1998; and *Tongoane v. National Minister for Land and Agricultural Affairs*,¹¹¹ a constitutional challenge to the 2004 Communal Land Rights Act.

4.2.1 *Equality Jurisprudence as a Forum for Harmonizing Customary Law and the Constitution*

The complex and multiple forms of inequality found in South Africa require a flexible test so that courts may respond to different forms of disadvantage, stigma, and vulnerability; to differing claims of recognition and redistribution; and to competing claims over power, status, and resources.¹¹² South African equality jurisprudence emphasizes the importance of context, impact, difference, values, and guiding principles.¹¹³ Arguably, this approach enables claims of discrimination and inequality within customary law to be adjudicated in a manner that values cultural diversity and gender equality.

¹¹¹ 2010 (6) SA 214 (CC).

¹¹² Catherine Alberyn, *Equality*, in SOUTH AFRICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS (Halton Cheadle, Dennis Davis, and Nicholas Haysom eds., Butterworths 2004); Catherine Alberyn and Beth Goldblatt, *Equality*, in CONSTITUTIONAL LAW OF SOUTH AFRICA chapter 35 (2nd ed., Stuart Woolman, Michael Bishop, and Jason Brickhill, eds., Juta 2007); Henk Botha, *Equality, Plurality and Structural Power*, 25 S. Afr. J. Hum. Rts. 1 (2009).

¹¹³ Equality jurisprudence relating to unfair discrimination is distilled in *Harksen v. Lane* (1998) 1 SA 1300 (CC). The equality analysis entails a contextual assessment of the impact of an impugned rule or conduct with due regard to the degree of disadvantage suffered by the complainant and his or her group, the purpose of the act or conduct, and the extent to which the complainant's rights and interests are invaded. These factors are weighed up within an overall assessment of the impairment of human dignity, generally defined as a failure to be treated with equal concern and respect. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the primary mechanism for private discrimination, also mandates a contextual inquiry and the assessment of disadvantage, purpose and impairment of dignity, but includes a broader range of factors within a consideration of unfair discrimination (section 14).

Attention to context always insists that account is taken of the actual reality of people's lives; their place within the community; and the power, resources, and interests implicated by the dispute. It requires one to take a close look at the origin and history of a rule or practice, its importance and purpose, and the extent to which it is supported or contested within the group. It also requires a consideration of the effects that outlawing or permitting the disputed practice would have on different members of the group.¹¹⁴

In addition, any claim about intragroup inequality arising out of culturally based gender discrimination will require an assessment of competing cultural narratives that speak to conflicting interests and different interpretations of practices within a community. Not only is a contextual approach essential for this, but also a thorough interrogation of the values and purposes underlying the disputed rules or practices and their resonance with constitutional values. Disputes about the status, role, and entitlements of women, although they may present as conflicts between "gender" and "equality," can often be distilled into competing interpretations of principle. In South African courts, this translates into what is fair or unfair: whether the dignity of women is undermined or not, and how different cultural arrangements can achieve just results. Underlying this are different interpretations of gender relations and the place of women and men in society. Opening up the meaning of constitutional and customary values, recognizing competing and overlapping interpretations of the same value, and justifying interpretative choices enable this discussion. This also enables the development of clearer principles to mediate a commitment to gender equality and cultural diversity.

The foundational values of the South African Constitution are dignity, equality, and freedom. The Constitution also recognizes customary values that are not inconsistent with the Constitution. It is possible, within this constitutional framework, to debate and adjudicate a range

¹¹⁴ Albertyn, *supra* note 17.

of values and their competing meanings: to balance individual and community, duty and autonomy, choice, and responsibility, and, importantly, to affirm significant customary and cultural norms in the construction of cultural diversity and solidarity under the Constitution.

This is the theory of equality jurisprudence (in its best interpretation).¹¹⁵ The next sections consider the actual practice in three cases.

4.2.2 *Bhe v. Magistrate Khayalitsha: The Living Law Contained?*

The official customary law, as codified in the Black Administration Act 38 of 1927 and regulations, reserved the right to inheritance to the eldest male relative of the deceased. In practice, this often led to women and their children being evicted from their homes upon the death of their husbands and/or living in penury.¹¹⁶ The case of *Bhe v. Magistrate Khayalitsha* found the rule of male primogeniture to be unfair gender discrimination.

Following *Alexkor*, then Deputy Chief Justice Langa (writing for the majority) asserted the importance of customary law and of the "living law," noting that

the fossilisation and codification of customary law...led to its marginalisation. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances. This no doubt contributed to a situation where...[c]ustomary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community.¹¹⁷

Langa emphasized that "the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights."¹¹⁸ He noted the manner in which the official

¹¹⁵ As noted earlier, this is not always followed. *Supra* note 27.

¹¹⁶ Mbatha, *supra* note 24.

¹¹⁷ *Supra* note 50, at para. 43 (footnotes omitted).

¹¹⁸ *Id.* at para. 46.

customary law resisted socioeconomic change and continued to stereotype women, subjecting them to “old notions of patriarchy and male domination,”¹¹⁹ resulting in a denial of access to property and economic opportunities,¹²⁰ and limiting their ability to assert control over their lives.¹²¹

The Court then turned to the rule of primogeniture in the customary law of succession, noting its concurrent obligations and cultural justifications, namely the “basic social need to sustain the family unit.”¹²² The Court concluded that although the maintenance of the family remained an important communitarian purpose, the responsibility for this could not be limited to elder males, to the exclusion of women (or younger men and unmarried sons). It found:

The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.

It reaching this conclusion, the Court also noted the changed circumstances of modern urban communities and families, and that fact that “the rules of succession in customary law have not been given the space to adapt and to keep pace with changing social conditions and values.”¹²³ It agreed with the observation by Bennett that:

[a] critical issue in any constitutional litigation about customary law . . . is the question whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency.¹²⁴

¹¹⁹ *Id.* at paras. 90–91.

¹²⁰ *Id.* at para. 90.

¹²¹ *Id.* at paras. 61–68.

¹²² *Id.* at paras. 84, 89–91.

¹²³ *Id.* at para. 82. See generally paras. 81–87.

¹²⁴ *Id.* at para. 86.

Although the Court noted evidence that the rule of primogeniture is evolving to meet the needs of changing social patterns, it felt that this reference to "living law" was insufficient to determine with any clarity.¹²⁵

The minority judgment of Justice Ngobo reveals a closer engagement with customary law and the development, meaning, and purpose of succession and inheritance. Ngobo notes that "[t]he underlying purpose of indigenous law of succession is...to protect the family and ensure that the dependants of the deceased are looked after."¹²⁶ This vested in male heirs, because women "were always regarded as persons who would eventually leave their original family on marriage" and could not be heads of their "new" families as "they were more likely to subordinate the interests of the original family to those of their new family."¹²⁷ He notes, however, that changing practice has led to some women succeeding to a deceased family head.¹²⁸ He concludes that the exclusion of women from succession is unfair and unjustified gender discrimination.¹²⁹

This rule might have been justified by the traditional social economic structure in which it developed. It has outlived its usefulness. In the present day and age the limitation on the right of women to succeed to the position and status of the family head, cannot be said to be reasonable and justifiable under section 36(1) of the Constitution.¹³⁰

There is little judicial dispute in the finding of unfair discrimination. In both judgments, the idea of "living law"¹³¹ – as a counter to the inflexible codified law and as evidence of changed practice – lends legitimacy

125 *Id.* at para. 85.

126 *Id.* at para. 173

127 *Id.* at para. 174

128 *Id.* at para. 175.

129 *Id.* at paras. 184–86.

130 *Id.* at para. 210.

131 The majority judgment, per DCJ Langa, recognized that "the rule of primogeniture is evolving to meet the needs of changing social patterns...[I]n reality different rules may well be developing, such as the replacement of the eldest son with the youngest for purposes of inheritance, and the fact that widows often take over their husbands'

to the finding of constitutional noncompliance. However, the divergence on remedy raises particularly interesting questions about the place of “living law” in constitutional jurisprudence, including the possibilities of allowing an uncertain and flexible “living law” to subsist when the vulnerability of certain community members, such as women or children, is at issue.

The Court faced considerable difficulty in framing a remedy in this case, in particular, in deciding what to put in place once the offending provisions had been struck down. Two options were possible. The civil law of intestate succession, duly amended to take account of polygyny, could be made applicable to customary inheritance. Alternatively, the Court was invited to consider using the living law to frame a remedy within customary law. First, it was suggested that it could develop customary law rules and principles to take account of gender equality that was manifest in the evolved living law. Second, the Court was invited to extract principles from the living law to facilitate the development of customary law within families and communities and with the magistrates’ courts that managed the distribution of the estate.¹³²

The majority decided that the best remedy was to strike out the impugned provisions and replace them with modified sections of the Intestate Succession Act (which granted inheritance rights to surviving spouses and children, based on the size of the estate). In deciding to provide customary heirs with (civil law-based) statutory rights, the majority concluded that there was “insufficient evidence and material” to “determine the true content of customary law” and test it “against the provisions of the Bill of Rights,”¹³³ thus enabling it to develop customary law to recognize a new rule. On the second issue, the Court concluded that it was too slow and uncertain a remedy, one that would lead to a lack of uniformity of law. In the end, the Court had

lands and other assets, especially when they have young children to raise.” *Id.* at para. 85. See Ncgobo, *id.* at para. 175.

¹³² *Id.* at paras. 109–10.

¹³³ *Id.* at para. 109.

serious doubts that leaving the vexed position of customary law of succession to the courts to develop piecemeal would be sufficient to guarantee the constitutional protection of the rights of women and children in the devolution of intestate estates. What is required... is more direct action to safeguard the important rights that have been identified.¹³⁴

Justice Ngobo differs. He proposes that, as required in relation to the common law,¹³⁵ “[w]here a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation.”¹³⁶ Here “the Court is not primarily concerned with the changing social context in which indigenous law of succession operates or the practice of the people,” but rather with the disjunction between a customary rule and the Constitution. As a result, the living law is less important.¹³⁷

[W]e are concerned with the development of the rule of male primogeniture so as to bring it in line with the right to equality. We are not concerned with the law actually lived by the people. The problem of identifying living indigenous law therefore does not arise. At issue here is the rule of male primogeniture... It is that rule which must be tested against the right to equality, and if found deficient, as I have found, it must be developed so as to remove such deficiency.¹³⁸

Ngobo suggests that the unwritten rule of male primogeniture can be developed to allow the eldest daughter to succeed to the deceased estate.¹³⁹ Regrettably, he does not include widows, a point that seems to

134 *Id.* at para. 113. As stated in the subsequent case of *Shilubana v. Nwamitwa* (*supra* note 67), recognition of the living law would be tempered by, *inter alia*, the need provide adequate protection to women and children. *Id.* at paras. 110–13.

135 In *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC), the Court found that there was an obligation on courts always to test the common law against the Constitution and develop it where necessary.

136 *Supra* note 50, at para. 215.

137 *Id.* at para. 218.

138 *Id.* at para. 220.

139 *Id.* at para. 222.

be otherwise justified by his recognition that many women are *de facto* heads of their families.¹⁴⁰ It can only be assumed that the limited development is linked to the facts of the case (concerning children).

Ngcobo seeks to address the consequences of striking down the impugned laws. He disagrees with the use of a civil law remedy based on a nuclear family model for customary communities.¹⁴¹ Rather, he proposes that the issues should be seen, first, as one of choice of law, in which some might apply the Intestate Succession Act (more likely in urban communities) and others a customary solution (especially in rural communities).¹⁴² He argues that to retain diversity and pluralism, and to respect the fact that customary law still has meaning for many South Africans, intestate deceased estates should be managed in a flexible manner in which the “actual applicability of indigenous law” is determined in the concrete setting of each case, based on

the respect for our diversity and the right of communities to live and be governed by indigenous law must be balanced against the need to protect the vulnerable members of the family. The overriding consideration must be to do that which is fair, just and equitable.¹⁴³

If this cannot be resolved by family agreements, then the magistrates’ courts should decide according to “fairness, justice, and equity.” However, Ngcobo gives little content to this beyond the expectation that women could inherit under this system.¹⁴⁴ He, too, is unable or unwilling to draw principles from the “living law.”

¹⁴⁰ *Id.* at para. 221.

¹⁴¹ *Id.* at paras. 228–233. See also Himonga, *supra* note 30.

¹⁴² *Id.* at para. 225.

¹⁴³ *Id.* at para. 238.

¹⁴⁴ All Ngcobo J notes is that “the Magistrate must have regard to, amongst other things, the assets and liabilities of the estate, the widow’s contribution to the acquisition of assets, the contribution of family members to such assets, and whether there are minor children or other dependants of the deceased who require support and maintenance. Naturally, this list is not intended to be exhaustive of all the factors that are to be taken into consideration, there may be others too. The ultimate consideration must be to do that which is fair, just and equitable in the circumstances of each case” (*id.* at para. 239).

The two judgments highlight the debate in South Africa on how to simultaneously remedy discrimination within customary law and value cultural diversity. The majority argues that the rights of the vulnerable cannot be left to families and communities that are, themselves, embedded in unequal gender relations. Clear rights are essential (even if this temporarily elides cultural values). The minority places more trust in families and communities to preserve culture and custom, but it risks overlooking the very power relations that will continue to exclude women from access to protection and resources through inheritance. In both instances, the living law is not used to provide a remedy because it is thought to be too uncertain to give rise to overarching principles.

4.2.3 *Gumede v. President of the RSA*

*Gumede*¹⁴⁵ concerned a claim of unfair gender discrimination against provisions of the "old order" customary law, codified in the KwaZulu Act and the Natal Code,¹⁴⁶ and against the Recognition of Customary Marriages Act 120 of 1998, a law passed by the democratic parliament to address the inequality faced by women in customary marriage. Although section 7(1) of this Act stipulates that customary marriages entered into after the commencement of the Act are in community of property¹⁴⁷ (thus guaranteeing each spouse one-half of the estate upon divorce), it also states that "the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law."¹⁴⁸ In this case, the codified "Zulu law" applied. The provisions of this code entrenched male ownership and control of matrimonial property during marriage and upon its dissolution, leaving women with no rights to property upon divorce.

¹⁴⁵ 2009 3 SA 152 (CC).

¹⁴⁶ KwaZulu Act on the Code of Zulu Law 16 of 1985; Natal Code of Zulu Law R 151 of 1987, GG No. 10966.

¹⁴⁷ Section 6. Some commentators have criticised the fact that civil law concepts of property were used in the Recognition Act, a fact that undermines customary forms of property. See Mbatha, *supra* note 105; Himonga, *supra* note 30.

¹⁴⁸ Section 7(1) of the Act.

The Court found little difficulty in concluding that the provisions discriminated unfairly on the basis of gender. In reaching its conclusion, the Court noted that the official version of customary law produced a “particularly crude and gendered form of inequality, which left women and children singularly marginalised and destitute.”¹⁴⁹ It is the particular combination of the unequal systems of customary and civil law that produced the “fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage”:¹⁵⁰

Women, who had great influence in the family, held a place of pride and respect within the family. Their influence was subtle although not lightly overridden. Their consent was indispensable to all crucial family decisions. Ownership of family property was never exclusive but resided in the collective and was meant to serve the familial good.¹⁵¹

This did not mean that patriarchy was not present, merely that its form was less severe: “It must however be acknowledged that even in idyllic pre-colonial communities group interests were framed in favour of men and often to the grave disadvantage of women and children.”¹⁵² Constitutionally inspired reform is necessary, not to return to an older (and “better”) times, but rather to overcome the chilling effects of codification and to ensure harmonization with the Constitution.¹⁵³ The nub of the inquiry in *Gumede* is the impact on women of the “fossilized” and patriarchal version of law set out in the Kwazulu Act and the Natal Code.

In finding unfair discrimination, the Court concluded that the impact of the law means that

affected wives in customary marriages are considered incapable or unfit to hold or manage property [and]...are expressly excluded

¹⁴⁹ *Supra* note 143, at para. 17.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at para. 18.

¹⁵² *Id.* at para. 19.

¹⁵³ *Id.* at paras. 21–22.

from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property.¹⁵⁴

The Court had a choice about where to go next. It could develop the "living law" and articulate rules of the "old" customary law of marriage, or it could address the matter through section 7 of the Recognition Act. It found that it could not develop codified law, but neither did it have evidence to enable it to develop "living law" into a new rule.¹⁵⁵ Should it do so, it would interfere with a choice made by Parliament to change the proprietary consequences of customary marriage to render them consistent with the Constitution.¹⁵⁶ It thus declares section 7 to be unconstitutional, insofar as it requires marriages entered into before the commencement of the Act to continue to be governed by customary law, to the detriment of women. As a result, all customary marriages entered into before or after the Act are deemed to be in community of property.¹⁵⁷

The unanimous decision in *Gumede* continues to confirm the consensus within the Court that equality for women within marriage is compatible with customary law, especially in recognition of its need to evolve in response to changing socioeconomic circumstances, including the changed position of women. "Living law" and context continue to be relevant to the legitimacy of change but not to remedy. Perhaps more appropriately, the Court relies on the certainty of newly legislated customary law.

4.1.3 Tongoane v. National Minister for Land and Agricultural Affairs: Challenging Legislation Based on the "Living Law"

The case of *Tongoane v. National Minister for Land and Agricultural Affairs* concerned a challenge to the 2004 Communal Land Rights Act

154 *Id.* at para. 35.

155 For the Court's reasoning, see *id.* at paras. 28–31.

156 The RCMA imposes community of property as the default regime for customary marriages.

157 *Supra* note 143, at paras. 50–54.

(CLRA) that sought to regulate the transfer of rural, communal land from the state to communities, and, in some cases, to individuals.¹⁵⁸ This case represents a fascinating example of the use of evidence of “living law” to challenge legislation, passed by the democratic government, as unconstitutional because it is out of step with a more constitutionally compliant and customary living law.

The final form of the CLRA (enacted after several different drafts that were more beneficial for women) reflected a compromise of multiple interest groups, with Traditional Councils¹⁵⁹ responsible for the administration and management of land and with some protection for women in the recognition of joint ownership by spouses and a provision on gender equality stating that women are entitled to the same rights and security of tenure as men (to act as a guiding principle in the implementation of the Act).¹⁶⁰ The Act was widely criticized for its failure to protect the different layered and nested customary land rights of individuals, families, and communities. For example, in relation to women, Aninka Claassens argued that the Act reinforced patriarchal power and entrenched, rather than removed, past discriminatory practices by failing to recognize women’s “user” and “occupier” rights. It did so by “upgrading and formalizing old-order rights held by men” and by enhancing the powers of traditional leaders over land.¹⁶¹ At the root of the problem, according to Claassens, was the manner in which the Act fit into rigid and formal ideas of top-down power, in which gender equality was reduced to quotas on Traditional Councils and statements of principle that have little practical meaning.¹⁶² She argued for an approach that

158 Discussions on the Act include Walker, *supra* note 46; Aninka Claassens, *Women, Customary Law and Discrimination*, in O’Sullivan and Murray 42 (2005), *supra* note 30; Shireen Hassim, *A Virtuous Circle? Gender Equality and Representation in South Africa*, in STATE OF THE NATION. SOUTH AFRICA 2004–2005, 336 (John Daniel, Roger Southall, and Jessica Lutchman eds., HSRC Press 2005).

159 Established under the Traditional Leadership and Governance Framework Act 41 of 2003.

160 Section 4(2) and (3) of the Act.

161 Claassens, *supra* note 155, at 43.

162 *Id.* at 78–79.

strengthened the rights of users and occupiers relative to communities and thus strengthened women's actual access to communal land.¹⁶³

Community members, researchers, and lawyers formulated a constitutional challenge to the Act. The case was based on the failure of the Act to preserve security of tenure (as required in section 25 of the Constitution) as obtained under the indigenous, living law. Given that the case was based on "living law," significant research was undertaken to provide evidence of this law.¹⁶⁴

In court, the matter rested on two pillars: (1) the substantive challenge on the basis that the provisions of CLRA undermined security of tenure in indigenous law and (2) a procedural challenge that the manner in which CLRA was enacted was incorrect. The High Court agreed that the legislative scheme that vested control of land in Land Administration Boards (dominated by the Traditional Councils) did not recognize and would interfere with the rights of individuals, families, and communities to own, control, and manage the land they occupied. The Court thus recognized and accepted evidence of the layered system of land rights within living, indigenous law.¹⁶⁵ The relevant provisions of the CLRA were declared unconstitutional, and the matter was referred to the Constitutional Court for confirmation.

By the time the matter was heard in the Constitutional Court, the minister had withdrawn the Act as no longer reflecting government policy. As a result, the Court limited the hearing to procedural matters and concluded that the incorrect procedures had been followed in Parliament.¹⁶⁶ As a result, the Act was declared unconstitutional in its entirety.

The withdrawal of the Act effectively prevented the substantive hearing on the case – this despite years of research and preparation. A revised

¹⁶³ *Id.* at 79–80.

¹⁶⁴ This research was published in Claassens and Cousins, *supra* note 24.

¹⁶⁵ *Tongoane v. National Minister for Land and Agricultural Affairs*, Case No. 11678/2006, North Gauteng High Court, Pretoria, October 30, 2009, unreported.

¹⁶⁶ This referred to the fact that, in terms of section 76 of the Constitution, the Bill should have been "tagged" as a matter affecting provinces and referred to the National Council of Provinces to be dealt with in accordance with a stipulated procedure.

Act is yet to be formulated. As a result, we have yet to see the impact of the case and whether the volumes of evidence on the living customary law will be used in reformulating the Act.

In the end, however, the case demonstrates that the courts are significant forums for resolving customary disputes. They are places where communities can bring evidence of living customary law – already imbued with rules and practices that address the needs and interest of women – to seek redress. In this lies the possibility that the courts should be recognized and enhanced as “mediating institutions” or institutions that enable democratic dialogue.

5 Courts, Communities, and “Living Law”

The cases discussed in this chapter suggest that the Constitutional Court has been able to lay down a jurisprudential framework for recognizing customary law and constitutional imperatives, such as gender equality. This allows it to manage, to some extent, the complexity of a transformative project that affirms cultural diversity and enables the achievement of social and economic equality.

This approach has resulted in important advances, including the affirmation of cultural diversity and legal pluralism; the recognition of the responsive and evolving nature of living law (and a similar view of culture), in which gender roles can change under changing socioeconomic circumstances and can be recognized within customary law and practice; the recognition of the power of traditional authorities and communities to develop their rules, customs, and practices in line with the Constitution; the idea that the establishment of new norms and standards of women’s roles and gender equality are possible *within* customary law (not as externally imposed values); and the establishment of living law as a key legitimating force in constitutional decisions.

Yet the Court’s approach is not without difficulties. It is caught between flexibility and certainty, between recognition of living law and development under the Constitution. This results in cautious decisions

and remedies that tend to fix rules rather than set guidelines for community practice and community-led dialogue and change. Here, the Court is correct to be concerned about the fact that women and children are often vulnerable members of communities. Nyamu-Musembi concludes that unequal gender relations are a particular barrier in family matters.¹⁶⁷ However, it is also important to avoid the imposition of remedies that might have little resonance with customary communities and, in the end, offer little protection for women. Himonga argues that this was the case with customary inheritance after the *Bhe* case.¹⁶⁸ The real question is how to engender change from within, how to provide women with fair and just solutions within their communities. These solutions can be more effective than remedies that are perceived to be "imposed," and they are more sensitive to the integrity of customary law and cultural diversity. Importantly, as Claassens and Mnisi point out, many rural women have little choice but to engage customary law and find solutions within it.¹⁶⁹

Such solutions depend on an idea of living law and enhancing community-led change. There is evidence of change within communities. Communities and individuals are also turning to democratic processes of law reform and litigation, which have become important sites of struggles over the meaning of culture and customary law and the limits of traditional power. This is a positive aspect of South African democracy. However, important questions remain about the extent to which all parties are able to participate in these cultural processes and conversations. Underlying this are issues of gendered power, participation, and agency.

Courts can play a greater role in enhancing these conversations and in helping to steer a process of "transformation" that enables all stakeholders to participate. If customary law is to be affirmed under the Constitution, and if living law is recognized as "the" customary law, then everyone in communities that "live" under that law must be given sufficient voice.

¹⁶⁷ *Supra* note 57 at 128.

¹⁶⁸ Himonga, *supra* note 30.

¹⁶⁹ *Supra* note 25, at 513–16.

This not only requires more ethnographic research to understand practices on the ground and to present these in court; it also requires lawyers to assist with legal strategies that support the agency of individuals and communities, especially women, in seeking rights solutions that resonate with customary and constitutional values. It requires lawyers and courts perhaps to defer more to communities, either through gathering the kind of evidence that was collected for the *Tongoane* case or through remedial action that enables community-led change, shaped by customary and constitutional norms. A useful form of remedial action might be a structural interdict, in which issues are referred back to communities for resolution or interpretation, within a time limit and with a requirement of further reporting to and oversight by courts. For example, if a particular group is excluded from access, resources, or participation, then the community is asked to suggest ways of resolving this in line with constitutional guidelines and cultural imperatives. If, for example, the sex or gender of a traditional leader is a real issue, then that can be referred back for deliberation. If the content of rights is at issue, then that can be deliberated within communities, together with Court-led guidelines for change. Important here is the need to find means of including all voices within communities and not to rely solely on traditional leaders, especially as women's participation in many traditional forums is limited. Such a process must be open to alternative ways of resolving practical and normative disputes.

Underlying this process is a greater faith in the ability and agency of communities to resolve issues and of customary law to adapt to new needs and circumstances, including the Constitution. Perhaps, also, it requires more uncertainty, risking trust in the "difference" of customary law. It also requires an ability to recognize that the answers to women's inequality do not necessarily lie in prescribed international norms or civil rights, and, also, that some of the values underlying international norms and constitutional rights are not necessarily foreign to customary law.

5 Keeping the Faith

Legitimizing Democracy through Judicial Practices in India

Gurpreet Mahajan

INDIA IS A LAND OF ENORMOUS RELIGIOUS, LINGUISTIC, AND ethnic diversity. Almost all major religions of the world exist there. Even though Hindus constitute almost 80.5 percent of the population, there are 138,188,240 million Muslims living in the country.¹ The latter constitute 13.4 percent of the total population of the country, but in absolute numbers this is the second-largest population of Muslims in the world.² The 2001 census identified 1,652 languages and dialects existing within the country. Of the twenty-two languages that were then recognized in the Eighth Schedule of the Constitution, twenty-one had more than 1 million speakers.³ The same census recorded the presence of 698 “Scheduled Tribes,” constituting 8.2 percent of the total population.⁴ What makes the situation even more complex is that the map of India – its communities, the majority and minorities, institutional arrangements for accommodation – looks different when we use religion and not language as the lens for discussing the issues of cultural diversity.

1 Government of India (GOI), “Census 2001,” available at http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx (last accessed Dec. 11, 2011).

2 The Future of the Global Muslim Population, available at <http://features.pewforum.org/muslim-population>.

3 GOI, “Census 2001,” available at http://www.censusindia.gov.in/Census_Data_2001/Census_Data_Online/Language/Statement5.htm (last accessed Dec. 11, 2011).

4 GOI, “Census 2001,” available at http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/scst.aspx (last accessed Dec. 11, 2011).

Although in the course of the twentieth century some linguistic identities came to be associated closely with particular religious communities⁵ (for instance, Hindi with the Hindu community, Gurmukhi with the Sikhs, and Urdu with the Muslims), in actuality the picture is much more complicated. In religious terms, Hindus constitute more than two-thirds of the total population, but when distinctions are made along the lines of language, then non-Hindi-speaking Hindus become a minority in some regions. For instance, the Tamil-speaking Hindu is a minority in the state of Karnataka, and the Bengali-speaking Hindu is a minority in the state of Tamil Nadu. Likewise, although Muslims may be a religious minority in India, the Kannada-speaking Muslims in Karnataka or the Malayalam-speaking Muslims in Kerala are part of the linguistic majority in these states, whereas the Oriya-speaking Hindus are a minority in these states. So the landscape changes when we identify communities along the lines of religion and not language. In addition, the Constitution of India recognizes and accommodates various kinds of diversity differently.⁶ Not only were these concerns taken up separately through different sets of provisions in the Constitution; different institutional structures were envisaged for each – something that has been consolidated further and, in some respects, supplemented in the postindependence period.⁷ This

5 Salil Misra, *From the Syncretic to the Plural: The World of Hindi and Urdu*, in ISLAM IN SOUTH ASIA: A SHORT HISTORY (Jamal Malik and H. Reifeld eds., Oxford University Press 2005); Vasudha Dalmia, THE NATIONALISATION OF HINDU TRADITIONS: BHARATENDU HARISCHANDRA AND NINETEENTH-CENTURY BENARAS (Oxford University Press 1997).

6 Asha Sarangi, *Linguistic Diversity in a Federal Polity: An Indian Experience*, in ACCOMMODATING DIVERSITY: IDEAS AND INSTITUTIONAL PRACTICES (Gurpreet Mahajan ed., Oxford University Press 2011); Rajeshwari V. Pandharipande, *Minority Matters: Issues of Minority Languages in India*, 4(2) INT'L J. MULTICULTURAL SOC. 213–34 (2002); A. R. Kamath, *Ethno-Linguistic Issues in Indian Federal Context*, in COMMUNAL IDENTITY IN INDIA: ITS CONSTITUTION AND ARTICULATION IN THE TWENTIETH CENTURY (Bidyut Chakrabarty ed., Oxford University Press 2003).

7 For a detailed discussion, see Gurpreet Mahajan, *Indian Exceptionalism or Indian Model: Negotiating Cultural Diversity and Minority Rights in a Democratic Nation-State*, in MULTICULTURALISM IN ASIA (Will Kymlicka and Baogang He eds., Oxford University Press 2005).

chapter explores questions of cultural diversity *only* by examining issues of religious difference and diversity.

When India gained independence, religion was the most strident and assertive identity in the public arena. Indeed, it was the basis for the partitioning of the country.⁸ The period after independence was no different. Inter-community conflict and targeted violence against members of a religious community erupted periodically in different parts of the country.⁹ This made religious identities and mobilizations a constant point of attention and concern. The only significant and noticeable difference was that, although the first two decades after independence were marked by the rhetoric of a strong secular state seeking to modernize society and carry forward the mandate of social reform, the period after the 1990s saw the consolidation of religious and cultural majoritarianism.¹⁰ Either way, religion and religious communities continued to occupy center stage, and this is one reason why this chapter dwells on issues that arose around religious diversity. Because I have discussed elsewhere (in some detail) the structure that India chose for accommodating religious diversity and the challenges this has posed, in this chapter, I examine the role of the judiciary by focusing on the interventions of the Supreme Court in protecting and nurturing religious diversity.¹¹

8 See Paul R. Brass, *The Partition of India and Retributive Genocide in the Punjab, 1946–47: Means, Methods, and Purposes*, 5(1) *J. GENOCIDE RES.* 71–101 (2003); Ian Talbot and Gurharpal Singh, *THE PARTITION OF INDIA* (Cambridge University Press 2009); Gyanendra Pandey, *REMEMBERING PARTITION: VIOLENCE, NATIONALISM AND HISTORY OF INDIA* (Cambridge University Press 2001); Thomas B. Hansen, *THE SAFFRON WAVE: DEMOCRACY AND HINDU NATIONALISM IN INDIA* (Princeton University Press 1999); *CULTURAL ENTRENCHMENT OF HINDUTVA: LOCAL MEDIATIONS AND FORMS OF CONVERGENCE* (D. Berti, N. Jaoul, and P. Kanungo eds., Routledge 2011).

9 *Infra* note 28.

10 See *MAKING INDIA HINDU: RELIGION, COMMUNITY AND POLITICS OF DEMOCRACY IN INDIA* (David Ludden ed., Oxford University Press 2005).

11 There are often significant differences between the decisions of the high courts and the Supreme Court, and, in many cases, different high courts have read the Constitution differently. For this reason, this chapter deals *exclusively with the interventions of the Supreme Court*. Besides, as this is the highest court of the land, its decisions give us an indication of what eventually prevails in law and policy. Although only a small

The role of the judiciary is important in all societies because individuals and communities turn to this institution in the expectation of relief against the policies of the state and other bodies. The common belief is that the Supreme Court will give due consideration to principles of fair treatment to all and religious liberty (something that is accepted in almost all liberal constitutions), and this will help to minimize the adverse effects of homogenizing and interventionist state policies. In India, too, groups have continuously knocked on the doors of the judiciary to challenge state laws, as well as the actions of other individuals and groups in society. As such, analyzing the constitutional structure or the policies of the state gives us only a partial picture of the social reality. Judicial pronouncements tell us more about the actual state of affairs, and they enable us also to identify the existing points of vulnerability.

In India, the judiciary, and, for the purpose of this chapter, the Supreme Court, has not always spoken with one voice. There have, on occasions, been differences in the way a particular issue was approached and adjudicated by the Supreme Court over time.¹² There have been many more cases in which the judgment has not been unanimous. Minority judgments have presented different reasoning to the public, and, at times, different members of the bench have also offered separate sets of reasons in support of their decisions.¹³ Yet, despite this, discernible

percentage of cases go to the Supreme Court, its decisions nevertheless set the norm that other courts then refer to and seek to apply.

12 To take just one example of a change in the Supreme Court's position over time, until the 1990s, the Supreme Court held that caste alone could not be the basis of reserving a quota of sets for "socially and economically backward" classes. However, in the Indra Sawhney case, it allowed caste-based reservations but excluded the better-off "creamy layer" among these castes from the benefit of these quotas. See *Indra Sawhney v. Union of India*, AIR 477 (1993).

13 For an example of different reasons being offered by the Supreme Court judges, see *Sardar Syedna Taher Saifuddin v. The State of Bombay*, AIR 853 (1965). In this case, the Supreme Court affirmed the right of the religious leader to excommunicate a community member. While the main judgment was presented by Justice P. B. Sinha, Justice K. C. Das Gupta and Justice N. R. Ayenger offered separate reasonings in support of the decision of the Court. There are, of course, several cases in which separate minority decisions are given that differ significantly from the majority view of the Court. In

trends are present, and it is these trends that the chapter highlights. In India, the Supreme Court has had the task of protecting the religious space and identity of the majority as well as India's minorities. Even though it has been attentive to the needs of each community and has attempted to strike a balance in a way that minimizes, in its view, possible points of contention and conflict between communities, it has also operated with a specific understanding of the nature of different religions – Hinduism, Islam, and Christianity. This understanding has placed some groups, particularly those that emerged as reform movements or separate creeds in relation to the majority religion (Hinduism), at a disadvantage insofar as it set aside their own self-perception of being a different religious community. Although there are a number of occasions when Hindu practices have been accommodated, the Supreme Court has been equally mindful of the need to be fair to the minorities, especially when they faced the might of the state.¹⁴ Perhaps the single most striking element is that the Supreme Court has not leaned unambiguously toward the side of the majority or the minorities. Instead, it has tried to play a balancing act, accepting the universal norms endorsed in the Constitution while simultaneously retaining a space for the existence of plurality of practices.

1 The Peculiarity of the Indian Case

When the Constitution of India was being drafted (December 9, 1946–November 26, 1949), the political leadership that had led the struggle

Commissioner of Police and Ors. v. Acharya J. Avadhuta and Anr., March 11, 2004 [AIR 2984 (2004)], for instance, the majority view disallowed the given practice (of taking out a procession performing Tandava dance) on the ground that it did not constitute the “core” beliefs of the community. The minority (dissenting) verdict, given by Justice A. R. Lakshmanan, however, maintained that if the practice was accepted by the followers, then it should be so recognized, even if it was only recently introduced and does not constitute an “essential” practice of the religious community.

¹⁴ See Shylashri Shankar, *SCALING JUSTICE: INDIA'S SUPREME COURT, ANTI-TERROR LAWS AND SOCIAL RIGHTS* (Oxford University Press 2009).

for independence was acutely aware of the country's existing diversities. Thus, an effort was made to represent different religious and cultural communities (or at least those that had sharply articulated their different interests and concerns) in the Constituent Assembly, particularly in the discussion on the basic rights of citizens. In fact, it is the deliberations of the Advisory Committee on the Fundamental Rights of Citizens and Minorities that shaped the framework for accommodating different kinds of diversities in the political and public arena.¹⁵

The conscious effort made to recognize and accommodate religious, linguistic, and cultural diversity is significant, irrespective of the way we assess the adequacy of the constructed paradigm, because it signaled the emergence of a state that was not openly aligned with the majority community. Furthermore, the deliberations of the political framework began with the understanding that prospective citizens had multiple identities; as such, the population that the assembly was dealing with was heterogeneous.¹⁶ This unique starting point had implications for the way the task of protecting cultural diversity was articulated and carried forward, and for the challenges that presented themselves in the years to come.

Theories of multiculturalism that emerged from the experience of Western liberal democracies almost always begin with the belief that the state in these societies reflects the cultural orientation of the majority community. Its exponents argue that even those states that were committed to the principle of secularism and *laïcité*, were in the past closely aligned with the majority; they had adopted policies that played a crucial role in consolidating that majority. Some of these policies – for instance,

15 See B. Shiva Rao, 2 THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENT, (Indian Institute of Public Administration 1967); Rochna Bajpai, *Constituent Assembly Debates and Minority Rights*, 35(21–22) ECON. POL. WEEKLY (May 27–June 2, 2000).

16 The importance of this starting point becomes further evident when we consider Will Kymlicka's analysis that Western liberal democracies assume a homogeneous population and, for this reason, neglect the different impact that the same law has for different cultural communities. See Will Kymlicka, *LIBERALISM, COMMUNITY AND CULTURE* (Oxford University Press 1991).

recognition of public holidays and dress codes – persist even today, and this disadvantages minorities, or at least places undue hardships on them.¹⁷ It is to offset this sense of unfair and unequal treatment that special consideration and, at times, special rights in the form of exemptions, recognition of community institutions and structures, financial support, separate representation, and self-governance are recommended for identified minorities. Since each of these rights or special considerations is aimed at enhancing the autonomy of the identified cultural minority, the question invariably confronted is, “To what extent should minority communities be left free to determine their own affairs?”¹⁸ This issue becomes a matter of pressing concern when some of the religious and cultural practices of these minority communities conflict with the principles of gender equality and individual autonomy – principles that liberal democracies have come to value deeply.¹⁹

In India, because the state occupied a unique position, one that was not similarly implicated in the life of the majority, the commitment to protecting cultural diversity took a distinctive form. Instead of granting special rights to minorities, the Constitution protected diversity by guaranteeing religious and cultural liberty to all communities – the majority and the minorities. Although the Constitution attended to the concerns of the minorities and gave them the right to establish their own educational institutions (article 30), along with the right to promote their language and culture (article 29), it ensured equal treatment of all by granting each individual the right to “profess, propagate and practice” his or her religion (article 25) and the opportunity to be governed by

17 Bhikhu Parekh, *Cultural Diversity and Liberal Democracy*, in *DEFINING AND MEASURING DEMOCRACY* (David Beetham ed., Sage Publications 1994); Will Kymlicka, *MULTICULTURAL CITIZENSHIP* (Oxford University Press 1995); Joseph Carens, *CULTURE, CITIZENSHIP AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS* (Oxford University Press 2000).

18 MINORITIES WITHIN MINORITIES (Abigail Eisenberg and Jeff Spinner Halev eds. Cambridge University Press 2005).

19 Susan Moller Okin, *Is Multiculturalism Bad for Women? When Minority Cultures Win Group Rights, Women Lose Out*, BOSTON REV. (Oct.–Nov. 1997).

the personal laws of the individual's community in all matters relating to family.²⁰ The compromise that was worked out as the Constitution was framed did not accommodate all the concerns of the minorities: For instance, the right to propagate a faith was granted but not the right to convert; Jains were not recognized as a separate religious community, and even the Buddhists and Sikhs were placed under the Hindu community for purposes of the Personal Law; and separate representation was not given to any religious community. Despite these omissions, it would be difficult to deny that the operative constitutional framework was one of accommodation and recognition of religious and cultural diversity; even more importantly, the framework that was put in place when the Constitution was drawn has remained, by and large, the accepted frame of reference.

Religious diversity was protected primarily by guaranteeing religious liberty of all communities. However, the exercise of religious and cultural rights (for instance, the right to religious practice) was subject to some general limitations: These rights could be restricted on grounds of "public order, morality and health,"²¹ but no attempt was made to draw the boundaries of what form of diversity is permissible. A few members of the Constituent Assembly had raised the issue of women's status and argued that the protection granted to religious practices might entrench the subordinate position of women.²² Despite these

20 For a discussion of the provisions relating to religious communities and minorities, see Gurpreet Mahajan, *IDENTITIES AND RIGHTS: ASPECTS OF LIBERAL DEMOCRACY IN INDIA* (Oxford University Press 1998).

21 Article 25 of the Indian Constitution begins with the statement

Freedom of conscience and free profession, practice and propagation of religion: (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

For a discussion of the constitutional framework and implications of these restrictions, see Dhirendra K. Srivastava, *RELIGIOUS FREEDOM IN INDIA: A HISTORICAL AND CONSTITUTIONAL STUDY* (Deep and Deep Publications 1992).

22 "As we are all aware there are several customs practiced in the name of religion: e.g. *parda*, child marriage, polygamy, unequal laws of inheritance, prevention of inter-caste marriages, dedication of girls to temples. We are naturally anxious that no clause in any

reservations, no attempt was made to regulate in advance or determine what would be permitted in the name of religious practice or cultural diversity. Only the practice of “untouchability” (exclusion and segregation) that existed within the majority community was prohibited, and Hindu places of worship were thrown open to members of all castes. So, an intervention was made in the affairs of the majority community but not in the “internal” affairs of minority communities. In the years that followed, the Indian state continued to exercise restraint in interfering in the Personal Laws of its minority communities.²³ It took the initiative to reform the Hindu Personal Laws to make them more gender just, and it addressed the concerns raised by women’s groups by enacting the Special Marriage Act (which gave individuals the option to not marry and not be governed by the laws of their community), but it did not intervene to introduce any changes in the Personal Laws of the minority communities.²⁴ This was so much the case that political groups that favored an aggressive form of cultural majoritarianism accused the state of “appeasing” minorities²⁵ and being unfair to the majority community.

fundamental right shall make impossible future legislation for the purpose of wiping out these evils...Indeed we have a further fear that validity of existing laws such as, the Sarda Act, and the Widow Remarriage Act may even be questioned.” Rajkumari Amrit Kaur quoted in B. Shiva Rao, *supra* note 15, at 146.

23 Shortly after independence, the government of India introduced major reforms in the Hindu Personal Law. Four separate bills were passed in 1955–56 (Hindu Marriage Act, Hindu Succession Act, Hindu Marriage and Guardianship Act, and Hindu Adoption and Maintenance Act) to make the laws more sensitive to the concerns of gender equality. However, the state refrained from introducing reforms in the Personal Laws of any other community. This was a task that was left to the communities themselves. For a discussion on Personal Laws, see Archana Parasher, *WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY* (Sage Publications 1992); Flavia Agnes, *LAW AND GENDER EQUALITY* (Oxford University Press 1999).

24 On the Special Marriage Act, see Flavia Agnes, *LAW, JUSTICE AND GENDER: FAMILY, LAW AND CONSTITUTIONAL PROVISIONS IN INDIA* (Oxford University Press 2011).

25 This is a charge that has been levied against the Congress Party, which formed the central government for the first three decades following independence, as well as the Bharatiya Janata Party and its ideological allies. See Asghar Ali Engineer, *Secularism in India*, in *SECULARISM AND SECULARITY: CONTEMPORARY INTERNATIONAL PERSPECTIVES* (Barry Alexander Kosmin and Ariela Keysar eds., ISSSC 2007); Arun Shourie, *A SECULAR AGENDA* (Rupa & Co. 2005); Christophe Jaffrelot, *HINDU NATIONALISM: A READER* (Princeton University Press 2007).

Although this was hardly the case, it certainly captured the peculiarity of the Indian situation. It showed that minority religious communities were not the only ones concerned about their fate in society; the majority, too, had their share of anxieties. Many people felt that the state intervened in their religion and community affairs and that this restricted their religious liberty and their ability to continue pursuing their own conception of a good life.

Immediately after independence, the governments of different states, as well as the central government, passed laws that had serious implications for religious communities, both the majority and minorities. On the one hand, a number of states initiated measures to reform Hindu social practices and to regulate the secular aspects of religious institutions and charitable endowments.²⁶ To take one example, Madras passed the Temple Entry Authorization Act in 1947, the Madras Bigamy and Divorce Act in 1949, and then the Madras Religious and Charitable Endowments Act in 1951. Madras was not the only state that formulated social legislation of this kind. Religious institutions, particularly large and well-endowed Hindu temples, came to be regulated by similar kinds of laws. Orissa enacted the Jaganath Temple Act in 1955, and that same year, the Sufi *durgah* at Ajmer came under the Durgah Khwaja Sahib Act. The Nathdwara Temple Act came into effect in 1959, and the Andhra Pradesh Hindu Religious and Charitable Endowments Act in 1969. In all these cases, the state appointed executive officers or members to the board of trustees; at times, the management came under the scrutiny of the office of the Hindu Commissioner for Religious and Charitable Endowments.

26 Although the Indian Constitution gave individuals and groups the right to set up and administer their own religious institutions and charitable trusts, it allowed the state to regulate the “economic, financial, political and other secular activities” associated with religious practice (article 25, clause 2a), and to provide for social welfare and reform (article 25, clause 2b). Different state governments used the space available within the constitutional structure to regulate the affairs of the majority religious community – its social practices and the administration of its religious institutions.

On the other hand, some of these state governments, like those of Tamil Nadu, Assam, and Bombay, passed laws prohibiting the slaughter of cows (cows are considered sacred by Hindus) and subjecting conversions to a greater degree of scrutiny and regulation.²⁷ If the first set of laws involving regulation of Hindu places of worship and their practices directly affected the majority community, the latter adversely affected minorities. The burden eventually fell on the judiciary, as it was called on to review the constitutionality of these laws and to protect the rights of different communities. Over the decades, the Supreme Court has also been asked to adjudicate between conflicting community practices and to consider the claims of different groups to be identified as separate religious communities. Thus, the Supreme Court has over the decades been confronted with claims both from the majority community and the minorities. In terms of majority-minority relations, the most important issue was that of inter-community violence,²⁸ but, until recently, the courts played a relatively small role here as few cases went before them. On most occasions, governments rarely took action on the reports of those judicial commissions that were set up to inquire into the violence that occurred. It is only recently that the Supreme Court has begun to

27 Ronald W. Neufeldt, *Legal and Political Dimensions of Conversions in Independent India*, in RELIGION AND LAW IN INDEPENDENT INDIA (Robert Baird ed., Manohar Publishers 1993); James Andrew Huff, “Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws,” available at org.law.rutgers.edu/publications/law-religion/articles/A10S-6_Huff.pdf.

28 Inter-community violence, or what in India is commonly referred to as *communal violence*, is the single most important cause of the insecurity felt by minority communities. Although all communities have been victims of this kind of violence, it is the minorities that have been the most vulnerable. From 1950 to 1995, it is estimated that almost 40,000 persons were injured and killed in Hindu-Muslim riots alone. See Gopal Krishna, *Communal Violence in India*, in RELIGION, POLITICS AND COMMUNAL VIOLENCE 181–82 (Steven Wilkinson ed., Oxford University Press 2005). Since then, the incidents of violence have decreased, but their intensity has increased. In the anti-Sikh riots that occurred in 1984, for instance, the Nanavati Commission set up to inquire into this violence noted that the Home Minister had stated in Parliament that 2,146 people had been killed in Delhi alone. Justice Nanavati Commission of Inquiry, “1984 Anti-Sikh Riots,” at 1, available at http://mha.nic.in/pdfs/Nanavati-L_eng.pdf (last accessed Jan. 20, 2012).

take *suo moto* cognizance of violations of law and allowed public interest litigation (PIL) to be filed by third parties.²⁹ Hence, this chapter focuses primarily on the Court's interpretation of community practices and the laws affecting them to get an idea of how issues of cultural diversity have played out in India.

2 State Regulation and the Majority Community

The discourses on cultural diversity most often focus on the fate of minority communities and the effect that state policies or laws have on the life of these communities. In India, as the commitment to diversity was closely linked with the assurance that all communities would be treated as equals and their liberty protected, it was not the minorities alone that were anxious about state intervention. The majority community also sought protection for its practices and expressed concerns about state intervention in its affairs. As different states tried to reform and regulate Hindu social and religious practices, the groups within the majority community challenged this legislation on the grounds that it violated the basic liberties granted to all persons and/or groups by the Constitution. In those cases that went before the Supreme Court, the Court upheld the right of the state to regulate the economic and financial aspects of religious and charitable trusts, as permitted by the Constitution.³⁰ However, although accepting the constitutional validity of state action, the Court examined the specific actions of the office of the

29 In the 1980s, shortly after the end of Emergency, the Supreme Court tried to play a more active role in defending the rights of citizens by creating space for public interest litigation (PIL). Under this new dispensation, cases involving threat to public interest due to neglect of public duty or violation of a constitutional provision could be filed before the high courts or the Supreme Court by any person or group, even if the rights of that person or group had not been infringed upon directly by that action. This provision, especially as it came to be defined in 1988, along with the establishment of the National Human Rights Commission in 1993, has in recent times played an important role in seeing that the perpetrators of violence are tried and the victims of communal violence receive some justice.

30 *Madharao Phalke v. The State of Madhya Bharat*, AIR 298 (1961); *The Durgah Committee, Ajmer v. Syed Hussain Ali*, AIR 1402 (1961).

Hindu Commissioner for Religious Endowments (HCRE) to see if it curtailed the autonomy of religious institutions of the majority community or placed unacceptable restrictions on their religious liberty. Through its pronouncements, the Court laid down certain norms for the functioning of the Commissioner and, in this process, attempted to protect the religious liberty and diversity of community practices.

The Court stipulated that the Commissioner could regulate the affairs of a religious institution; he or she could settle a scheme, change the trustees, or sell immovable property, *but only if there was evidence of mismanagement of funds by the trust.*³¹ The Supreme Court also gave trustees the right to appeal against new schemes proposed by the Commissioner (or his or her office) for better management.³² In the first two decades after independence, when a number of cases of this kind came up for review, the Court maintained that the schemes proposed by the Commissioner should ordinarily receive due regard, since he or she would be familiar with the administration of the temple. But this did not mean that the Court was “relieved of its duty of ascertaining the necessity for framing the scheme … or to consider the propriety or advisability of the scheme.”³³ In addition, there were cases when the Court ruled against the decisions of the Commissioner. For instance, when the legality of the sale of a property belonging to the Sri Bugga Math, in Tirupathi, came before the Court,³⁴ it stated that the mode of sale adopted was not in the interest of the institution. In fact, it reflected “non-application of mind”³⁵ and thus could not be accepted. In a like manner, it questioned the decision of the HCRE of Madras, S. Govind Menon,

31 Sri La Sri Subramania Desiga Gnansambanda Pandara Sannadhi v. The State of Madras AIR 1683 (1965); the issue of mismanagement remains a central point and receives the Court’s attention even today. See, for instance, Pannalal Bansilal Pitti and Ors. v. State of Andhra Pradesh and Anr., AIR 1023 (1996).

32 Mahant Sri Jagannath Ramanuj Das v. The State of Orissa and Anr., AIR 400 (1954).

33 See *supra* note 11, at 936.

34 Chenchu Ram Reddy and Anr. v. Government of Andhra Pradesh and Ors., AIR 1158 (1986).

35 The Supreme Court favored public auction of land as a way of protecting the interest of the trust. This is a norm that other courts would subsequently follow. See Arulmighm and Ors. v. P. Arunmugam and Ors., 2 MLJ 453 (1995).

to lease out the private forestland of the Devaswoms.³⁶ In its judgment, the Court passed a stricture against the actions of the Commissioner, stating that his action involved gross negligence and abuse of power in the discharge of duties.

Subjecting the actions of the Commissioner to judicial scrutiny was, on one level, a way of ensuring that the latter was performing the job well and discharging his or her responsibilities in a fair and reasonable way. However, on another more important plane, it was a means of protecting religious liberty and the autonomy of religious institutions from undue interference from the state. The Supreme Court stipulated that state intervention (through the office of the HCRE) was acceptable only to prevent mismanagement and to ensure that the *original intent* of the endowment be fulfilled. Regulation by the state was also acceptable when it helped to fulfill the basic constitutional intent to throw open all Hindu temples to persons of all castes.³⁷ But this did not imply that state officials were free to pursue agendas that they considered to be in the interest of the public. For instance, if the endowment was created to give an annual feast to people of a particular community, then this could not be altered. The funds could not be substituted, even for such things as building inns for pilgrims, roads, and hospitals. Surplus money, left after the completion of the original intent, could be utilized for other purposes by the Commissioner, but the funds could not be diverted to fulfill functions that the latter considered desirable or socially useful.³⁸

Even more important, the Court laid down norms to ensure that the authority and dignity of the religious or spiritual head and the institution would not be undermined by the office of the Commissioner. In this regard, the Supreme Court frequently spoke of the special position occupied by the religious head, the *mahant*. The *mahant*, it argued, was supposed to impart religious instruction to the disciples, and he or she must not be reduced to the position of a “servant under the state

36 S. Govind Menon v. Union of India, AIR 1274 (1967).

37 See *infra* note 42.

38 Ratilal P Gandhi v. State of Bombay, AIR 388 (1954).

Department.”³⁹ Also, he or she should have the right to enjoy the property of the trust or the beneficial interest so long as he or she holds office. This meant that *mahants* should not also be deprived of their customary power to use surplus income for the purposes sanctioned in the endowment.⁴⁰ The Hindu Commissioner was also advised to refrain from passing orders on matters of religious belief and practice. When members of the HCRE office wanted to visit the temple or scrutinize its records, they were asked to give due notice to the religious head so that rites and ceremonies would not be disturbed and the sanctity of the place of worship would be protected. The religious and spiritual head should be, it maintained, free to discharge his or her duties without undue interference from the Commissioner on a day-to-day basis.

39 The Commissioner, Hindu Religious Endowments, State of Madras v. Sri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt, AIR 282 (1954). In the words of the Supreme Court, “The restrictions would cease to be reasonable if they are calculated to make him unfit to discharge the duties which he is called upon to discharge. A Mahant’s duty is not simply to manage the temporalities of a *Math*. He is the head and superior of spiritual fraternity and the purpose of *Math* is to encourage and foster spiritual training by maintenance of a competent line of teachers who could impart religious instructions to the disciples and followers of the *Math* and try to strengthen the doctrines of the particular school or order, of which they profess to be adherents. This purpose cannot be served if the restrictions are such as would bring the Mathadhipati down to the level of a servant under a State department. It is from this standpoint that the reasonableness of the restrictions should be judged” (*id.* at 1020). The Supreme Court, however, made a distinction between a religious or spiritual head and other secular heads and placed the *acharak* (who is appointed by the trustee) in the latter category. In the case of such secular heads, the state would regulate the appointment while keeping in mind the requirements of religion. See Seshammal and Ors. v. The State of Tamilnadu 1972, available at <http://indiankanoon.org/doc/641343>.

40 But this also meant that the concerned party had to show that it was being deprived of its customary powers in religious matters by the state’s regulation. Through the decades since independence, a number of cases have come before the Supreme Court in this regard, and not all have been settled in favor of the plaintiff. In making its decisions, the Supreme Court almost always tried to establish whether a certain provision was sanctioned by religion or whether the use enjoyed by a party was backed by customary practice. See State of West Bengal v. Ashutosh Lahiri, AIR 464 (1995); N. Adithayan v. The Travancore Devaswom Board, 8 SCC 106 (2002).

The interventions of the Supreme Court attempted to demarcate the sphere of religious affairs that must be protected even when the religious institution is placed under state regulation. But, more fundamentally, they were a means of protecting the right of the community (or groups) to continue with their distinctive religious practices. At a time when the Indian state saw itself as an agent of social change and reform, acting as a “modern rational”⁴¹ force, these interventions of the Supreme Court played a critical role in checking the power of the state. In the process, the Court also made space for protecting the diversity of religious beliefs, practices, and institutional structures. To the extent that regulation by the state was, in many parts of Europe, a way of homogenizing practices and secularizing institutions, the interventions of the Supreme Court in India curtailed this expression of modernity. It made room for the religious along with the secular modern state and, through this, pluralized the public arena.

Nowhere was this more evident than in the Court’s interpretation of the universalizing norms that the Constitution had put in place with regard to caste. The Constitution had not only made the practice of “untouchability” punishable by law; it had thrown open Hindu temples to people of all castes. In the early years after independence, several cases came before the Courts involving claims of various sects that their places of worship were private institutions set up by particular individuals (as was the situation in the Srirur Mutt case) or that they were denominational institutions and their practices were protected under article 26(b).⁴² In almost all such cases, the Supreme Court looked at past

41 Partha Chatterjee, *Secularism and Toleration*, 29 (28) ECON. POL. WEEKLY 1768–77 (1994). The state is here seen as taking upon itself the task of determining which religious and social practices are acceptable and which are offensive, and therefore unacceptable, to what it considers to be the “modern” sensibility.

42 In Sri Venkatarama Devaru v. The State of Mysore and Ors., AIR 255 (1958), the Supreme Court held that article 26(b) of the Constitution must be read subject to article 25(2)(b). Article 26(b) guarantees to every religious denomination the right to manage its own affairs in matter of religion. Article 25(2)(b), conversely, allows a law to be made for the throwing open of Hindu religious institutions of a public

usages of the temple; if it was open to visitors, the Court maintained that this was a Hindu temple and hence it must be open in principle to persons of all castes. However, this did not imply that all persons are entitled to personally perform services normally reserved for special functionaries. In effect, this meant that although the universal principle that challenged caste-based stratification and exclusion was retained, the Court maintained that the particulars of who would perform ceremonies and who would be permitted entry to the *sanctum* were matters that may continue to be governed by religious norms and in accordance with accepted textual authority.⁴³ So, even though no denomination could totally exclude any section of the Hindus from worshipping in that temple, a denomination could, in accordance with its norms, exclude some from specific ceremonies.⁴⁴

character to all classes and sections of Hindus. Also see Seeni Thevar and Ors. v. M. S. Velayutha Raja and Anr., 2 MKJ 530 (1992), available at <http://www.indiankanoon.org/doc/1308819>.

43 The Supreme Court ruled that, in many Hindu temples, the “actual worship of the deity is allowed to be performed only by the authorised Poojaris of the temple and by no other devotee entering the temple for darshan. In many Hindu temples, the act of actual worship is entrusted to the authorised Poojaris and all the devotees are allowed to enter the temple up to a limit beyond which entry is barred: to them, the innermost portion of the temple being reserved only for the authorised Poojaris of the temple. If that is so, then all that s. 3 purports to do is to give the Harijans the same right to enter the temple for ‘darshan’ of the deity as can be claimed by the other Hindus. It would be noticed that the right to enter the temple, to worship in the temple, to pray in it or to perform any religious service therein which has been conferred by s. 3, is specifically qualified by the clause that the said right will be enjoyed in the like manner and to the like extent as any other Hindu of whatsoever section or class may do. The main object of the section is to establish complete social equality between all sections of the Hindus in the matter of worship specified by s. 3; and so, the apprehension on which Mr. Desai’s argument is based must be held to be misconceived.” Sastrī Yagnapurushadji and Ors. v. Muldas Brudardas Vaishya and Anr., AIR 1119 (1966), at 258). Also see Marc Galanter, “Temple Entry and Untouchability Act,” available at <http://marcgalanter.net/Documents/templeentryandtheuntouchabilityact.pdf>.

44 Here, again, the Supreme Court examined the religious texts to see if indeed the ceremonial and religious tasks were assigned to a specific group or not by that religion. In the case of Devaswom Board, for instance, it examined whether the appointment of a non-Brahmin violated the religious beliefs and principles; in particular, it asked whether Brahmins were usually appointed because they alone had knowledge of the

These were some ways by which the Supreme Court made space for cultural practices and checked the effects of both state intervention in the affairs and practices of the majority. As noted earlier, the Constitution permitted regulation of the “secular” aspects of religious practices. Hence, the Supreme Court had to once again balance this Constitutional intent with the equally important commitment to protecting religious liberty and cultural diversity.

3 Representation of Hinduism and the Ensuing Process of Homogenization

Pluralizing the public domain despite the formal acceptance of some universalizing norms was one consequence (intended or otherwise) of the interventions of the Supreme Court. This followed from the manner in which the Court dealt with state regulation and intervention in matters of religion. However, the space created for the liberty of religious groups and institutions was accompanied by a specific understanding of the nature of different religions. Hinduism was, by and large, represented as a unique religion, accommodative of differences, willing to absorb within it a variety of different influences – something made possible by the absence of a single doctrine or a holy book:⁴⁵

necessary religious hymns and texts, or whether the appointment of the Brahmin was mandated by religion. The Court eventually concluded that customary practice was based on social reality; consequently, in the changed circumstances where the board had set up a school to impart religious training to its students, anyone who had the qualifications, irrespective of caste, could be appointed to perform the necessary religious services. This was yet another attempt to endorse and apply the universal but in a way that was mindful of the particularity of the case.

45 “When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more. Confronted by this difficulty, Dr. Radhakrishnan realised that ‘to many Hinduism seems to be a name without any content. Is it a museum of beliefs, a medley of rites, or a mere map, a geographical

The Hindu religion is a reflection of the composite character of the Hindus, who are not one people but many. It is based on the idea of universal receptivity. It has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and then, so to speak, swallowed, digested, and assimilated something from all creeds.⁴⁶

This representation of the uniquely accommodative nature of the majority religion, Hinduism, placed many groups at a disadvantage: Groups like the Arya Samaj, Satsangis, and Anand Margis, who saw themselves as a separate religious community, were clubbed under Hinduism.⁴⁷ Operating with the understanding that Hinduism is an accommodative religion, the Supreme Court discounted the self-perception of these communities and devised its own framework for determining whether a group is part of Hinduism or a separate religious entity. It stipulated that the observance of special initiation ceremonies, or the absence of some practices fairly common among the Hindus, like idol worship, were not enough for claiming that these groups were not a part of Hinduism.

The Supreme Court defined Hinduism in terms of belief in the authority of the Vedas (i.e., Hindus draw their ideas from the principles embedded in the Vedas) and belief in the cycle of rebirth and preexistence.⁴⁸ These were a very broad set of ideas, allowing the Court to draw the boundaries of Hinduism quite widely, homogenizing within it

expression?' (*The Hindu Way of Life...*). Having posed these questions which disturbed foreigners when they think of Hinduism, Dr. Radhakrishnan has explained how Hinduism has steadily absorbed the customs and ideas of peoples with whom it has come into contact and has thus been able to maintain its supremacy and its youth." Sastri Yagnapurushadji and Ors. v. Muldas Brudardas Vaishya and Anr., AIR 1119 (1966) at 260.

46 *Id.* at 261.

47 See D. A. V College v. State of Punjab and Ors., AIR 1731 (1971); S. P. Mittal v. Union of India, AIR 1983 SC (1) (1983); Bramchari Sideshwar Shai and Ors. v. The State of West Bengal, AIR 2089 (1995); Sastri Yagnapurushdasji and Ors. v. Muldas Bhuradas Vaishya and Anr., AIR 1119 (1996); Acharya Jagdishwaranand and Ors. v. Commissioner of Police, Calcutta, AIR 512 (1984).

48 *Supra* note 45, at 262.

the diversity of beliefs and practices that characterized different groups such as the Anand Margis and the Rama Krishna Mission. Indeed, on occasions, the Supreme Court also placed Sikhism, Buddhism, and at times even Jainism within the rubric of Hinduism. If Hinduism was to be defined mainly in terms of its goal of releasing the human body from the cycle of birth and death and not by specific practices related to achieving that end, then Rama Krishna and Guru Nanak could be described as Hindus. Hinduism became, in one fell swoop, both a tolerant and an inclusive religion, which was open to including within it all religious viewpoints that emerged in the country within its fold. In the words of the Supreme Court:

Naturally it was realised by Hindu religion from the very beginning of its career that truth was many-sided and different views contained different aspects of truth which no one could fully express. This knowledge inevitably bred a spirit of tolerance and willingness to understand and appreciate the opponent's point of view... When we consider this broad sweep of Hindu philosophic concept under Hindu philosophy, there is no scope for excommunicating any notion or principle as heretical and rejecting it as such.⁴⁹

The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought and practices elements of corruption and superstition and that led to the formation of different sects. Buddha started Buddhism; Mahavir founded Jainism; Basava became the founder of Lingayat religion; Dnyaneshwar and Tukaram initiated the Varakari cult; Guru Nanak inspired Sikhism; Dayananda founded Arya Samaj, and Chaitanya began Bhakti cult; and as a result of the teachings of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic form. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views; but underneath that divergence, there is a kind of subtle indescribable unity which

49 *Id.* at 262–63.

keeps them within the sweep of the broad and progressive Hindu religion.⁵⁰

Thus, in the Supreme Court's reading, every religious group that emerged in India became a separate sect of Hinduism rather than a separate religion. By implication, primarily Islam, Christianity, and Judaism surfaced as separate and distinct religions. This understanding of Hinduism was not entirely new; it informed the more aggressive expressions of Hindu majoritarianism as much as its more benevolent form,⁵¹ as articulated by philosophers like S. Radhakrishnan, and this, in a way, justified placing Sikhs, Buddhists, and Jains under the Hindu Personal Law.

The homogenization implicit in this understanding of Hinduism received a great deal of attention in the 1990s, when Hindu religious majoritarianism was in ascendance,⁵² although this focus informed the interpretations of the Supreme Court for a much longer time. However, as was customary, the Supreme Court tried to accommodate some of the concerns of these groups, now designated as sects or denominations. In the case of the Rama Krishna Mission, for instance, the Court argued that the autonomy they enjoyed in appointing governing bodies and principals for educational institutions run by them should continue.⁵³ So,

50 *Id.* at 264.

51 For a distinction between aggressive and benevolent majoritarianism, see Gurpreet Mahajan, *From Community to Nation: the Making of the Majority-Minority Framework*, in POLITICAL IDEALS IN INDIA (V. R. Mehta and Thomas Pantham eds., Sage Publications 2005).

52 For instances of the majoritarian rhetoric and analysis, see G. N. S. Raghavan and Seshadri Chari, A NEW ERA IN INDIAN POLITICS: A STUDY OF ATAL BIHARI VAJPAYEE (Gyan Publishing House 1996); LAW AND DEVELOPMENT (Subash C. Raina and Usha S. Razdan eds., Daya Publishing 2003); also see *supra* note 10 and *infra* note 67.

53 Article 30 of the Constitution had given minorities the right to establish and administer their own educational institutions; institutions that were granted the status of minority educational institutions could then teach and impart instruction in their own language, as well as make key administrative appointments – an option that was not available to other educational institutions. It is not surprising that several groups sought the status of a minority. In the cases that went to the Supreme Court, for instance, of the educational institutions run by the Rama Krishna Mission, the Court maintained that the mission constituted a sect or a denomination and not a separate religious community.

even though the Court did not address the question of the group's status as a minority that was entitled to exercise the rights granted under article 30 of the Constitution (i.e., the right to establish its own educational institutions), in effect, it protected the group's autonomy and disallowed state intervention – something that is usually done in the case of a minority educational institution. Thus, the Rama Krishna Mission, even though placed within Hinduism, was granted the right to administer and run its own educational institutions; likewise, even though other sects, like the Satsangis, were required to open their temples to all castes, the Rama Krishna Mission's claim that, in their religious practices, certain ceremonies in the temple could only be performed by some castes or groups was accepted.

4 Minorities and the Supreme Court

The Supreme Court operated with a conception of Hinduism that was assimilative and homogenizing. Although this reading of Hinduism had long-term consequences for the notion of cultural diversity, which gained strong roots over time, it affected the fate of groups and communities that emerged in relation to, and by distinguishing themselves from, the prevalent form of Hinduism. The case of recognized minorities, like Muslims and Christians, was somewhat different and needs to be examined separately.

India is a federal polity, and those governments that were voted into office in different states have sometimes, over the decades, adopted dual and somewhat conflicting policies while dealing with recognized minorities. On the one hand, governments (both at the federal center and in different states) refrained from intervening directly in the Personal Laws of these communities, even when women's groups within these

Although it gave the Rama Krishna Mission the right to establish institutions for charitable purposes, including imparting education, it did not accept its self-perception that it was a distinct religious community. *Bramchari Sidheswar and Ors. v. The State of West Bengal*, AIR 2089 (1995).

communities asked for changes in these laws. On the other hand, across the political spectrum, governments enacted laws restricting or regulating conversions,⁵⁴ and some even legislated to prohibit the slaughter of cows.⁵⁵ Both sets of laws adversely affected members of minority communities. In addition, these were gestures made toward the majority community to assure them that the governments were attentive to the concerns of the Hindu community. But this is only one part of the story. If in some respects (most notably in the field of conversions) minority communities were placed at a disadvantage, there were a number of occasions in which their interests and concerns were attended to and accommodated. For instance, groups from the Christian and Muslim communities that were identified as socially and economically “backward” were included on the list “Other Backward Classes” so that they could avail themselves of the benefits of reservations (quotas) in educational institutions and government jobs.⁵⁶ For the Muslim community, the *hajj* pilgrimage was subsidized, and the All-India Muslim Personal Laws Board was set up so that the Muslim community could govern its internal affairs and express its views on matters that affect it.⁵⁷ As governments everywhere adopted this dual strategy for mobilizing the electoral support of specific communities, the courts were expected to draw the boundaries of what is permitted by the constitutional provisions.⁵⁸

54 V. Venkatesan, *Conversion Debate*, 19 FRONTLINE 25 (Sept. 13–26, 2008); Sarah Claerhout and Jakob De Roover, *The Question of Conversion in India*, 40(28) ECON. POL. WEEKLY 3048–55 (2005).

55 Shortly after independence, many states in India initiated legislation to regulate or ban the slaughter of cows. The Punjab Prohibition of Cow Slaughter Act 1955, the Assam Cattle Preservation Act 1951, the West Bengal Animal Slaughter Control Act 1950, and the Orissa Prevention of Cow Slaughter Act 1960 are just some instances of legislation on the issue.

56 Gurpreet Mahajan, “Higher Education Reservation and India’s Economic Growth: An Examination,” Centre for International Governance Innovation, Working Paper No. 36 (Sept. 2008), available at <http://www.cigionline.org>.

57 See Syed Tahir Mahmood, *THE MUSLIM LAW OF INDIA* (Law Book Co. 1980).

58 For example, although the central government provided a subsidy for the *hajj* pilgrimage (something that has over the years increased), it is the courts that have had to deal with the issue of its permissibility. Only recently, in response to a PIL, the Supreme

On the issue of conversions, the Supreme Court has, by and large, endorsed the validity of regulating conversions. At the time of the drafting of the Constitution, there was a debate on this issue. Despite the minorities asking for the right to conversion, the Constitution had only given the right to propagate, not to convert.⁵⁹ The Supreme Court continued to affirm this distinction; on occasion, it went on to say that allowing conversions would place the Hindu community, which did not proselytize, at a disadvantage. On the issue of the ban on cow slaughter, where again minorities were particularly affected, the Court accepted the ban, albeit on the ground of public order. Confronted with the case of the Qureshi brothers, who maintained that slaughtering a cow on the occasion of *Bakrid* was part of the prescribed practices of their community, the Court invoked the “essential” practice test. It maintained that slaughtering a cow was an “optional” practice, as another animal could be sacrificed.⁶⁰ So, in the interest of public order, the prohibition on slaughtering a cow was accepted, but a few qualifications were made specifying when the animal might be slaughtered.⁶¹ On both issues, if one looks at the final judgment rather than at the reasons offered, it would appear that

Court observed that the *hajj* subsidy must gradually be withdrawn and the relevant amount (approximately 650 crore a year) be invested instead for the education and social development of the minority community. It may be added here that both the Hindu Right, as well as some members of the Muslim community, like Syed Shahabuddin, had demanded the withdrawal of this subsidy, the former on the grounds of it being contrary to the principle of secularism, and the latter claiming that it was un-Islamic. See Union of India and Ors. v. Rafique Shaikh Bhikhan and Anr. (May 7, 2012), available at <http://www.ndtv.com/article/india/read-supreme-courts-orders-on-hajj-subsidy-207940>.

59 Justice K. T. Thomas, “The Right to Convert and the Indian Constitution,” THE SIXTH STANLEY SAMARTHA MEMORIAL LECTURE (Oct. 4, 2007), available at http://nifcon.anglicancommunion.org/resources/documents/the_percent20sixth_stanley_samartha_memorial_lecture.pdf.

60 M. H. Qureshi and Ors. v. The State of Bihar, AIR 731 (1958).

61 Although upholding the “ban on the slaughter of cows of all ages and calves of she-buffaloes, male and female . . . breeding bulls or working bulls . . . a total ban on slaughter of she-buffaloes, bulls and bullocks . . . after they cease to be capable of yielding milk or breeding or working as draught animals cannot be supported as reasonable in the interest of the general public.” *Id.* at 687.

the interests of the majority were protected; in fact, considerations of public order allowed the Supreme Court to intervene and maintain the status quo in favor of the majority.⁶²

Although the Supreme Court had taken this position on cow slaughter and conversion since the early years after independence, these judgments did not provoke the ire of the community or shake its faith in the judiciary. To a considerable extent, the reception of judgments that came from the Court have been shaped by the larger political environment. In the first three decades after independence, faith in the secular nature of the polity cushioned response to these judgments. However, from the mid-1980s onward, with the gradual ascendance of assertive majority nationalism, the perception of the minorities changed considerably, and this was evident particularly when judgments came on issues involving women, Personal Laws, and hate speech.⁶³

Although the Personal Laws that govern all family matters fall under the jurisdiction of the community, the Supreme Court had allowed available rules and provisions to be used by vulnerable women to seek fairer treatment. It entertained, for instance, appeals from divorced women from different communities under the provisions of the Criminal Code that applied to “destitute” women. Since the Personal Laws of the Muslims have not yet been reformed, despite women asking for a more just dispensation, the opening provided by the Supreme Court constituted an important resource for vulnerable Muslim women. Yet, in 1985,

62 Ronojoy Sen, *ARTICLES OF FAITH: RELIGION, SECULARISM AND THE INDIAN SUPREME COURT* (Oxford University Press 2010); Rajeev Dhavan, *Religious Freedom in India*, 35(1) AM. J. COMP. L. (Winter 1987).

63 This was evident from the way that members of the Muslim community and the Hindu community responded to these judgments. Examples of this are THE SHAH BANO CONTROVERSY (Asgar Ali Engineer ed., Orient 1987); Syed Shahabuddin, *The Turmoil in Muslim Mind*, ONLOOKER (March 1986); Shekhar Gupta, with Farzard Ahmed and Inderjit Bardhwar, *The Muslims, a Community in Turmoil*, INDIA TODAY (Jan. 1986); Anil Nauriya, *The Hindutva Judgments: A Warning Signal*, 31(1) ECON. POL. WEEKLY (Jan. 6, 1996); and Arun Shourie, “The Hindutva Judgements: The Distance That Remains,” available at http://www.bjp.org/index.php?option=com_content&task=view&id=2653&Itemid=376 (last accessed on May 2012).

when the Supreme Court ruled that section 125 of the Code of Criminal procedure (Code 1973), applied to people of all religions, including a divorced Muslim woman who had no source of income to support herself and her children, most of the religious and political leadership of the Muslim community felt that this was an unwarranted intervention in the affairs of the Muslim community.⁶⁴

This was not the first time that the Court had entertained the petition of a Muslim woman or taken upon itself the responsibility of reading and interpreting religious texts. Indeed, as in many other cases, here the Supreme Court referred to the Quran and other religious texts to argue:

The Quran, the Sacred Book of Islam, comprises in its 114 Suras or chapters, the total of revelations believed to have been communicated to Prophet Muhammed, as a final expression of God's will. (The Quran – Interpreted by Arthur J. Arberry). Verses (Aiyats) 241 and 242 of the Quran show that according to the Prophet, there is an obligation on Muslim husbands to provide for their divorced wives...⁶⁵ In Aiyat 242, the Quran says: "It is expected that you will use your commonsense." The English version of the two Aiyats in Muhammad Zafrullah Khan's 'The Quran' (page 38) reads thus: "For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus does Allah make His commandments clear to you that you may understand."⁶⁶

Over the years, whether in matters relating to the majority or the minorities, the Supreme Court has often drawn upon religious sources to

64 On being divorced by her husband, Shah Bano petitioned the Court seeking maintenance for her children and herself. The Madhya Pradesh High Court upheld her plea and asked her husband (who had divorced her) to pay a small sum of Rs. 179 (about US\$20) per month as maintenance to her. The Supreme Court later upheld the high court verdict; see Mohd. Ahmed Khan v. Shah Bano Begum and Ors., AIR 945 (1985). However, following protests, the community leadership persuaded her to refuse even this small sum of money as maintenance. See Zakia Pathak and Rajeshwari Sunder Rajan, *Shah Bano*, 14(3) SIGNS 558–82 (1989) and Madhu Kishwar, *Pro-Women or Anti-Muslim? The Shahbano Controversy*, 32 MANUSHI (1986).

65 *Id.* at 859.

66 *Id.* at 860.

support its decisions. This engagement with religion, in the form of interpretation of religious texts, has been subject to considerable academic debate, but it has been a recurrent feature of the Court's intervention.⁶⁷ Perhaps what made the situation in the Shah Bano case more contentious was that the Muslim Personal Law Board had submitted that the Court should concern itself with the question of how a divorced woman would maintain herself. The Supreme Court rejected this reasoning; in fact, it went on to argue that there was need to reform the Muslim Personal Law, if not also a case for formulating a more just uniform civil code that would apply to all citizens irrespective of their religion. Although many women's groups had made this demand, this agenda was taken up by the Hindu Right, and this hardened the position of the Muslim minority.

While discussing issues of cultural diversity, it is necessary to reiterate that, although religion and community surface as the inner sphere within the nation (and claims of diversity seek to protect that sphere), within the community, it is the Personal Laws that emerge as the inner, more private realm that communities seek to protect and shelter from external intervention.

In addition to the issue of the Personal Laws, the Supreme Court has on several occasions been called on to address the issue of hate speech. Section 123 of the Representation of People's Act had limited the use of religion in elections, but this was a subject that frequently came up for adjudication. Toward the end of the 1980s, a series of pronouncements from the Shiv Sena (a political party in Maharashtra that pursued policies of majority nationalism while simultaneously targeting the Muslim minority) came before the Court. Statements made by its leader during the election campaign of Manohar Joshi in 1990 and, subsequently, statements made during the election campaign of Ramesh Prabhu came before the Supreme Court in separate cases. In the first instance, the

67 Pratap Bhanu Mehta, *Passion and Constraint: Courts and the Regulation of Religious Meaning*, in POLITICS AND ETHICS OF THE INDIAN CONSTITUTION (Rajeev Bhargava ed., Oxford University Press 2008).

Court invoked an expansive notion of the term *Hindutva* to argue that it referred to a way of life rather than a specific religion.⁶⁸ Hence, the use of this term does not involve a reference to religion. But, in the second case, the speeches made by the Shiv Sena leader Bal Thackeray were seen as constituting corrupt practices.⁶⁹ Without dwelling on the finer points of difference, it is important to note that the Supreme Court has at times ruled in a way that has checked hate speech. On other occasions, however, it has been more lenient or cautious in applying the provisions of corrupt electoral practices. While deliberating on these issues, it has maintained:

At the time of elections, the atmosphere is usually surcharged with partisan feelings and emotions and the use of hyperboles or exaggerated language, or the adoption of metaphors, and the extravagance of expressions in attacking one another, are all part of the game, and so on, when the question of the effect of speeches delivered or pamphlets distributed at election meetings is argued in the cold atmosphere of a judicial chamber, some allowance must be made and the impugned speeches and pamphlets must be construed in that light.⁷⁰

Hence, although there are instances when the Supreme Court has helped to curtail what might be called hate speech (directed against the Muslim minority in particular), there are also instances when minorities have been disappointed and left believing that the Court had not acted to check provocative statements being made against them.

68 *Manohar Joshi v. Nitin Patil*, AIR 1996 SC 796 (1996).

69 *Ramesh Y. Prabhu v. Prabhakar K. Kunte*, AIR 1113 (1996). As the appeal made by Bal Thackeray was rejected, he was stripped of his basic right to vote and contest elections for a period of six years. Eventually, the period of punishment was reduced to two years, and no restrictions were placed on him in the 1999 elections. This was seen by many to be a relatively weak action. This impression was compounded by the fact that he had been let off by the high court in a case involving a set of articles in *Saamna*, commonly recognized as the official mouthpiece of the party, from December 1992 to January 1993.

70 *Kultar Singh v. Mukhtiar Singh*, AIR 141 (1965) at 796.

5 The Balancing Act

In 2005, a survey conducted to measure the state of democracy in India⁷¹ showed that, among the different institutions existing in the country, the judiciary (along with the Election Commission) enjoys the greatest trust of the people. How was this possible? Why do different communities, particularly the minorities, still place their trust in the judiciary? These questions can be answered best when we juxtapose the actions of the judiciary to those of other institutions, such as the legislature, the executive, and political parties. While governments and different political parties have opportunistically extended patronage to particular communities, wooed them with benefits and promises to protect their religious practices, and put forward religious and social demands on behalf of a particular community, it is the judiciary that has had the difficult role of balancing the claims of different communities and determining the constitutional validity of specific policies.⁷² Indeed, in electoral politics, each party, in its effort to win the votes of a group, makes promises that it knows are unlikely to meet the parameters of constitutionality. In such a scenario, the judiciary has come to occupy a special position, one to which all communities turn at some point or another.

Almost all communities – the majority as well as the minorities – have felt let down by the verdicts of the Supreme Court. But it is still not seen as leaning unambiguously toward any one community. If the Supreme Court has on occasions denied permission to the specific religious practices of some sects, failed to curb speech that created hostility toward certain minorities, or viewed Hinduism as a tolerant religion or simply a way of life, there are as well many instances in which it has ruled in favor of the minorities, curbed provocative statements aimed at them,

71 Alfred Stepan, Juan J. Linz, and Yogendra Yadav, *CRAFTING STATE-NATIONS: INDIA AND OTHER MULTICULTURAL DEMOCRACIES* (Johns Hopkins University Press 2011).

72 To borrow Rajeev Dhavan's phrase, often "social problems masquerading as legal problems" come before the Supreme Court, and it then has the difficult task of balancing the different values and group concerns. Dhavan, *supra* note 62, at 218.

and protected their religious and educational institutions against unreasonable state intervention.

What has helped the Supreme Court to win the trust of different communities is that it has applied similar strategies and forms of reasoning in cases involving the majority and the minorities. If it interpreted religious texts to declare that slaughtering a cow was an optional practice for Muslims, then it did the same in cases involving Hindu religious practices. Indeed, it is with reference to the claims of different groups within the majority religion that it invoked and applied the test of *essential practice* to determine what is or is not permissible.⁷³ Not only did it use this rationale for interpreting the religious texts of Hindus but, in the case of Anand Margis, it decreed that the performance of the Tandava with tridents, skulls, conchs, and live snakes in a public procession was not a part of the essential practices of the Anand Margis – a group that had previously been declared a denomination of Hinduism.⁷⁴ Likewise, it used the rationale of maintaining public order in a range of different situations: those involving the majority, the minorities, and sections of the minority and majority. In almost all cases that came before it, the Supreme Court accepted the need to regulate religious processions, but when such negotiations failed to achieve the desired end, then it intervened more directly. In Lucknow, when the Shia-Sunni conflict⁷⁵ that invariably erupted at the time of the Muharrum procession could not be resolved, the Court stipulated (on the basis of its reading of religious texts) that there was no religious injunction in Islam against the shifting of graves.⁷⁶ So, it ordered that two Sunni graves be relocated so that the point of conflict was removed.

73 For a critical reading of this strategy, see Rajeev Dhavan and Fali Nariman, *The Supreme Court and Group Life: Religious Freedom, Minority Rights and Disadvantaged Communities*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (B. N. Kirpal, ed., Oxford University Press 2000).

74 Commissioner of Police and Ors. v. Acharya J. Avadhuta and Anr., AIR 2984 (2004).

75 The Shia and Sunni, despite their differences, are placed within the broader category of the Muslim community.

76 Abdul Jalil and Ors. v. State of Uttar Pradesh and Ors., AIR 882 (1984).

The very fact that the Supreme Court applied the same rationale to different cases involving different sects and communities has undoubtedly helped it to gain the trust of the people, even when differences existed on the verdicts that were given in a specific case. For this reason, perhaps, irrespective of the reception that particular judgments received in different communities and by society as a whole, the verdicts of the Supreme Court have been accepted by political parties, governments, and communities, and it has retained the legitimacy to intervene and settle inter-community conflicts. In fact, in instances involving disputes between communities, governments have often been eager to pass on the responsibility of adjudication to the judiciary. The dispute around the birthplace of Lord Rama and the accompanying demand for the construction of a temple on the site where the Babri Masjid once stood is an instance of this. As dialogue between members of the two communities – Hindus and Muslims – was unable to resolve the issue, and successive governments attempted to mobilize particular communities, it was left to the courts to determine ownership of the land on which the Babri Masjid once stood.⁷⁷

What needs to be underlined is that while adjudicating on the claims of specific communities and points of conflict between different communities, the Supreme Court has not privileged any one principle, neither individual liberty, equality for all, nor cultural diversity. Instead, it has tried to strike a balance among these values, particularly between inter-group equality and diversity, by contextualizing the issue, considering the consequences of an action for public order, and factoring in past history and practices. This kind of reasoning, in the form of *modus vivendi* rather than a normative principle, has offered a flexible way of dealing with and balancing different concerns that have emerged around the issue of

77 The case has just gone to the Supreme Court after the high court offered a pragmatic solution in the interest of public order, dividing the land between different communities in accordance with the way it was being used by them in recent times. For the deliberations of the Allahabad High Court, see *Sunni Central Board of Waqfs v. Gopal Singh Vishard and Ors.*, 2010, available at <http://indiankanoon.org/doc/1162149>.

cultural diversity in India. To some, this may suggest a rather messy situation in which we cannot know in advance which way a decision may go, but it certainly has given the Supreme Court the space and the capacity to try to balance different values – something that is essential in democracies marked by religious and cultural diversity.

6 Self-Government and Cultural Identity

The Colombian Constitutional Court and the Right of Cultural Minorities to Prior Consultation

Daniel Bonilla Maldonado

COLOMBIA IS A MULTICULTURAL STATE WHOSE HISTORY has been constructed from the interactions and intersections among the cultures of Europe, Africa, the Middle East, and the indigenous communities living in the country since pre-Hispanic times.¹ Some 42 million people live in Colombia.² Of this number, 3.4 percent identify themselves as indigenous, 10.6 percent as black, and 0.01 percent as Roma.³ Some 84.9 percent of Colombians do not recognize themselves as members of a cultural minority.⁴ Nevertheless, the majority recognize themselves as mestizos from both a racial and a cultural point of view.⁵ The country has eighty-seven indigenous

1 See Louise Fawcett de Posada, *Libaneses, palestinos y sirios en Colombia*, 9 DOCUMENTOS (1991) (Col.), available at <http://ciruelo.uninorte.edu.co/pdf/BDC17.pdf>.

2 Departamento Nacional de Estadística, “La visibilización estadística de los grupos étnicos colombianos,” p. 27 (2005), available at http://www.dane.gov.co/files/censo2005/etnia/sys/visibilidad_estadistica_etnicos.pdf.

3 *Id.* at 28.

4 In the 2005 census, 84.9 percent of Colombians did not identify themselves with a minority cultural community. The census only asked Colombians if they belonged to a cultural minority. *Id.*

5 Culturally and racially, however, most Colombians are recognized as mestizos. In the 1993 census, 20 percent of Colombians considered themselves white and 66.25 percent mixed. Daniel Bonilla, “Los derechos fundamentales y la diversidad cultural: Análisis del caso colombiano,” p. 1, available at <http://www.seminario2005.unal.edu.co>

communities that speak thirty-four different languages.⁶ Most members of these communities live on *resguardos*, collectively owned territories recognized by the Colombian state.⁷ The black communities that recognize themselves as culturally diverse are divided into three groups: the rural communities living in the Colombian Pacific corridor that runs from the department of Chocó to Nariño,⁸ the *raizales*, communities native to the department of San Andrés and Providencia and Santa Catalina;⁹ and the *palenque* of San Basilio.¹⁰ Bandé and Palenquero are spoken in these last two communities.¹¹ Roma remains the language of the Roma community.

The Constitution of 1991, for the first time in Colombian history, recognized this cultural diversity. It established a series of principles that

.edu.co/Trabajos/Bonilla/Los percent20derechos percent20fundamentales percent20y percent20la percent20diferencia percent20cultural.pdf.

6 Departamento Nacional de Estadística, “Colombia una nación multicultural,” p. 20 (2007), available at <http://www.dane.gov.co/files/censo2005/etnia/sys/colombia.nacion.pdf>.

7 A reservation is a territory over which one or more indigenous groups exert collective ownership and where they can govern their public and private life through their cultural traditions. See DECRETO 2164/95, December 7, 1995, art. 21. In 1997, 84.53 percent of the members of aboriginal groups were living on reservations. See Raúl Arango and Enrique Sánchez, *LOS PUEBLOS INDÍGENAS EN COLOMBIA* [Indigenous Peoples in Colombia] 223 (Tercer Mundo 1999) (Col.).

8 Groups of black families of African ancestry that inhabit the rural lowlands of the Pacific Coast. L. 70/93 recognized the collective property of the national territories that these groups inhabit. This law was enacted as a development of article 55 (transitory) of the 1991 *CONSTITUCIÓN POLÍTICA DE COLOMBIA* [hereinafter *CONST. COL.*]. L. 70/93, August 27, 1993, D.O.

9 Groups of black families of African ancestry that speak Caribbean English or Creole (mixture of English and Spanish) and that, in great majority, belong to the Baptist Church. See Nina S. de Friedmann, *Religión y tradición oral en San Andrés y Providencia* [Religion and Oral Tradition in San Andrés and Providencia], in *SAN ANDRÉS Y PROVIDENCIA: TRADICIONES CULTURALES Y COYUNTURA POLÍTICA* (Isabel Clemente ed., Ediciones Uniandes 1989) (Col.); Walwin G. Petersen, *Cultura y tradición de los habitantes de San Andrés y Providencia* [Culture and Tradition of San Andres' and Providencia's Inhabitants], in *id.*

10 Black communities of African descent that speak a mixture of Spanish and various African languages. Slaves who escaped from their masters created the first *palenques* during the colonial period.

11 Departamento Nacional de Estadística, *supra* note 6, at 23–24.

value and seek to promote it.¹² Article 1 establishes that Colombia is a pluralistic country;¹³ article 7 states that the Colombian state must protect the ethnic and cultural diversity of the nation;¹⁴ article 8 indicates that the state and citizens must protect the cultural riches that exist in the country;¹⁵ and article 70 recognizes the equal dignity of all cultures that exist in Colombia.¹⁶ The Constitution also established a number of rights that allow Colombian cultural minorities to develop and defend their differences. These rights can be grouped in three categories:¹⁷ rights of self-government,¹⁸ rights to political participation,¹⁹ and cultural rights.²⁰

The Constitution of 1991 may therefore be described as a multicultural Constitution. The Constitution is marked, however, by a tension between cultural unity and cultural diversity that has created significant challenges for its interpretation and application.²¹ This tension is built on two components, each of which contains two sets of principles and rights. The first component consists of the conflict between individual

12 CONST. COL. arts., 1, 7, 8, and 70.

13 CONST. COL. art. 1.

14 CONST. COL. art. 7.

15 CONST. COL. art. 8.

16 CONST. COL. art. 70.

17 Will Kymlicka, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 20 (Oxford University Press 1995).

18 Cultural minorities' self-government rights are recognized by article 330, which acknowledges the Aboriginal groups' right to govern themselves by their uses and costumes, and by article 246, which grants Aboriginal peoples the right to exercise jurisdictional powers within their territory. Cultural minorities' self-government rights are also recognized by articles 287, 288, and 289, which state that Aboriginal lands have "territorial entities" status as provinces or municipalities, by the declaration that Indian territories are collective property (art. 329), and by the obligation of the state to promote the participation of Aboriginal communities in the decision-making process concerning the exploitation of natural resources within their lands (art. 330).

19 CONST. COL. art. 171 (special national electoral district for Senate); CONST. COL. art. 176 (special electoral district for the House of Representatives).

20 *Id.* art. 10 (linguistic rights); *id.* art. 68 (educational rights).

21 I present and analyze the general tension between unity and diversity in Daniel Bonilla, *LA CONSTITUCIÓN MULTICULTURAL*, chapter 2 (Siglo del Hombre-Ediciones Uniandes-Instituto Pensar 2007) (Col.).

rights, of clear liberal origin,²² and the rights of self-government of cultural minorities. The former are centered on the defense of the autonomy of individuals; the latter are intended to allow minority cultures to live according to their moral and political ideals, some of which include illiberal norms.

The second component consists of the conflict between the principle of political unity²³ and the rights of self-government of cultural minorities. In Colombia, the principle of political unity has historically been interpreted by appealing to a monistic perspective of the state.²⁴ It is therefore understood that there is only one Colombian legal and political system and that it is organized in a hierarchical and centralized manner. The national institutions, Congress, and the presidency, concentrate political power and the authority to make law. Other authorities in the country, such as those of the cultural minorities, only have the power to regulate and implement the mandates formulated by the national institutions. The rights of self-government, in contrast, allow minority cultures to live in accordance with their moral and political ideals. As such, they allow them to make law and to judge members of the community following the substantial and procedural norms in effect. Consequently, rights of self-government generate a kind of legal pluralism that clashes with the legal monism promoted by the traditional interpretation of the principle of political unity.²⁵

The tension between cultural unity and cultural diversity that runs through the Constitution of 1991 creates multiple theoretical problems

22 CONST. COL. title II, ch., “Fundamental Rights.”

23 Article 1 of the Constitution declares that “Colombia is a social state of law, organized as a unitary Republic.” CONST. COL. art. I.

24 For the differences between legal monism and legal pluralism, see Libardo Ariza and Daniel Bonilla, *El pluralismo jurídico: Contribuciones, debilidades y retos de un concepto polémico* [Legal Pluralism: Contributions, Weaknesses and Challenges of a Polemic Concept], preliminary study, in *PLURALISMO JURÍDICO* (Brian Tamanaha, Sally Engle Merry, and John Griffiths eds., Siglo del Hombre, Ediciones Uniandes, and Instituto Pensar 2007) (Col.).

25 See David Soto, *La descentralización en Colombia: Centralismo o autonomía*, 3 REVISTA OPERA 133–52 (2003) (Col.).

that intersect and overlap.²⁶ This tension generates, among other things, very difficult questions related to the way that liberal democracies must accommodate cultural differences, the limits of liberal tolerance, and the obligations that cultural minorities have to the state to which they belong. These theoretical problems are also directly linked to significant political, economic, and social issues affecting Colombians. The situation of religious minorities within cultural minorities, the dispute over the exploitation of natural resources that exist within indigenous territories, and the coordination between national and indigenous jurisdictions are just some examples of these types of conflicts.

In this chapter, however, I analyze only one aspect of the second component of the tension that exists in the Constitution between cultural unity and cultural diversity: the conflict between the right to prior consultation, as derived from the right of self-government of cultural minorities, and the principle of political unity. This analysis includes the Constitutional Court's jurisprudence on this conflict. The Constitutional Court has been proactive in understanding and trying to solve this conflict. The case law of the Constitutional Court on the right to prior consultation has clarified the contents of this institution and has been central to strengthening the bargaining position of cultural minorities with regard to the state and private companies interested in exploiting the

26 See Daniel Bonilla, *Los derechos fundamentales y la diversidad cultural: Análisis del caso colombiano* [An Analysis of Human Rights and Cultural Diversity in the Colombian Context], in *LOS DERECHOS FUNDAMENTALES* 3–4 (2003) (Arg.). See generally Daniel Bonilla, *Las comunidades negras en Colombia: Entre la diversidad cultural, la diferencia racial y los derechos diferenciados* [Black Communities in Colombia: Among Cultural Diversity, Racial Difference, and Differentiated Rights], in Andreé Viana, ed., *REPENSAR LA PLURALIDAD* (Tirant lo Blanch 2009) (Spain); Daniel Bonilla, *Confianza, instituciones políticas y minorías culturales* [Trust, Political Institutions, and Cultural Minorities], in *EL CONFLICTO COLOMBIANO: REFLEXIONES FILOSÓFICAS* (Ruben Sierra ed., Universidad Nacional de Colombia 2008) (Col.); *Los derechos de las minorías culturales y las desigualdades de clase* [The Rights of Minority Cultures and Class Inequalities], in *DERECHOS, COSTUMBRES Y JURISDICCIÓNES INDÍGENAS EN LA AMÉRICA LATINA CONTEMPORÁNEA* (Laura Giraudo ed., Centro de Estudios Políticos y Constitucionales 2008) (Spain).

natural resources in their territories.²⁷ This doctrine describes prior consultation as a fundamental right held by indigenous and culturally diverse black communities; as such, it is inescapably intertwined with the rights of self-government and the cultural integrity of minorities.²⁸ Similarly, this doctrine offers a set of normative criteria to guide and evaluate the development of any prior consultation. Finally, this doctrine has established a procedure to advance prior consultation for administrative and legislative measures that directly affect Colombian cultural minorities.²⁹ The Constitutional Court, then, has faced a series of theoretical and practical problems that seriously afflict Colombia, and it has articulated a set of complex legal tools to address them.³⁰

To understand and evaluate the strengths and weaknesses of the Court's doctrine, it is central to make explicit and examine the arguments that support it. The political philosophy model that underlies the dominant doctrine of the Court on prior consultation is one that I call "multicultural liberal monism." This model accounts for the greater part of the

27 See, e.g., Corte Constitucional [C.C.] [Constitutional Court] Sentencia T-129/11, March 3, 2011, M.P. Jorge Iván Palacio (declaring that the right to consultation includes veto power for cultural minorities in certain circumstances).

28 See Sentencia SU-039/97, February 3, 1997, M.P. Antonio Barrera.

29 See Sentencia C-030/08, January 23, 2008, M.P. Rodrigo Escobar.

30 This constitutional doctrine has enabled cultural minorities to effectively challenge important state decisions contrary to their interests. For example, this doctrine allowed the Court to declare unconstitutional the General Forestry Law (Sentencia C-030/08) and the Rural Development Law (Sentencia C-175/09). Likewise, it permitted the international treaty between Colombia and Venezuela, which regulates matters related to the Wayuu indigenous community, to be declared unconstitutional. C.C., Sentencia C-615/09, September 2, 2009, M.P. Humberto Sierra Porto. It also allowed the Court to stop the actions of large multinational mining companies that sought to exploit (or were exploiting) nonrenewable natural resources in indigenous territories. C.C., Sentencia T-769/09, October 29, 2009, M.P. Nilson Pinilla. Finally, it prompted the state apparatus to create both the institutions and procedures for cultural minorities and the state to maintain a permanent dialogue on the problems and issues that affect them directly. It led, for example, to the creation of the prior consultation unit within the division of ethnic affairs in the Ministry of the Interior. Resolución 3598 de 2008, December 4, 2008, D.O. See also Decrees 4530 of 2008 and 200 of 2003, and the issuance of decrees regulating the steps to be taken for the embodiment of the right to prior consultation (Decree 1320 of 1998).

case law articulated by the Court on prior consultation.³¹ This is a model that appeals primarily to autonomy and equality to justify the right to prior consultation. This model bases the right to prior consultation on a monistic structure of the political community that distinguishes between consent and consultation. Yet this is not the only available model for justifying the right to prior consultation. There are two other models that compete with it: procedural liberal monism and multicultural liberal pluralism. Procedural liberal monism justifies prior consultation on the rights to property and privacy of cultural minorities, locates prior consultation within a monist structure of the state, and argues that cultural minorities' consent is not a component of this right. Multicultural liberal pluralism justifies the right to prior consultation by appealing to the rights of self-government and cultural integrity, as well as for reasons of intercultural equality and corrective justice. This model interprets the right to prior consultation as including cultural minorities' right to veto and links this right with a pluralist interpretation of the state.

This chapter is divided into three sections. The first section provides the legal background to the right to prior consultation. It presents the legal framework that supports the right to prior consultation and presents the basic legal and practical problems that cut across it. The second section systematizes and analyzes the doctrine articulated by the Constitutional Court on prior consultation from 1991 to the present. The third section provides a critical analysis of the arguments defended by the monistic procedural liberal and monistic multicultural liberal models, and it demonstrates why the pluralistic multicultural liberal model is a better means of interpreting and implementing the right to prior consultation. This chapter is not intended to study the way in which the right to prior consultation is exercised in practice or its effectiveness. Its purpose is to examine and evaluate the legal and philosophical foundations of the right to prior consultation.

31 See Sentencia SU-039/97; Sentencia T-652/98, November 10, 1998, M.P. Carlos Gaviria; Sentencia C-030/98.

1 The Legal and Practical Context

The 1991 Constitution, Law 70 of 1993, and Convention 169 of the International Labor Organization – to which Colombia is a party – recognized the right to prior consultation. Article 330 of the Constitution provides that the state must consult indigenous communities when it has an interest in exploiting natural resources in their territories.³² Law 70 of 1993, which develops transitory article 55 of the Constitution,³³ extended this right to culturally diverse black communities living in the Colombian Pacific.³⁴ However, the right to prior consultation of the black communities is not explicitly mentioned in the Constitution of 1991. Therefore, it does not have constitutional rank and cannot be protected through the *acción de tutela*.³⁵ In contrast, Convention 169 of the International Labor Organization (ILO), which forms part of the Colombian block of constitutionality,³⁶ expanded the coverage of individuals holding this right, as well as the issues on which they must be consulted. Articles 6 and 7 of Convention 169 state that indigenous communities and tribal peoples must be consulted on all projects that aim to exploit natural resources in their territory.³⁷ These articles also indicate that these

32 CONST. COL. art. 330.

33 CONST. COL. transitory art. 55.

34 CONST. COL., L. 70/93, August 27, 1993, D.O., arts. 22 and 38.

35 The *tutela* is a constitutional legal action created to protect, in an inexpensive, fast, and efficient way, the fundamental rights of Colombians (CONST. COL. art. 86).

36 In Colombia, all international human rights treaties approved by Congress have the same status as the Constitution or should be used to interpret it. The main source of the block of constitutionality is article 93 of the Constitution (CONST. COL. art. 93). This article indicates, “International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically. The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia.” *Id.* See also Rodrigo Uprimny, *El bloque de constitucionalidad en Colombia: Un análisis jurisprudencial y un ensayo de sistematización doctrinal* [The Block of Constitutionality in Colombia: An Analysis of the Case Law and an Attempt of Doctrinal Systematization], in 1 COMPILACIÓN DE JURISPRUDENCIA Y DOCUMENTARIA NACIONAL E INTERNACIONAL (Oficina en Colombia del Alto Comisionado de las Naciones Unidas para los Derechos Humanos 2000) (Col.).

37 International Labor Organization (I.L.O.) Convention 169 of 1989, arts. 6 and 7, June 27, 1989.

cultural minorities must be consulted on the administrative and legislative measures that directly affect them.³⁸ Thus, both the Constitution and international law, which in this case has constitutional rank, recognize a broad right of consultation for Colombian cultural minorities.

38 *Id.*, article 6 states:

- (1) In applying the provisions of this Convention, governments shall:
 - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
 - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
 - (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
- (2) The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7 states:

- (1) The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development, which may affect them directly.
- (2) The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
- (3) Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
- (4) Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Id.

The result is a direct conflict between cultural minorities' rights and constitutional principles. The problem is that the right to prior consultation, and the right of self-government to which it is closely linked, are in tension with those articles of the Constitution that recognize that the state owns the subsoil and nonrenewable natural resources,³⁹ that Colombians have the right to freedom of movement,⁴⁰ that the rights to property may be limited when they conflict with the general interest,⁴¹ and that Congress concentrates the power to make law in the country.⁴² The Constitution and Convention 169 indicate that cultural minorities in Colombia have the right to determine which moral, political, and legal norms are to regulate their territory, how to use the natural resources in their territory, and who may settle on and move across their lands, and to demand that their authorities be consulted on any project or piece of legislation that affects them directly.⁴³ It also indicates, however, that the Colombian state may limit the right to collective ownership of their lands,⁴⁴ can exploit nonrenewable resources within them,⁴⁵ and has the power to enact laws to regulate broad areas of the social life of all Colombians.⁴⁶ Similarly, it indicates that Colombians have, in principle, the right to move through all national territory.⁴⁷

The intensity of political and economic conflicts generated by this tension of constitutional principles and indigenous rights becomes visible if one recognizes that indigenous and black communities own 34 percent of the national territory⁴⁸ and that many of these lands are rich in

39 CONST. COL. art. 332.

40 CONST. COL. art. 24.

41 CONST. COL. art. 58.

42 CONST. COL art. 150.

43 ILO Convention 169 of 1989, arts. 6 and 7.

44 CONST. COL. art. 58 (establishing limits to the right to property).

45 CONST. COL. art. 332 (declaring that the state is the owner of the subsoil and all nonrenewable resources).

46 CONST. COL. art. 150 (determining the areas in which Congress is competent to create law).

47 CONST. COL. art. 24 (freedom of movement).

48 Departamento Nacional de Estadística, *supra* note 6, at 19.

minerals and oil. The conflict becomes even more apparent if we consider that, to further their illegal activities, armed groups and drug traffickers use a significant number of reservations, and that the exploitation of minerals like coal, oil, and nickel are central to the national economy.⁴⁹ In principle, the state should have access to the lands of indigenous and black communities if it wants to maintain public order and macroeconomic stability in the country. Conversely, the right to self-government would be simply a paper norm if cultural minorities had no real possibility of controlling their territories and participating in the processes that create the legal norms that affect them directly. The theoretical and practical problems created by the recognition of the right to prior consultation by the Colombian legal system are, no doubt, of great theoretical and practical importance.

2 The Colombian Constitutional Court and the Right to Prior Consultation

The Constitutional Court has constructed a long and solid case law in relation to prior consultation.⁵⁰ In the past twenty years, the Court has decided twenty-three cases directly related to this right.⁵¹ This case law can be grouped into three sets, each of which develops different aspects

49 Between 1996 and 2003, oil, coal, and iron constituted approximately 40 percent of Colombian exports. BUSINESSCOL.COM, “Exportar Colombia: Exportaciones por sector económico” [Colombian Exports by Economic Sector], available at <http://www.businesscol.com/comex/estexp01.htm> (last updated Jan. 27, 2005).

50 See Daniel Bonilla, *Introducción*, in JUSTICIA COLECTIVA, MEDIO AMBIENTE Y DEMOCRACIA PARTICIPATIVA (Daniel Bonilla ed. Universidad de los Andes 2009). Some sections of this introduction are included in this chapter when presenting the rules that constitute the first two stages of the case law of the Constitutional Court.

51 These cases, most of which have more than one hundred pages, are the following: Sentencia T-188/93, May 12, 1993, M.P. Eduardo Cifuentes Muñoz; Sentencia T-257/93, June 30, 1993, M.P. Alejandro Martínez Caballero; Sentencia T-380/93, September 13, 1993, M.P. Eduardo Cifuentes Muñoz; Sentencia T-405/93, September 23, 1993, M.P. Hernando Herrera Vergara; SU-039/97 M.P. Antonio Barrera; T-652/98 M.P. Carlos Gaviria; C-891/02 M.P. Jaime Araújo; Sentencia SU-383/03, May 13, 2003, M.P. Álvaro Tafur Galvis; Sentencia T-737/05, July 14, 2005, M.P. Álvaro Tafur Galvis;

of this legal institution. The first set specifies the basic characteristics of prior consultation and articulates the normative criteria that should guide its development. These criteria, although generic, arise from the Court's analysis of consultations on projects aiming to exploit natural resources in territories belonging to cultural minorities.⁵² The cases the Court decided in this period touch on issues related to major mining or infrastructure projects, such as the exploitation of oil and the construction of dams. This first stage of the Court's case law makes no reference to consultation on legislative or administrative measures, or makes only a passing reference to the subject. The two key rulings in this first period in the history of the case law of the Court are those referred to as Uwa⁵³ and Urrá.⁵⁴ The doctrinal contributions articulated by the Court in these two cases, however, are revisited and refined in subsequent rulings on prior consultation.⁵⁵

The second set of rulings references the normative criteria that should guide the consultations on legislative and administrative measures. The three fundamental rulings in this second period are those

Sentencia T-382/06, May 22, 2006, M.P. Clara Ines Vargas Hernández; Sentencia T-880/06, October 26, 2006, M.P. Álvaro Tafur Galvis; Sentencia C-461/08, May 14, 2008, M.P. Manuel José Cepeda; Sentencia C-030/08, January 23, 2008, M.P. Rodrigo Escobar Gil; Sentencia T-154/09, March 12, 2009, M.P. Nilson Pinilla Pinilla; Sentencia C-175/09, March 18, 2009, M.P. Luis Ernesto Vargas; Sentencia C-615/09, September 2, 2009, M.P. Humberto Sierra; Sentencia T-769/09, October 29, 2009, M.P. Nilson Pinilla Pinilla; Sentencia T-547/10, July 1, 2010, M.P. Gabriel Eduardo Mendoza Martelo; Sentencia C-702/10, September 6, 2010, M.P. Jorge Ignacio Pretelt Chaljub; Sentencia T-745/10, September 14, 2010, M.P. Humberto Antonio Sierra Porto; Sentencia C-915/10, November 16, 2010, M.P. Humberto Antonio Sierra Porto; Sentencia C-941/10, November 24, 2010, M.P. Jorge Iván Palacio Palacio; Sentencia T-129/11, March 3, 2011, M.P. Jorge Iván Palacio Palacio.

52 The most important cases of this first stage of the Court's jurisprudence are Uwa and Urrá. The first is related to a project aimed to explore and exploit oil in the territory of the Uwa people. The second to the construction of a dam in the territory of the Emberá-Katío people. See *infra* text accompanying notes 66–69.

53 See Sentencia SU-039/97, February 3, 1997, M.P. Antonio Barrera Carbonell.

54 See Sentencia T-652/98, November 10, 1998, M.P. Carlos Gaviria Díaz.

55 See Sentencia SU-383/03; Sentencia T-737/05.

concerning the Forestry Law,⁵⁶ the Rural Law,⁵⁷ and the International Wayuu Treaty.⁵⁸ In this second period, the Court's attention is focused on the relationship between laws and administrative acts on the one hand and minority cultures on the other. The Court focuses its efforts on articulating a set of criteria to determine how, when, and with whom consultation should occur regarding legal projects and administrative acts. In this second period, the Court also decides some of the few cases related to issues of consultation and territory.⁵⁹ Nevertheless, these cases merely reiterate the doctrine established by the Uwa and Urrá cases.

The first two periods of constitutional case law are cumulative and complementary. The rules established in the first stage are applied in the second and generate a coherent legal and theoretical framework. The general criteria that the Court established in the first stage to guide the “territorial” consultation – good faith, complete and accurate information, and so forth – can and should apply in the case of “legislative and administrative” consultations. The criteria generated in the second stage refer only to consultations on legal norms that directly affect cultural minorities. These criteria are focused on the particularities of the processes of lawmaking and administrative acts. They make no reference to the notion or basic structure of the right to prior consultation.

The third stage that emerges in the history of the case law of the Constitutional Court reiterates much of the existing constitutional doctrine. However, the two key *tutela* rulings of this period introduce an element that contradicts the interpretation that the Court had articulated on prior consultation in the previous two stages: the right to veto. In this third stage of case law, the Court argues that the right to prior

56 See Sentencia C-030/08, January 23, 2008, M.P. Rodrigo Escobar Gil.

57 See Sentencia C-175/09, March 18, 2009, M.P. Luis Ernesto Vargas.

58 See Sentencia C-615/09, September 2, 2009, M.P. Humberto Sierra. The cases that confirm this precedent are Sentencia C-915/10, November 16, 2010, M.P. Humberto Antonio Sierra Porto; Sentencia C-941/10, November 24, 2010, M.P. Jorge Iván Palacio Palacio.

59 See Sentencia T-547/10, July 1, 2010, M.P. Gabriel Eduardo Mendoza Martelo; Sentencia T-745/10, September 14, 2010, M.P. Humberto Antonio Sierra Porto.

consultation requires the consent of cultural minorities.⁶⁰ If no agreement is reached, the minority would have the right to veto the government's decision when it puts at risk its existence as a distinct culture or imposes an undue and excessive burden. In support of its interpretation, the Court calls upon three arguments: the government's repeated violation of the right to prior consultation;⁶¹ the consequences of this violation for cultural minorities;⁶² and international law, particularly the case law of the Inter-American Court of Human Rights and the reports of the Special Rapporteur on Human Rights of Indigenous People.⁶³ The future of this interpretation of prior consultation in the case law of the Constitutional Court is unclear, however. The two rulings that articulate it are *tutela* rulings decided by panels composed of three justices.⁶⁴ The full Constitutional Court therefore has not ruled on the issue – as it has done to defend the monistic multicultural liberal interpretation of this legal institution.

2.1 The Fundamental Right to Prior Consultation and the Rules for Its Development

The constitutional doctrine that specifies the basic structure of the right to prior consultation is articulated in the Uwa and Urrá cases, which represent the first set in this line of cases.⁶⁵ The first case involved the Uwa indigenous community, the Colombian government, and the company

60 See Sentencia T-129/11, March 3, 2011, M.P. Jorge Iván Palacio Palacio.

61 See *id.*

62 See *id.*

63 See *id.* Inter-American Court of Human Rights. Case of the Saramaka People v. Suriname. Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs).

64 Panels of three justices decide all *tutela* cases. The only exception is the *sentencias de unificación* (unification cases). The nine justices of the Constitutional Court decide these cases. Their aim is to unify the jurisprudence of the court when there are two or more contradictory cases decided by the regular *tutela* panels.

65 For a detailed analysis of these cases, see Bonilla, LA CONSTITUCIÓN MULTICULTURAL, *supra* note 21, at 228–61.

Occidental de Colombia. The conflict began when the company petitioned the Ministry of the Environment to grant it an environmental license for carrying out seismic studies in the territory of the indigenous community.⁶⁶ These studies were intended to confirm the existence of petroleum deposits within the Uwa territory. The work involved the construction of access roads, excavation, and the use of dynamite. To fulfill its duty to consult the indigenous community, the government organized a meeting to discuss plans for the project in their territory. The indigenous community opposed the project, arguing that it was contrary to the integrity of their culture. Community authorities pointed out that natural resources could not be considered the property of any one individual or public institution. Natural resources, the community argued, are the creation and property of the god Sira, and the indigenous community is obligated to manage them according to the laws imposed by this god. Furthermore, for the community, petroleum is considered to be the blood of Mother Earth; its exploitation thereby signifies her death.

As a consequence of the disagreement between the parties, the government and the multinational company arranged for the creation of an intercultural committee with the community that would be tasked with modifying the project and evaluating its progress. However, the Ministry of the Environment had granted the environmental license to the oil company before the intercultural committee was able to fulfill its mission. As a result of this government decision, the office of the ombudsman filed a *tutela* on behalf of the Uwa community claiming the violation of the right to prior consultation. The government argued that it had fulfilled its obligations with respect to prior consultation by organizing the meeting in which the community was informed about the project. Occidental de Colombia indicated, moreover, that it had met on thirty-three occasions with the Uwa authorities, representatives of the government, and other indigenous communities in the region. From the perspective of

66 See Sentencia SU-039/97, February 3, 1997, M.P. Antonio Barrera Carbonell (Section I: *Antecedentes (1) Hechos*). The summary of the facts of this case is based on this section of the Court's opinion.

the company, these meetings were evidence that the indigenous community had been consulted on the project. The Constitutional Court decided that the right to prior consultation of the Uwa community had been violated and that the meetings organized by the government and the multi-national could not be deemed sufficient to satisfy this right.

In the second case, central to this first stage of the case law of the Constitutional Court, the parties involved in the *tutela* were the national government, state-owned enterprises Atlantic Power Corporation (Corelca) and Urrá, and the Emberá-Katío indigenous community of Alto Sinú.⁶⁷ The conflict in this case began when the government decided to declare that the area of the department of Córdoba where the state-owned enterprise Corelca planned the construction of the Urrá dam was of social interest and public utility.⁶⁸ This area partly overlaps the territory collectively owned by the Emberá-Katío. The construction of the dam involved two stages. The first had the objective of advancing the work of excavation and the construction of infrastructure related to the project and the deviation of the Sinú River. The second was aimed at filling and operating the dam.

With respect to the first stage, the government granted the company the necessary environmental permits to begin work without even informing the indigenous community about the project. After finishing the first stage and before the start of the second, the Emberá-Katío community and the Urrá Company (which was formed to replace Corelca in the project) agreed on the formulation and implementation of the Plan of Ethnic Development. The plan was aimed at evaluating the

67 For a detailed description of the Uwa case, see Helena Alviar and Daniel Bonilla, “Entre la diversidad cultural, los derechos individuales y el desarrollo económico – El caso Uwa” [Between Cultural Diversity, Individual Rights and Economic Development – The Uwa Case], available at <http://www.gvdireito.com.br/casoteca/default.aspx?pagid=GQDKQPWPandmenuid=51>, Facultade de Direito Getúlio Vargas – São Paolo.

68 See Sentencia T-652/98, November 10, 1998, M.P. Carlos Gaviria Díaz (Section *Antecedentes (I) Hechos*). The summary of the facts of this case is based on this section of the Court's opinion.

consequences that these projects and the diversion of the river had on the Emberá-Katío community. The plan also sought to create programs to mitigate and compensate for the damage that had been caused to the community. The financing of these projects would be the responsibility of the company.

Implementation of the Plan of Ethnic Development, however, was delayed by the company's argument that the divisions and disputes among different groups in the Emberá-Katío community made it impossible to determine who were its legitimate representatives. Given the segmented and diffuse character of the Emberá-Katío political organization, the various groups decided to create the Supreme Council, so that negotiation with the government would have only one indigenous spokesperson. However, some community groups questioned the actions of the council and argued that the institution did not adequately represent their interests. The political divisions among the community generated intense disputes that hindered interaction with the government.

The company subsequently petitioned the national government to grant an environmental permit to begin work on the second stage of the project. The government denied the company's request for various reasons, including its violation of the right to prior consultation. Along with nongovernmental organizations, the Colombian Commission of Jurists, and the National Indigenous Organization of Colombia, the Emberá-Katío community brought a *tutela* in defense of the right to prior consultation, as well as various other rights of the indigenous community. The Constitutional Court decided that the right to prior consultation in this community had been violated. Similarly, it ordered the formulation and implementation of a plan to reduce the negative effects of the dam's construction, as well as compensation for damage caused to the community.

In the Uwa and Urrá cases, the Court formulated the basic structure of its doctrine on prior consultation. The Court describes this institution as a fundamental right and formulates six principles that must guide the actions of the parties entering into an intercultural dialogue using this

legal form. The first of these principles indicates that the responsibility for organizing and conducting prior consultation rests with the government, not the companies interested in exploiting the natural resources found in the territories of cultural minorities.⁶⁹ The fundamental right to prior consultation that cultural minorities have in Colombia generates a concrete obligation for the national government.

The second principle indicates that the government must consult with the communities affected as to how to proceed with the prior consultation.⁷⁰ To be effective, the consultation must take into account the differences among the indigenous and black groups inhabiting the

69 The Court says: “Neither can the myriad of meetings presided over by the organization Occidental de Colombia Inc. with different members of the Uwa community be considered or treated as the consultation required in these cases, as the responsibility undeniably falls exclusively within the domain of State authorities, who have sufficient power of representation and decision over the higher interests involved, those of the indigenous community and the country pertaining to the need to exploit natural resources or not, as environmental policy demands in relation to sustainable development.” Sentencia SU-039/98.

70 In the Uwa case, article 6 of Convention 169 is cited, indicating that the consultation should be carried out with “proper procedure.” *Id.* In the Urra case, “For these reasons, due to the irregularities that have been presented regarding the recognition of the Emberá authorities (matter that will be considered in this Court at a separate and later time), and because the consultation of the regime applicable to the area of overlap of the Paramillo National Natural Park and the modern-day reservations has not even begun, the application of Decree 1320 of 1998 to this process of consultation would clearly be contrary to the Constitution and the norms incorporated to domestic law by means of law 21 of 1991; therefore, it is ordered that the Ministries of the Interior and the Environment disapply their decisions, and attend to the following guidelines in this case.” Sentencia T-652/98.

The principle was articulated in a clear and direct manner in the Court’s ruling T-737 of 2005: “Nevertheless, the consultative process carried out by the authorities before the indigenous peoples for making a decision affecting their interests must be preceded by a consultation on how the consultative process will be effected. Indeed, the Colombian State must take into account that the processes of prior consultation cannot respond to a single model applicable equally to all indigenous peoples, as to provide an effective application of Convention 169 of the ILO and in particular the provisions of Article 6 and Article 7 of the Charter, the consultation processes should first protect the utility and customs of the indigenous peoples, respecting the methods or procedures for making decisions they have developed.” Sentencia T-737/05.

country, such as in the management of Spanish, who is considered a representative of the community, and the levels of interaction indigenous and black communities have had with the majority culture. This principle embodies the idea that prior consultation must be a procedure that adapts to the various contexts and participants involved in the process. The Court specifies, however, that this does not mean that prior consultation is a simple formal requirement to be carried out in varied but mechanical fashion, or that it can be replaced by generic processes of “sharing and analyzing” projects.⁷¹ The Court indicates that prior consultation is a fundamental right – consisting of particular and precise characteristics – that protects the cultural identity of minorities,⁷² protects their right to self-government,⁷³ and embodies one of the central principles of the Constitution of 1991: participatory democracy.⁷⁴

71 The Court indicated, “Informing or notifying the indigenous community about a project to explore or exploit natural resources does not therefore have the value of a consultation.” It is necessary to meet the above guidelines that present formulas for consultation or agreement with the community that, through their representatives, finally demonstrates the community’s agreement or disagreement with the project and how it affects their ethnic, cultural, social and economic identity.” Sentencia SU-039/98.

72 See *id.*

73 For the Court, “In connection with the duty of consultation on measures which are likely to directly affect indigenous and tribal peoples, the Court has said that it is a direct consequence of the right of native communities to decide what to prioritize in their process of development and preservation of culture and, where stemming from the duty of consultation, there emerges a fundamental right subject to protection by means of the *acción de tutela*, due to its political importance, to its significance for the defense of cultural identity and integrity and its condition as a mechanism for participation.” Sentencia C-030/08.

74 To this respect, the Court states in ruling SU-509/97: “The Constitution alludes to citizen participation that offers different modalities in a variety of norms (preamble, arts. 1, 2, 40, 79, 103, among others). As such, politics is not the only form of participation. In the opinion of the Court, the participation of indigenous communities in decisions that may affect them in relation to the exploitation of natural resources offers the particularity that the fact or circumstance observed in the sense of that participation, through the mechanism of consultation, acquires the connotation of a fundamental right, as it is erected as an instrument that is essential to preserve the ethnic, social, economic and cultural integrity of indigenous communities and to therefore to ensure their survival as a social group.” *Id.*

The third principle indicates that cultural minorities must have a real and effective participation in the consultation process through their representatives.⁷⁵ That is, the community is the entity responsible for specifying who must interpret and defend its interests in the process of dialogue with the administration, and these representatives should be able to make their voices heard at all stages of the consultation.⁷⁶ Neither the government nor the companies that are part of the prior consultation can choose the indigenous spokesperson or influence the selection process undertaken by the communities to select their representatives.

The fourth principle indicates that the communities must have access to all the information related to the objectives and content of the projects.⁷⁷ Without this information, the Court affirms, it would not be possible to establish a reasonable position toward the subject under discussion, and it would therefore not be possible to participate effectively in the process.⁷⁸

The fifth principle states that the parties must recognize and respect their interlocutors and must act in good faith at all stages of the

75 See Sentencia C-891/02, October 22, 2002, M.P. Jaime Araújo Rentería.

76 The Court indicates in this regard: “the opportunity to consciously evaluate the advantages and disadvantages of the project freely and without outside interference should be given to the community and its members through the convening of its members or representatives, along with the opportunity to be heard in relation to the concerns and claims presented by the project with respect to the defense of their interests, and the opportunity to decide on the feasibility of the project. The aim is this, that the community be able to have an active and effective participation in making the decision that should be adopted by the authority, which should be agreed upon or achieved harmoniously to the full extent possible.” *Id.*

77 For the Court, “a) The community should have full knowledge of the projects to explore or exploit natural resources in the territories they occupy or that belong to them, and the mechanisms, procedures and activities required to implement them. b) The community should also be aware and enlightened about how the execution of those projects may have effects or cause impairment of the elements that form the basis of their social, cultural, economic and political cohesion and, thereby, the basis of their survival as a human group with unique characteristics.” Sentencia SU-039/97, February 3, 1997, M.P. Antonio Barrera Carbonell.

78 See *id.*

consultation.⁷⁹ The parties must recognize each other and should not lead their opposing party to error. The Court also indicates that prior consultation cannot be interpreted as an adversarial process.⁸⁰ The parties to the prior consultation should work to achieve the objective of the consultation, that of reaching an agreement.

The sixth and final principle indicates that, as long as the right to prior consultation does not give cultural minorities veto power over the projects discussed, the administration's decision with respect to the project's development cannot be authoritarian or arbitrary in the case that no agreement is reached between the parties.⁸¹ The Court emphasizes that the purpose of the consultation is to reach an agreement between the parties, but it acknowledges that this cannot always be achieved. In this case, the government's decision should prevail over that of the cultural minority. The Court indicates, however, that the administration should take the necessary measures to compensate for or mitigate the negative effects of its decision.⁸²

79 "Based on article 330...of the Constitution and the norms of Covenant 169 cited before, the Court considers that the consultation to indigenous communities...implies adopting communication and understanding relationships, determined by mutual respect and good faith among them and public authorities." Sentencia SU-039/97. This arguments are confirmed in cases C-418/02 and C-891/02.

80 See Sentencia SU-039/97.

81 The Court says in this respect: "Where an agreement or accord is not possible, the authority's decision must be free of arbitrariness and authoritarianism; it must therefore be objective, reasonable and proportionate to the constitutional finality required by the State to protect the social, cultural and economic identity of the indigenous community. In any case they must settle on the necessary mechanisms to mitigate, correct, or reverse the effects produced by the measures or they could generate harm for the community or its members." Sentencia SU-039/97. See also Sentencia C-891/02, October 22, 2002, M.P. Jaime Araújo Rentería.

82 In the Urrá case, the Court said, "As the omission of prior consultation for granting the environmental license for the construction of civil works of the hydroelectric plant is precisely the fact that caused the violation of these rights, and irreversible damage caused by the construction of such works can in no way be remedied by subsequent compliance with the constitutional requirement omitted, the Court shall order compensation to the people affected at least to the extent that ensures their physical survival, while elaborating on the cultural, social and economic changes that are now

2.2 *Prior Consultation for Legislative and Administrative Measures*

The second stage of the Constitutional Court's case law consists of three decisions ruling on, respectively, the Forestry Law, the Rural Development Law, and the International Wayuu Treaty. In the first decision, the Court declared the General Forestry Law to be unconstitutional.⁸³ This norm regulated all matters relating to the operation of forest resources in the country.⁸⁴ In the second, the Court declared the Rural Development Law, a law that controlled all issues related to the sustainable development of the Colombian countryside, to be unconstitutional.⁸⁵ This norm then regulated subjects ranging from the procedures for furthering agrarian reform in the country to the structure of public institutions related to the countryside and the protection of the rural population displaced by violence.⁸⁶ These two rulings are the result of two public actions of unconstitutionality, or *actio popularis*. The rulings are therefore an abstract review of constitutionality. The first case was brought by the University of the Andes Public Interest Law Group and was supported by organizations such as the Process of Black Communities, the National Indigenous Organization of Colombia, and the Association of Traditional Authorities of the Regional Indigenous Council of the Mid-Amazon.⁸⁷ The second was brought by the Colombian Commission of Jurists and supported by organizations such as Dejusticia, the National Indigenous Organization of Colombia, the Indigenous Organization of Antioquia, and the University of El Rosario.⁸⁸ The problem under

inescapable, and for which the project owners and the State denied them the opportunity to choose, in open violation of the Constitution and the law in effect." Sentencia T-652/98, November 10, 1998, M.P. Carlos Gaviria Díaz.

83 Sentencia C-030/08, January 23, 2008, M.P. Rodrigo Escobar Gil.

84 L. 1021, April 20, 2006, D.O. 4629, art. 1.

85 See Sentencia C-175/09, March 18, 2009, M.P. Luis Ernesto Vargas.

86 L. 1152, July 25, 2007, D.O. 46.700, art. 1.

87 See Sentencia C-030/08 (listing the *demandantes* in the case, and see Section IV, *Intervenciones*).

88 See Sentencia C-175/09 (listing the *demandantes* in the case, and see Section IV, *Intervenciones*).

discussion is the coherence of the system. In particular, the debate centers on the alleged violation of the Constitution by a statute, not the damage that the application of the legal norm may have caused for a particular person. In both rulings, the Court based its decision on the violation of the right of cultural minorities to prior consultation on legislative measures, and it found in each case that the government did not consult two laws directly affecting the indigenous and culturally diverse black communities.

The third decision, on the International Wayuu Treaty, is a consequence of the automatic review that the Constitutional Court must perform on all draft bills for approving international treaties.⁸⁹ The sole objective of the treaty was to regulate matters relating to the Wayuu indigenous community living in Venezuela and Colombia. In this decision, the Court found that the law approving the treaty agreement between Venezuela and Colombia for assistance to and development of the Wayuu indigenous community was unconstitutional.⁹⁰ The Court held that the government should have consulted the indigenous community on the bill, given that it affected the community directly.⁹¹

The doctrinal contributions of the rulings in this group of cases are related to the following five issues.⁹² The first one specifies who is obligated

89 CONST. COL. art. 241(10).

90 L.1214, July 16, 2008, D.O., 47.052.

91 See Sentencia C-615/09, September 2, 2009, M.P. Humberto Sierra.

92 In case C-175/09, in which the Constitutional Court declared the Rural Development law to be unconstitutional, the Court confirmed what was said in case C-030/908. The only contribution of C-175/09 with respect to the way prior consultation of legislative measures has to be understood is related to the meaning of the words “directly affecting the cultural minorities.” For the Court in this ruling, all legislative measures that affect the cultural identity of the indigenous and black communities directly affect them, and the cultural minorities should be consulted on them. For the Court, “the duty of prior consultation on legislative measures is legally enforceable when they affect communities of indigenous and African descent. This happens when the project is related to issues that have an intrinsic connection with the definition of the ethnic identity of these groups... to demonstrate the requirement of prior consultation, it must be determined whether the subject of the legislative measure is a necessary link to the definition of the ethos of the communities of indigenous and African descent.”

to conduct prior consultation on legislative measures; the second determines when to advance this process; the third indicates the principles that should guide the development of this fundamental right, principles that are equally applicable in the case of prior consultation for the exploitation of the lands of cultural minorities; the fourth embodies the consequences of bypassing or performing the prior consultation inadequately; and the fifth indicates that the government must consult cultural minorities on all administrative acts that directly affect them.

The Constitutional Court noted that the duty to organize and proceed with prior consultation on legislative measures is the responsibility of the executive branch of the national government.⁹³ The Court specifies that the origin of the bill does not matter, nor does whether the bill was formulated and defended by the national government or a member of Congress.⁹⁴ The ruling leaves no doubt as to who has the primary duty to protect the right to prior consultation: the national government.⁹⁵

Sentencia C-175/09. Cf. Public Interest Law Group at the Faculty of Law, University of the Andes, *El derecho fundamental a la consulta previa de medidas legislativas* [The Fundamental Right to Prior Consultation on Legislative Measures] (May 2009) (unpublished manuscript) (analyzing the jurisprudence of the Colombian Constitutional Court on the right to prior consultation).

93 See Sentencia C-030/08, January 23, 2008, M.P. Rodrigo Escobar Gil.

94 The Court states in this respect, “The convention establishes an obligation for governments, but it is worth asking whether, in a broader sense, this obligation may be extended to other scenarios, particularly when, as in the case of legislative measures, the State is otherwise tasked with adopting them . . . What happens when, in developing the initiative conferred to them by the Constitution, subjects other than those provided for in Article 155 of the Constitution, separate from the government, decide to submit for consideration by the legislatures bills the content of which is likely to directly affect indigenous and tribal communities? . . . It would seem necessary in this case that the government, upon the presentation of a bill on which cultural minorities should be consulted, go to actors for which the legislation has been projected, such as the Permanent Bureau for Cooperation with Indigenous Peoples and indigenous organizations established by Decree 1397 of 1996, or others deemed relevant, to define what would be the most appropriate instances or mechanisms for consultation in that scenario.” Sentencia C-030/08.

95 *Id.*

The Constitutional Tribunal also indicated that prior consultation should occur before the bill that directly affects the interests of cultural minorities is filed in Congress.⁹⁶ In the case of international treaties, the Court affirmed that consultation with cultural minorities must be carried out after the head of state or his or her representative has negotiated and signed the treaty, but before presenting the draft bill for approval in Congress.⁹⁷ Debates occurring in the legislature on the strengths and weaknesses of a bill that may include representatives of the indigenous and black communities cannot be considered to satisfy the right to prior consultation, according to the Court.⁹⁸ The Court also stipulates, however, that the fact that prior consultation should take place before the draft legislation is submitted to Congress does not preclude that the debates assessing its suitability for the country be as broad and participatory as possible.⁹⁹ The Court added that the legislative process must

96 The Court says, “First, dealing specifically with legislative measures, it is clear that the duty of consultation does not apply to any legislative measure that is likely to affect indigenous communities, but only to those that directly affect them,” Sentencia C-030/08. This argument was first mentioned in ruling C-891/02. The Court indicated in this ruling that “it is consistent with the Constitution that a government entity autonomously develop a bill on a matter within the scope of its powers, even though it be in the interest of indigenous peoples, as such activity is part of the exercise of their functions,” but that nevertheless “it is clear that in this case the entity must provide to the communities prior to the filing of the bill in the Congress of the Republic, the opportunities due to them to not only thoroughly familiarize themselves with the bill but, above all, to participate actively and intervene in its modification, if necessary.” Sentencia C-891/02, October 22, 2002, M.P. Jaime Araújo Rentería.

97 The Court states in this regard, “This being so, the question is: in terms of probationary bills for international treaties, at what point should the indigenous community directly affected be consulted? As a starting point, you should keep in mind that neither the Constitution, the Vienna Convention of 1969 on the law of treaties nor Convention 169 of the ILO provides a policy normative response to this question. However, based on the principles of good faith and efficiency that should guide the conduct of the consultation, and so that a true intercultural dialogue can be held, it can be affirmed that this must be done before the submission of the international instrument by the President of the Republic to the Congress of the Republic.” Sentencia C-615/09, September 2, 2009, M.P. Humberto Sierra.

98 See Sentencia C-030/08.

99 See *id.*

include all voices interested in the bill, particularly those that would be directly affected by it, and that it must comply with the mandates on citizen participation specified by Law 5 of 1992 – the norm governing the process of making law in Colombia.¹⁰⁰

Similarly, the Court affirmed that prior consultation should be understood as a flexible and adaptable process.¹⁰¹ Convention 169, which clearly and precisely established the obligation of party states to consult with indigenous and tribal communities on legislative measures that affect them directly, does not establish any procedure to embody this right.¹⁰² Thus, prior consultation on legislative measures does not have a singular and unchangeable form to be carried out. Consequently, the Court affirmed that the process should take into account the cultural characteristics of the communities involved in the process and the contexts in which they live to determine how to implement this fundamental right.¹⁰³ However, the Court also states that any prior consultation on legislative measures should be guided by the six principles established in the case law to conduct consultations related to the exploitation of natural resources found within the lands of indigenous or black communities.¹⁰⁴ The Court therefore indicates that the constitutional

100 Cf. Public Interest Law Group at the Faculty of Law, University of the Andes, *supra* note 92.

101 In this regard, the Court says, “As to the conditions set forth on the time, manner and place under which the consultation must occur, it is necessary to indicate that to the extent that Convention 169 does not establish rules of procedure and so long as they are not fixed by law, they should be addressed with the flexibility on the issue enshrined in the Convention and the fact that, in accordance with the same, the process of consultation is submitted to the principle of good faith, which is to say that it corresponds to the States to define the conditions under which consultation will take place, and also that, in order to be successful in light of the constitutional order, consultations should be effective and conducive in this context, but without having to talk in peremptory terms of its completion, or the essential conditions for the effect.” Sentencia C-030/08.

102 See *id.*

103 See *id.*

104 See Sentencia C-175/09, March 18, 2009, M.P. Luis Ernesto Vargas (discussing the “systematization of the rules on complying with the fundamental right to prior consultation”).

doctrine articulated in the first phase of its case law should also apply in the second. Thus, the Court reinforces the close link between the right to prior consultation and the rights of participation, self-government, and the integrity of cultural minorities.

The Court also stated that a legislative measure on which the cultural minorities directly affected have not been consulted in advance will have the following three consequences: First, the norm could be declared unconstitutional.¹⁰⁵ The Constitutional Court must exclude the law from the legal system if a citizen were to question its constitutionality by an *actio popularis*. Second, the Constitutional Court may refuse to apply the approved norm to cultural minorities.¹⁰⁶ This situation could only occur if the norm in question can achieve its objectives; namely, to be effective and not negatively effect the life of the indigenous and black communities in Colombia. Third, in cases in which the norm has unduly omitted matters relating to cultural minorities, and consequently has not consulted with these communities on the norm, the Court may be able to order Congress to regulate the excluded items of the law that was approved, after prior consultation with the minority cultural communities affected.¹⁰⁷ The Court ultimately specifies that all administrative

105 See Sentencia C-030/08.

106 See *id.*

107 In this regard, the Court said, “In [the] event [of failure to conduct prior consultation] it would be possible, under certain circumstances, to find that the law itself is unconstitutional, but it is also possible that, with a law that concerns indigenous and tribal peoples generally, and that affects them directly, the omission of the consultation is resolved in a decision to exclude these communities from the scope of application of the law; or it may happen that, in an event of this nature, the presence of a legislative omission is established, so that the law, as such, is kept in the system, but the necessary measures to remedy the legislative omission derived from the lack of foresight on measures specifically aimed at the indigenous and tribal communities. If the law has no such specific provisions, there would be a legislative vacuum in an area that affected everyone, derived from the need to create provisions with the indigenous groups in their own spheres of identity, considering special provisions and that they be consulted in advance. In this case, to the extent that the general law was called to apply to indigenous peoples, it would be decreed a legislative omission given the absence of specific norms consulted in advance.” Sentencia C-030/08.

measures regulating laws on which black and indigenous communities were properly consulted should also arise from consultation with these cultural minorities.¹⁰⁸ To the extent that the proper application of a law generally depends on its regulation, it is essential that the administrative acts that emerge be the result of a process of dialogue involving all stakeholders.¹⁰⁹

2.3 *The Right to Veto and Prior Consultation*

The third stage of the Constitutional Court's case law on prior consultation comprises two *tutela* rulings. The first, T-769/09, was brought by members of the Bachidubi community belonging to the Río Murindó reservations, which is collective property of the Emberá-Katío community.¹¹⁰ This *tutela* was supported by the Office of the Ombudsman and the Global Justice program at the University of the Andes.¹¹¹ The second, T-129/11, was brought by the Chidima-Tolo and Pesca-dito reservations belonging to the Association of Kuna, Emberá, and Katío *cabildos*.¹¹² This lawsuit was supported by the nongovernmental

108 See *id.*

109 "In sum, the Constitutional Court has considered that, in terms of prior consultation on legislative or administrative measures, to the indigenous communities prior consultation (i) constitutes a fundamental right; (ii) the ILO Convention 169 is part of the block of constitutionality; (iii) its pretermission, in the case of the legislative process, configures a violation of the Constitution; (iv) there is a clear link between the realization of prior consultation and the protection of the cultural identity of ethnic minorities; (v) the implementation of the mechanism of participation becomes compulsory when the measure, be it legislative or administrative, directly affects the indigenous community; (vi) the consultation must be such that it is effective and ensures the real participation of affected communities; (vii) ignorance of prior consultation can be invoked in *tutela* cases; and (viii) the government has the duty to promote consultation with respect to the bills it initiates." Sentencia C-615/09, September 2, 2009, M.P. Humberto Sierra.

110 See Sentencia T-769/09, October 29, 2009, M.P. Nilson Pinilla Pinilla (Section I, *Antecedentes*).

111 See *id.* (Section G, *Intervención de la Defensoría del Pueblo como coadyuvante*; Section H, *Intervención de la Universidad de los Andes como coadyuvante*).

112 See Sentencia T-129/11, March 3, 2011, M.P. Jorge Iván Palacio Palacio (Section *Referencia*).

organizations Dejusticia, the Center for Research and Popular Education (CINEP), the Colombian Commission of Jurists, and the line of research in environmental law at the University of El Rosario.¹¹³

The first case involved the Muriel Mining company, the Colombian government, and a set of indigenous and culturally diverse black communities.¹¹⁴ The Muriel Mining company petitioned the Colombian government to sign a contract granting the right to mine on a large area of the departments of Antioquia and Chocó. The governor of the Antioquia Department accepted the petition and signed a thirty-year contract with the company, renewable for an additional thirty years. The contract was to explore and exploit minerals such as copper and gold in an area that included collective territories of indigenous and culturally diverse black communities. The government and the company held a series of meetings with some community members who would be affected by the mining project, to inform them of their plans. At the meetings, however, all the legitimate representatives of the communities were not present, nor were all the communities affected by the project represented at the meetings. For the indigenous groups of the region, then, the government violated the right to prior consultation of cultural minorities living in the territories that were part of the mining concession. The Constitutional Court accepted the arguments of those who submitted the *acción de tutela* and declared that the government had violated the right to prior consultation of indigenous and black communities.

The second case involved the Emberá-Katío community and various state institutions, including the Ministry of Mining, the Ministry of Transportation, the company Electric Interconnection (ISA), and the mayor of the municipality of Acandí. In this *tutela*, the Court evaluated whether a set of works, projects, and government decisions violated the right to

113 See *id.* (Section IV, *Intervenciones amicus curiae en sede de revisión*).

114 See Sentencia T-769/09 (Section A, *Hechos y relato efectuado por los demandantes*).

The summary of facts is based on this section of the opinion.

prior consultation of the Emberá-Katío.¹¹⁵ The Court studied projects developed by the Ministry of Transportation for the road partially linking the towns of Unguía and Acandí. This road was four kilometers short of completion and, if finished, would have crossed the reservation of the Emberá-Katío community. The contracts signed between the Ministry of Transportation and the municipalities Unguía and Acandí were aimed at improving and finishing the route. The Court also examined the electric interconnection project between Panama and Colombia. This project was in the feasibility assessment stage when the *tutela* was brought. As part of this evaluation process, company officials entered the indigenous territory to perform measurements and to point out the spots where the electrical interconnection towers would eventually be built.

Similarly, the Court evaluated the mining concessions granted to private enterprise Gold Plate over an area of 40,000 hectares that overlaps in part with indigenous territories. Last, the Court studied the illegal occupation of indigenous territories by settlers and the risk of displacement of the Emberá-Katío community by these occupations and the works and projects mentioned above. The illegal occupation of the territories happened, in part, because the Colombian state registered them as three separate lots. It is argued in the *tutela* that the fragmentation of the territory makes it difficult for the indigenous groups to control the land and facilitates the encroachment of settlers. The Emberá-Katío claim that the state has refused to create a single reservation. To do so, it was necessary to expand the reservation so that the three existing lots could be joined. It was argued in the *tutela* that the indigenous people were at risk of displacement by conflicts with those who were illegally occupying their land and by its economic appeal for settlers and those carrying out the works and projects just mentioned. After evaluating these situations, the Court declared that the Colombian state had violated the right to prior consultation of the Emberá-Katío: Under no circumstances had

¹¹⁵ See Sentencia T-129/11 (Section I, *Antecedentes (1) Hechos*). The summary of facts is based on this section of the opinion.

the government proceeded with the necessary steps for consulting with the indigenous community in advance.

The doctrine of the Constitutional Court on prior consultation in this third stage reflects and reiterates the rules established in the preceding stages. The two rulings from this period of case law include long sections in which the *tutela* panels, constituted by three justices, reconstruct the norms established by the Court to define and advance “territorial,” “legislative,” and “administrative” prior consultation.¹¹⁶ Nevertheless, these two decisions contradict the precedent on a timely but crucial issue for understanding and interpreting this legal institution. The Court indicates that cultural minorities have the right to veto¹¹⁷ government decisions when they endanger the existence of the cultural community or impose an undue burden on it.¹¹⁸ Cultural minorities therefore do not have a

116 See Sentencia T- 129/11 (Section 6, *El derecho fundamental de las comunidades étnicas a la consulta previa respecto de obras, proyectos y/o actividades que tengan la posibilidad de afectar sus territorios: Referente jurisprudencial en la materia*); Sentencia T-769/09, October 29, 2009, M.P. Nilson Pinilla Pinilla (Section 4, *La consulta previa: Reiteración de la jurisprudencial*).

117 The Court states, “Given the above, this corporation makes it clear that when it comes to development or large-scale investment plans which have the greatest impact within the territory of peoples of indigenous and African descent, it is the duty of the State not only to consult these communities but also to obtain their free, prior and informed consent, according to their customs and traditions, as these populations, upon the execution of plans for investment, exploration and exploitation in their habitat, can pass through profound social and economic changes, such as the loss of their traditional lands, eviction, migration, depletion of the resources necessary for physical and cultural survival, the destruction and pollution of the traditional environment, among other consequences; so that in these cases the decisions of the communities can come to be considered binding, due to the serious level of involvement that it carries for them.” *Id.*

118 For the Court, “[b]ased on the above, an ethnic community cannot be forced to give up its lifestyle and culture by the mere arrival of an infrastructure or mining project and vice versa. It should be so in exceptional cases or those in which constitutional judges limit State agencies in a residual fashion if the evidence and trial indicate the need for the consent of the communities to determine the least harmful alternative.” *Id.* “As a manifestation of the special protection that the Constitution grants to ethnic minorities in projects whose magnitude has the potential to distort or destroy their modes of living, the Court finds prior consultation and informed consent of the ethnic communities to be necessary in general to determine the least harmful alternative in those

general power of veto. Nonetheless, this veto is applicable to “territorial” as well as “legislative” and “administrative” consultations.¹¹⁹ For the Court, the differences between the various types of consultation are irrelevant in clarifying the relationship between consultation and consent.¹²⁰ The relevant point is that government decisions could lead to excessively negative consequences for cultural minorities.

The Court calls on four arguments to justify its decision. First, it reiterated the relationship between prior consultation and the rights of participation, self-government, and cultural identity of cultural minorities that it formulated in the two previous stages of its case law.¹²¹ Second, the Court pointed to the government’s repeated breach of the right to prior consultation.¹²² For the Court, the many cases that it has had to decide on

events that: (i) involve the moving or displacement of communities for the work or project; (ii) are related to the storage or dumping of toxic waste in ethnic lands, and/or (iii) represent a high level of social, environmental and cultural impact on an ethnic community, which may lead to endangering its existence, among other things. Now, in the event that the less harmful alternative is explored with the participation of the ethnic communities in its construction, and that it may be proven in said process that all are harmful and that the intervention would lead to the destruction or disappearance of the group, the protection of the rights of ethnic communities under the principle of *pro homine* interpretation shall prevail.” Sentencia T-129/11.

119 For the Court, “concatenated with the above is the need to answer the question of whether consent should be sought only in cases of development or large-scale investment. For the Court the answer is negative. Under this ruling, any administrative measure, project, or work of infrastructure involving or having the potential to affect indigenous or ethnic territories must not only exhaust the consultation process from the beginning, but also be guided by the principle of participation and recognition in a dialogue of equals that will seek to obtain the free, prior and informed consent of the ethnic communities involved.” *Id.*

120 See *id.*

121 See *id.*

122 The Court says, “[h]owever, the various cases that have been reviewed by the Court in this matter permit the conclusion that prior consultation has not been carried out or conducted with the rigor it deserves; given that in the cases under review there has on the part of the accused parties been a constant equating of the process of consultation with a mere formality of joint informal meetings without articulation or consideration for the rights at play in these processes. To that extent, it is imperative for this Court that the process not be limited only to the period prior to intervention in ethnic

the subject show that the government has not taken the right to consultation seriously.¹²³ The government's actions show that it interprets prior consultation as a mere formality – thus violating the case law of the Constitutional Court. Third, the Constitutional Court argued that the Inter-American Court,¹²⁴ the Special Rapporteur on Human Rights of Indigenous People,¹²⁵ and the Convention against Racial Discrimination¹²⁶ affirm that prior consultation requires the consent of the cultural minorities involved when government decisions can have excessively negative consequences for these communities. Fourth and last, the Court makes reference to the negative consequences that the decisions imposed by the government have had for many cultural minorities in Colombia after the failure of the consultation.¹²⁷

The doctrine formulated by the Constitutional Court on prior consultation during these three periods has notable value. Three points are particularly important with respect to the characteristics and origins of this doctrine: first, its richness and adaptability to the context. The key elements of the Court's interpretation of prior consultation stem from international law. Articles 6, 7, and 15 of Convention 169 of 1989 contain the seed planted by the doctrine of the Court.¹²⁸ Yet the Court took the seed, cultivated it, and made it grow into a legal form with precise contours and structure. The Court granted prior consultation the status of a fundamental right, broadened the communities entitled to it, and established who is obligated to conduct proceedings, what the procedure

territories, reason for which formulas that balance the purposes of ILO Convention 169 are needed as well as subsequent developments on the matter.” *Id.*

123 See *id.*

124 See *id.*

125 See *id.*

126 See *id.*

127 The Court says, “Now, in the event in which the least harmful alternative is explored with the participation of the ethnic communities in its construction, and this process proves that all [alternatives] are harmful and that the intervention would bring the destruction and disappearance of the group, the protection of ethnic communities' rights will prevail as a consequence of the *pro homine* criterion of interpretation.” *Id.*

128 See *id.*

is for doing so, and what legal effects are generated by failure to comply with the process.¹²⁹

Similarly, the Court clarified the similarities and differences among “territorial,” “legislative,” and “administrative” consultations.¹³⁰ The Court likewise drew attention to the flexibility that prior consultation must have. This procedure, the Court found, should be tailored to the needs and characteristics of each cultural minority and each project that may affect it directly.¹³¹ Finally, in the third stage, the doctrine of the Court was influenced by the contexts in which its mandates were applied. The Court recognized the inefficacy of the doctrine, the lack of political will in the government to implement it, and the consequences that these facts have generated for cultural minorities.¹³² As a result, the Court reinterpreted a key part of the structure of the doctrine so that it could respond to the legitimate needs of cultural minorities.

Second, the doctrine is notable for the roles that international law and the block of constitutionality played in its formulation.¹³³ The ILO’s Convention 169 has been a critical tool for protecting Colombian

129 See *id.*

130 See Sentencia C-030/08, January 23, 2008, M.P. Rodrigo Escobar Gil.

131 See *id.*

132 See *id.*

133 For the Court, “it is also of particular relevance to the case study to reiterate that Convention 169 of the ILO 17, and in particular the right of indigenous and tribal peoples to prior consultation is in conformity with the Constitution and block of constitutionality pursuant to articles 93 and 94 of the constitutional order, not only because the instrument that contains it comes from the International Labor Organization and stipulates the labor rights of these peoples – article 53 of the Constitution – but because i) pursuant to the participation of indigenous communities in the decisions adopted on the exploitation of natural resources in their territories, provided for in article 330 of the Constitution, it cannot be understood as a denial of the right of these peoples to be consulted on other aspects inherent to their livelihood as recognizable communities – article 94 of the Constitution, ii) given that the Convention is cited as the best-known instrument against the discriminations suffered by the indigenous and tribal peoples, iii) because the right of indigenous peoples to be consulted in advance on the administrative and legislative decisions directly affecting them is a measure of affirmative action that the international community adopts and recommends to combat the origins, causes, forms and contemporary manifestations of racism, racial discrimination,

cultural minorities and promoting their interests and cultural rights.¹³⁴ This convention has been a powerful instrument for achieving this goal in that it broadens both the groups entitled to the right of prior consultation and its objective as established in the Constitution of 1991. It recognizes that both indigenous communities and tribal peoples have this right.¹³⁵ One must not forget that the Colombian Constitution of 1991 granted the right to prior consultation to indigenous communities alone.¹³⁶ Thus, the convention has been critical in ensuring that Roma and culturally diverse black communities in Colombia are also entitled to this right via case law. The Court indicates in its case law that these communities should be considered tribal people.¹³⁷ Convention 169 also broadened the object of prior consultation from projects seeking to explore or exploit natural resources in territories of cultural minorities, a right recognized in the Constitution of 1991, to any legislative or administrative measures that directly affect indigenous communities or tribal peoples.¹³⁸

The Court's widespread use of international law to interpret the Constitution of 1991 lies in contrast with the limited use of or total disregard for international law by other national courts – the U.S. Supreme Court, for example.¹³⁹ There are three explanations for the Constitutional Court's receptivity to international law: one legal, one political, and one cognitive. These explanations are important for understanding the origins and path of the doctrine on prior consultation. The legal explanation is tied to article 93 of the Constitution. This article indicates that

xenophobia and connected forms of intolerance that affect indigenous and tribal peoples – Durban Declaration and Plan of Action – and, iv) due to article 27 of the Pact.” Sentencia SU-383/03, May 13, 2003, M.P. Álvaro Tafur Galvis.

134 See Sentencia SU-039/97, February 3, 1997, M.P. Antonio Barrera Carbonell.

135 See Sentencia C-175/09, March 18, 2009, M.P. Luis Ernesto Vargas Silva.

136 See *supra* text accompanying notes 33–39.

137 See Sentencia C-175/09.

138 See Sentencia C-030/08, January 23, 2008, M.P. Rodrigo Escobar Gil.

139 See generally Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108

YALE L.J. 1226–38 (1999) (advocating a bricolage approach in using comparative law to interpret the U.S. Constitution).

the rights and obligations established therein must be interpreted in the light of the international human rights treaties ratified by Colombia.¹⁴⁰ Thus, the Constitution itself opens the door for the interaction between national and international law. Nevertheless, the Court has developed a broad interpretation of this article, which, together with the principle of *pro homine* interpretation of rights, has allowed for the use of international law to defend, in many cases, the fundamental rights of the weakest Colombians.¹⁴¹

The political explanation is connected to the legitimacy of the Constitutional Court. The Court's case law on prior consultation places obligations on the government and large national and multinational companies.¹⁴² These obligations incur economic and political costs that, in turn, generate political challenges and pressure against the Court. By appealing to treaties, international tribunals, and other international operators to support their decisions, the Court can say that it is only complying with the international obligations assumed by Colombia and that legitimate interpreters of these treaties are consistent with the Court's interpretations of the obligations generated for state parties. The last explanation references the cognitive costs involved in calling upon preestablished legal knowledge. The Court does not have to invest time, energy, and economic resources in the creation of new legal knowledge: International law and its interpreters have already done so.

The third and last explanation is that the broad application of Convention 169 in Colombia has been a consequence of the alliance between

140 See *supra* note 37 and accompanying text. Article 93 indicates, "The enunciation of the rights and guarantees contained in the Constitution and in international agreements in effect should not be understood as a negation of others which, being inherent to the human being, are not expressly mentioned in them." CONST. COL. art. 93.

141 See generally Mónica Arango, "El bloque de constitucionalidad en la jurisprudencia de la Corte Constitucional colombiana" [The Block of Constitutionality in the Jurisprudence of the Colombian Constitutional Court], REVISTA PRECEDENTE (2004), available at <http://www.icesi.edu.co/contenido/pdfs/C1C-marango-bloque.pdf>.

142 These companies have to comply with all the duties imposed by the right to prior consultation.

academia and social organizations, as well as the positive reception of these claims by the Constitutional Court.¹⁴³ Strategic litigation that has allowed for the development of the right to prior consultation results from the political and legal work of several nongovernmental organizations, such as the Indigenous Organization of Colombia, Process of Black Communities, the Colombian Commission of Jurists, and Dejusticia, as well as universities, such as National University and the University of the Andes and the traditional authorities of the Colombian indigenous and black communities.¹⁴⁴ The universities and organizations that do not directly represent cultural minorities have contributed their legal, political, and communications knowledge to the process, and grassroots organizations and traditional authorities have contributed their knowledge of the facts, strategies for political mobilization, and their own lines of legal argumentation.

This partnership has allowed litigants to pool the economic and legal resources necessary for this type of litigation. Similarly, it has created a critical mass that, although small, discusses the issue of prior consultation in the public sphere, challenges actions by the government and companies that violate the case law of Court, and pressures media to cover the subject. Last, this litigation has allowed a Court committed to cultural rights to develop them in a clear, accurate, and often persuasive manner. The Court is obligated to decide the public actions of unconstitutionality brought by citizens. It cannot choose which legal norms should be evaluated for allegedly violating the Constitution. Likewise, the Court has the authority to choose what it will review from among the thousands of *tutelas* that are decided throughout Colombia. The issues it can choose for review are innumerable. Nevertheless, the Court has had the political will to choose a notable number of cases involving the right to prior consultation with cultural minorities.

143 See *supra* notes 38–39 and accompanying text.

144 See *supra* notes 88–89 and accompanying text.

3 Liberalism and the Right to Prior Consultation

The jurisprudence of the Constitutional Court on the right to prior consultation is solid, rich, and complex. However, to understand and evaluate it adequately, it is necessary to examine its philosophical bases. Prior consultation can be justified by calling upon the following three models: the monistic multicultural liberal model,¹⁴⁵ the monistic procedural liberal model,¹⁴⁶ and the pluralistic multicultural liberal model.¹⁴⁷ These models advocate different interpretations on the fundamentals of consultation, its objectives, and the structure that the legal and political

145 The monistic multicultural liberal model justifies the first two stages of the Colombian Constitutional Court's jurisprudence on the right to prior consultation. See *supra* Sections 2.1 and 2.2. It is also advanced by, *inter alia*, the International Labour Organization. See International Labour Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Doc. 169), adopted June 27, 1989, entered into force September 5, 1991, 28 I.L.M. 1382; see, e.g., Corte Constitucional [C.C.] [Constitutional Court], March 18, 2010, Sentencia 001-10-SIN-CC (Ecuador); and the International Council on Mining and Metals, see Aidan Davy, *ICMM's Position on FPIC*, in 9(2) GOOD PRACTICE: THE NEWSLETTER OF THE INTERNATIONAL COUNCIL ON MINING AND METALS (Nov. 2010). See César Rodríguez-Garavito, *infra* note 155, at 289.

146 The monistic procedural liberal model is behind an interpretation of the first stage of the Colombian Constitutional Court's jurisprudence on the right to prior consultation. See *supra* Section 2.1. This is an interpretation that gives priority to the collective titles that indigenous groups have over their lands. From this perspective, thus, the right to prior consultation is a means to protect the right to property, which includes the right to exclude. In this interpretation, the right to prior consultation is also a means to protect the right to "be left alone." Indigenous groups, through this right, can limit or eliminate the influence of third parties in their cultures. The monistic procedural liberal model is the only one whose general contours do not appear fully in the Court's jurisprudence. It is a possible way of justifying the right to prior consultation that takes into account only certain arguments presented in the first stage of the Court's case law. It is important to note, though, that the three models analyzed in this section do not appear explicitly and completely in the Court's jurisprudence. Of course, these models are a consequence of my analysis of the Court's legal arguments.

147 The pluralistic multicultural liberal model justifies the third stage of the Colombian Constitutional Court's jurisprudence on the right to prior consultation. See *supra* Section 2.3. It has also been promoted, recently, by the United Nations. See, e.g., United Nations, Declaration on the Rights of Indigenous Peoples, art. 10, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (establishing that "[i]ndigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall

system surrounding this legal form must have. The monistic multicultural liberal model, which justifies the first two periods of the Constitutional Court's case law on prior consultation, revolves around the following four elements: First, prior consultation is a legal institution that mandates dialogue between two parties whose interests intersect and affect each other.¹⁴⁸ Consultation requires that two independent and abstract subjects follow a procedure that has the objective of reaching a voluntary agreement.¹⁴⁹ Second, to ensure the transparency and equality of the procedure, the model offers a series of formal normative criteria that limit the actions of the parties.¹⁵⁰ These criteria refer to the information that must be available to parties, the type of acceptable behavior during the procedure, and the ways to participate. According to this model, the

take place without the *free, prior and informed consent* of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return") (emphasis added).

148 See also, e.g., ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Doc. 169), adopted June 27, 1989, entered into force Sept. 5, 1991, 28 I.L.M. 1382, art. 6(1)(a) (mandating governments to "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly").

149 See also, e.g., ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Doc. 169), adopted June 27, 1989, entered into force Sept. 5, 1991, 28 I.L.M. 1382, art. 6(2) (stating that "[t]he consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures").

150 See also, e.g., International Council on Mining and Metals, Mining and Indigenous Peoples: Position Statement (May 2008) (committing to "respect the rights and interests of Indigenous Peoples as defined within applicable national and international laws; clearly identify and fully understand the interests and perspectives of Indigenous Peoples when seeking to develop or operate mining/metals projects; engage with potentially affected Indigenous Peoples during all stages of new development projects/mining activities; seek agreement with Indigenous Peoples, based on the principle of mutual benefit, on programs to generate net benefits (social, economic, environmental and cultural) for affected indigenous communities; develop good practice guidance to support members in implementing the position statement; and participate in national and international forums on Indigenous Peoples issues, including those dealing with the concept of free, prior and informed consent").

result of a dialogue will be fair if it is conducted by formally equal parties and governed by a set of rules ensuring transparency and the absence of coercion in the process.

Third, the model bases the right to prior consultation on the rights to self-government, cultural integrity, and collective ownership of the lands of cultural minorities.¹⁵¹ Prior consultation is the instrument through which cultural minorities can exercise their right to determine the contours and structure of their public and private life. Consultation helps to measure the type and extent of interaction that cultural minorities want to have with the state and the majority culture. Without the right to prior consultation, this model argues, cultural minorities would not be able to protect and promote the moral and political projects to which they are committed. It is therefore a critical tool for protecting their cultural integrity.

Fourth, the model differentiates radically between prior consultation and consent.¹⁵² From this perspective, the right to consultation only requires the government to try to come to an agreement with the cultural minorities by completing a series of formal requirements. For the

151 See also, e.g., ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Doc. 169), adopted June 27, 1989, entered into force Sept. 5, 1991, 28 I.L.M. 1382.

152 See also, e.g., ILO, *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO No. 107), adopted June 26, 1957, entered into force June 2, 1959, 328 U.N.T.S. 247. “The treaty...is considered problematic given that it was clearly developed with a State-centric view of development, and was aimed at the assimilation of indigenous peoples. The only provision that recognises the participation rights of indigenous peoples is in relation to the relocation of indigenous communities. Article 12, Convention No. 107 clearly requires the free consent of the affected indigenous communities, but then places restrictions on this right by allowing States to subordinate the right of consent if the relocation is in accordance with national laws, in the interest of national security, or the interest of national economic development. Ultimately, the Convention severely limits the right to give or withhold consent by allowing States to ignore these rights using the excuses historically invoked to remove indigenous peoples from their lands.” Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law*, 10 Nw. J. INT’L HUM. RTS. 54, 59 (2011).

monistic multicultural liberal model, the right to prior consultation does not include the minority cultures' right to veto.¹⁵³ There is only one legal and political system in Colombia, and it is structured in a hierarchical and centralized manner. Those responsible for the system, the national institutions, should prevail over those of the cultural minorities. The authorities of the cultural minorities are subordinated to the national authorities that concentrate political power and the authority to make law. The model argues that this is the only way to safeguard three core values of liberalism: legal certainty, equality, and individual autonomy. When there is one and only one legal system consisting of general and abstract norms, citizens may have certain expectations about the legal consequences of their actions. Likewise, this is a system that does not discriminate unfairly among its citizens. There are no strata, no first- or second-class citizens. In principle, legal norms are applied to all members of the political community. Finally, having clarity about the norms governing their behavior, citizens are able to define the contours of the spaces in which they can exercise their autonomy. In the event that the consultation fails, however, this model argues that the negative consequences generated by the government's decisions should be mitigated as much as possible and that the damage caused should be compensated.

The shortcomings of the monistic multicultural liberal model are three¹⁵⁴: First, the model violates the principle of equality to which it

153 See also, e.g., Aidan Davy, "ICMM's Position on FPIC," in 9(2) GOOD PRACTICE: THE NEWSLETTER OF THE INTERNATIONAL COUNCIL ON MINING AND METALS (Nov. 2010) (noting that "[w]here governments have not fully embraced FPIC, [extractive] companies cannot endorse it unilaterally").

154 The doctrine of the Constitutional Court also has some important practical weaknesses. These weaknesses have to do with the context in which it is applied. Prior consultation is a legal instrument that obligates the parties to establish a dialogue aiming to reach an agreement. The problem with this kind of dialogue in Colombia is directly related to the existence of armed conflict; the power imbalance among cultural minorities, the government, and private enterprises; and the lack of political will to comply with the substance and not the form of the normative criteria articulated by the Court. The problem is also related to the political and practical difficulties that the Court

claims to be committed. Even before starting the procedure, the model subordinates one of the parties, minority cultures, to the other, the government. This deficiency does not acknowledge that, in practice, one of the parties has more political or economic power.¹⁵⁵ It is the design of the institution that favors one of the parties. Dialogue is not developed between equal abstract subjects, but between unequal abstract subjects. In addition, the model does not include within its design any tool to control the power differences that do exist between the parties entering into dialogue. The differences in political, economic, and cultural power between the government and the cultural minorities are, as usual, huge. The formal normative criteria that the model provides are not sufficient to ensure the horizontal nature of the dialogue.

Finally, the model considers the analysis and evaluation of the consequences of the failure of the procedure for minority cultures to be secondary,¹⁵⁶ and therefore also considers the effects that the imposition of the government's will has on cultural minorities to be secondary. These consequences are only taken into account to try to mitigate the negative effects of the government's decision or to compensate for the damage it may cause. Nevertheless, this approach loses sight of the fact that the cultural damage that this decision may cause can hardly be quantified, corrected, or compensated in monetary terms. The multicultural

would have in monitoring the implementation of its decisions and the immense difficulties for civil society in monitoring the consultation processes that are constantly taking place in the country. Although important, these difficulties should not obscure the contributions of the doctrine of the Constitutional Court for the understanding and application of the right to prior consultation. On the contrary, these problems should motivate more creative thinking and more effective political action to strengthen the right to prior consultation.

155 See Bonilla, *LA CONSTITUCIÓN MULTICULTURAL*, *supra* note 21 (chapter 4). See generally César Rodríguez-Garavito, *Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields*, 18 IND. J. GLOBAL LEGAL STUD. 263 (2011) (analyzing, from a sociological point of view, the power differences among cultural minorities, governments, and multinational companies, and analyzing the connections and tensions between what he calls the neoliberal paradigm and the right to prior consultation).

156 See *id.* at 293–94 (analyzing the problematic equalizing power of money and law).

liberal model identifies the consultation with the formal scheme of the liberal contract and situates it within a particular political and legal structure: monism. Ultimately, this is a model committed to majority rule and to a political and legal system that only recognizes interstitial spaces for the expression or development of cultural diversity.

We must not, however, lose sight of the fact that the requirements to be met for it to be understood that prior consultation was conducted properly are formal but demanding. These criteria are intended to balance the field of interaction and the capabilities of the parties entering into a dialogue. Thus, for example, the obligations to provide all available information to the opposing party, to avoid a confrontational attitude, to recognize the other as an equal partner in the process, and to not intervene in the election of the opposing party's representatives, contribute in part to equalizing the power differences that actually exist between the parties. The model also recognizes the connections between prior consultation and the rights to cultural integrity and self-government of cultural minorities. The model thus recognizes that the protection of cultural minorities is also part of the public interest. The government must therefore protect the interests of cultural minorities during the consultation and not only promote the interests that it has as the opposing party in the consultation process.

The monistic procedural liberal model, in contrast, connects the right to prior consultation with the right to property and privacy.¹⁵⁷ Prior consultation is therefore conceived from two intersecting axes. The first is defined as a legal instrument through which two owners – the state and cultural minorities – dialogue on a topic of common interest that has the potential to affect their interests. The second is defined as a legal tool that allows cultural minorities to protect their right “to be left alone” so they can live their lives without undue interference from the state.

¹⁵⁷ See also, e.g., Kichwa People of Sarayaku and Its Members v. Ecuador, Case 12.465, Inter-Am. Comm'n H.R., Application to the Inter-Am. Ct. H. R. paras. 56–69 (Apr. 26, 2010) (finding that the state's failure to effectively consult affected communities violated their right to property).

Thus, this model, like the previous one, emphasizes the consultation as the meeting point of two abstract and autonomous subjects that seek to reach an agreement on an issue that affects them both. This is a model that considers culture as a category that is appropriately placed in the private sphere. Matters related to culture only concern individuals, not the state. The limits imposed on the parties, good faith and the duty to provide complete and accurate information, for example, have the sole objective of ensuring transparency and the absence of coercion in the process. This model also considers that, in case of continued disagreement, the state's interests should be privileged over those of the cultural minorities.¹⁵⁸ Decisions made by the government may be imposed on its counterparts in the event that no agreement is reached.¹⁵⁹ The majority rule and the centralized, hierarchical structure of the legal system require this to be so. As in the previous model, though, the damage caused by this must be mitigated or compensated.¹⁶⁰ The veto is therefore not part of the right to prior consultation.

This model has significant shortcomings. The first three are the same as those affecting the monistic multicultural liberal model. Thus, this model is inconsistent, in that it violates the principle of equality that is one of its premises; it does not provide tools to recognize, assess, and control all of the power differences between the parties; and it ignores the consequences of the failure of the dialogue, or only assesses them quantitatively. The fourth, however, is specific to this model and makes it even weaker than the previous model. Monistic procedural liberalism privatizes culture and obscures the collective dimension of the right to prior consultation. In this model, the category “culture” is formed in the interest of one of the parties. Culture forms part of the private sphere

¹⁵⁸ See also, e.g., *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Cost, Inter-Am. Ct. H.R. (ser. C) No. 172, para. 127 (Nov. 28, 2007) (holding that “a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society”).

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

of the cultural minority, not part of the public sphere, and therefore is not a category that the state must take into account when conducting the consultation. Culture is the interest of the counterparty. It is not one of the government's interests. Thus, in the process of prior consultation, the government excludes the minority group of individuals that it represents. Finally, this model ignores the close ties between the right to consultation and the right to self-government. By focusing the discussion on the right to property and the right to privacy, it obscures the relevance of the right to self-government for understanding and supporting prior consultation.

The pluralistic multicultural model, on which the third stage of the case law of the Constitutional Court is based, departs from the monistic procedural liberal model and reflects the strengths of the monistic multicultural liberal model while distancing itself from their weaknesses. The fundamental difference between these two models is that, in the pluralistic multicultural one, the right to prior consultation includes the possibility that cultural minorities may veto government decisions if either of the following two conditions is met: the decision endangers the existence of the minority cultures or imposes an excessive undue burden on them. This is a structural difference. In this model, the institutional design of prior consultation includes a tool that balances the parties in a notable way. In the very structure of the institution, it incorporates both the practical consequences that the failure of the consultation can have on the parties and the power differentials that actually exist between them.

The model is still committed to dialogue and to autonomy. Nevertheless, this is an “embodied” dialogue; that is, a dialogue that recognizes the general characteristics of the parties and their differences while leaving open space for the process to recognize the specific characteristics of each.¹⁶¹ The model accepts that cultural minorities are usually politically

¹⁶¹ See also, e.g., *id.* United Nations, Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (affirming that “indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such”).

and economically weaker than governments and private companies.¹⁶² Similarly, it recognizes that the decisions made by the government after the failure of prior consultation, such as the construction of large projects of infrastructure, the granting of mining concessions, and the enactment of norms governing key aspects of the life of a minority culture, often have negative effects of immense importance in minority communities.

Nonetheless, the model recognizes that cultural minorities and governments have diverse interests and characteristics that also change over time. The model accepts that distributive justice, for example, may require that, in cases that are “not extreme,” the decision made by the government should be imposed on cultural minorities. A weighing of the legal principles conflicting in the case, along with a cost-benefit analysis, may show that it is fitting that the government impose its decision on cultural minorities.

Last, the model situates prior consultation within a pluralistic political and legal structure.¹⁶³ Cultural minorities are not subordinate to state institutions from the start. In specific situations, which are based on solid arguments, the decisions of cultural minorities may prevail over those of Congress and the presidency. The legal and political system thus is pluralistic, paritary, and dynamic. The authorities of minority cultures and the national authorities would, in principle, be equal with respect to the issues that directly affect the former. Which of them should be subordinated to the other would depend on the particularities of the conflict and the arguments presented by each to support their position.

162 See also, e.g., United Nations, Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (recognizing that “that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests”).

163 See also, e.g., United Nations, Declaration on the Rights of Indigenous Peoples, art. 5, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (“Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State”).

The pluralist multicultural liberal model also calls upon arguments of intercultural equality and corrective justice to justify prior consultation. Minority cultures should have the same opportunities to protect and promote their traditions as are available to the majority culture.¹⁶⁴ Prior consultation should be one of the most powerful tools to compensate for the imbalance of power between the majority and minorities. The economic, legal, and political resources at the disposal of the former to safeguard the existence of its culture are immensely greater than those available to the latter. In addition, this difference has historically been the result of legal and political measures taken by the majority in relation to the minorities. Law and politics have been powerful tools for the coercive assimilation and physical destruction of cultural minorities. Hence, too, prior consultation should be a tool to correct the injustices committed against these communities. The consultation would allow minorities to decide independently what kind of relationship they want to have with the majority culture, as well as the intensity of that relationship.

4 Final Considerations

The case law of the Constitutional Court, particularly in its third stage, opens important doors for cultural minorities to be recognized and adequately accommodated in a liberal democracy such as Colombia. The right to consultation has symbolic and material power that should not be dismissed. This right can help ensure that cultural minorities are recognized as full members of the political community. However, court rulings are only paper rules until it becomes apparent that their mandates are motivating the actions of the individuals and groups to which they are addressed. The number of case law rules that go from paper to action

¹⁶⁴ See also, e.g., United Nations, Declaration on the Rights of Indigenous Peoples, art. 2, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (“Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity”).

in a country like Colombia is much fewer than desired. The power of the law to change the social reality in Colombia is, as in most countries, remarkably limited. Violence, social and economic inequalities, the government's lack of political will, and institutional weaknesses markedly limit the effectiveness of a right such as prior consultation.

Having too many expectations of the legal system to change the structural aspects of society opens the gates to frustration and despair, and this leads to nothing but collective and individual inertia. The law cannot become a tool to demobilize people politically. Neither can the law be considered an instrument that should be set aside to concentrate solely on political action. The use of law should therefore always go hand in hand with a long-term political strategy. Law alone cannot generate the social change we want. It also cannot be forgotten that the effectiveness of political and legal actions depends largely on how they are perceived by the political community. The message of change must be adequately communicated in the public sphere. Finally, we must not lose sight of the fact that, under the rule of law, state action can only be generated when justified by the law. However limited, the law seems an essential component for achieving the transformation of the political community.

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Part III ACCESS TO JUSTICE

7 Courts and Structural Poverty in South Africa

To What Extent Has the Constitutional Court Expanded Access and Remedies to the Poor?

Jackie Dugard

THE SOUTH AFRICAN CONSTITUTION IS EXPLICITLY FRAMED in transformative language. It seeks to “heal the divisions of the past”; “establish a society based on democratic values, social justice, and fundamental human rights”; and “improve the quality of life for all citizens and free the potential of each person.”¹ Yet eighteen years after the advent of democracy, South Africa is an increasingly unequal society with extremes of prosperity and poverty. So, to what extent has the Constitutional Court, as one of the primary interpreters of the Constitution, fulfilled its constitutional promise? Specifically, has the Court acted optimally as a constitutional voice for

1 Preamble of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution). See the analysis of the genesis and character of the Constitution in [Chapter 1](#) of this book, by David Bilchitz.

This chapter amalgamates and updates previous scholarship: Jackie Dugard, *Courts and the Poor in South Africa: A Critique of Systematic Judicial Failures to Advance Transformative Justice*, 24(2) S. Afr. J. Hum. Rts. 214–38 (2008); and JACKIE DUGARD, *Basic Services in Urban South Africa: Rights, Reality and Resistance*, in *SYMBOLS OR SUBSTANCE: THE ROLE AND IMPACT OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA* (Malcolm Langford, Ben Cousins, Jackie Dugard, and Tshepo Madlingozi eds., Cambridge University Press 2012).

the poor?² This chapter seeks to contribute to answering such questions by examining the Constitutional Court's record of grappling with (or not) key fault lines for advancing transformative adjudication, access, and remedies for the poor.

The Constitutional Court was established in 1994 as a key institution of the post-apartheid constitutional order in recognition of how tainted the existing judiciary had been under apartheid³ and specifically to create a democratically representative judicial institution to oversee the new democratic dispensation.⁴ A hybrid of decentralized and centralized systems,⁵ the Court has characteristics of a final court of appeal, as well as characteristics of a court of constitutional review. According to the 1996 (final) Constitution, the Constitutional Court is the court of final instance for all constitutional matters, including appeals on constitutional matters from the Supreme Court of Appeal, and it decides on which issues are constitutional matters.⁶ In turn, the Supreme Court of

2 COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? (Roberto Gargarella, Pilar Domingo, and Theunis Roux eds., Ashgate 2006).

3 For an analysis of the executive-mindedness of apartheid judges, see, for example, John Dugard, HUMAN RIGHTS AND THE APARTHEID LEGAL ORDER (Princeton University Press 1978).

4 See Richard Spitz and Matthew Chaskalson, THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT 191 (Hart 2001), who argue that one of the fundamental reasons for South Africa deciding on a centralized model of constitutional review with a separate Constitutional Court was an implicit recognition to "bypass" the existing judicial hierarchy and especially the Appellate Division (later renamed the Supreme Court of Appeal), which lacked the political legitimacy and demographic representivity to assume the role of court of final appeal on constitutional matters in the new democratic dispensation.

5 In jurisdictions with decentralized judicial review – for example, the United States, Japan, India, and Australia – constitutional review is incorporated into the existing judicial hierarchy with a single supreme court at the apex. In jurisdictions with centralized judicial review, such as France, Germany, Indonesia, Colombia, and South Africa, constitutional review is undertaken by a separate, specialized, constitutional court.

6 Under the 1993 interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993), the position between the then Appellate Division of the Supreme

Appeal is the final court of appeal in all matters other than constitutional matters.⁷ In addition to its concurrent appeals function, shared with the Supreme Court of Appeal, the Constitutional Court has non-appellate jurisdiction in three areas. First, it is required to confirm any order of invalidity of an Act of Parliament, a provincial Act, or conduct of the president “made by the supreme Court of Appeal, a High Court, or a court of similar status.”⁸ Second, the Constitutional Court has exclusive jurisdiction over the constitutionality of amendments to the Constitution, the constitutionality of parliamentary or provincial Bills, and disputes between national and provincial spheres of government concerning their powers and functions.⁹ Third, and most critically for this chapter, section 167(6)(a) of the Constitution empowers the Constitutional Court to function as the court of first instance by allowing direct access “when it is in the interests of justice and with leave of the Constitutional Court.” As detailed later, it is in respect of this direct access function that the Court’s practice has been most disappointing.

Whatever jurisdictional and functional confusions might have been expected to arise from establishing a new superior court alongside an existing system were compounded by an early decision of the Constitutional Court in which the Court ruled that all matters are constitutional matters, thereby further blurring the jurisdictional lines between the Supreme Court of Appeal and the Constitutional Court:

There is only one system of law. It is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the constitution and is subject to constitutional law.¹⁰

Court and the Constitutional Court was even more ambiguous, with the two courts appearing to enjoy parallel jurisdiction.

7 Section 167(3) of the Constitution.

8 Section 167(5) of the Constitution.

9 Section 167(4) of the Constitution.

10 Pharmaceutical Manufacturers Association of SA: *In re: Ex parte President of the Republic of South Africa (2) SA 674 (CC) (2000)*, paras. 44–45.

Having established that all law is constitutional law, the Court has subsequently not conclusively defined what is not a constitutional matter; that is, when does the Constitutional Court not have jurisdiction? Or, to put it differently, why is there a need for both a Constitutional Court and a Supreme Court of Appeal? Indeed, overlapping and to some extent usurping the jurisdiction of the Supreme Court of Appeal, and despite being the most powerful court in South Africa, the Constitutional Court has yet to carve a distinct and comprehensive character for itself.¹¹ And, although it has been robust in defending civil and political rights, it appears to have struggled to define its role in respect to healing the class divisions of the past and advancing socioeconomic transformation. This has been most evident in its failure to address the gaps provided in the constitutional schema for pro-poor adjudication in respect of advancing direct access and remedying poverty.

Thus, despite being racially representative¹² and having expressly committed itself to overseeing socioeconomic justice in the interests of South Africa's overwhelmingly poor black majority,¹³ the Constitutional Court has balked at allowing poor people who might

11 See, for example, Frank Michelman, who argues that the Court's subsequent attempts to narrow down its appellate jurisdiction to a "subset of all possible appeals" have not been entirely successful. Frank Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 2nd ed., Stuart Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, and Matthew Chaskalson eds., Juta 2005).

12 Although, in 1994, seven of the eleven judges were white and four were black, the ratio of white to black judges steadily decreased, and in 2012, only three of the eleven judges were white. All of the black judges grew up in socioeconomic disadvantage under the apartheid system. Thus, following Theunis Roux's analysis of the Land Claims Court, the Court can be regarded to be a "pro-poor" court at least in form; see Theunis Roux, *Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court*, S. Afr. J. Hum. Rts. 20, 511-43 (2004).

13 Jackie Dugard and Theunis Roux, *The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995-2004*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 107-25 at 108 (Roberto Gargarella, Pilar Domingo, and Theunis Roux eds., Ashgate 2006).

otherwise be denied justice to gain direct access and has failed to operationalize a meaningful recognition of poverty in its socioeconomic judgments. As a consequence – and in stark contrast to the popularity of constitutional courts in many developing countries, such as Colombia¹⁴ – in South Africa, the Constitutional Court is a remote institution that is increasingly sandwiched between growing animosity from the polity over its political judgments¹⁵ on the one hand

14 See, for example, [Chapter 9](#) of this book, on access to justice in Colombia by Manuel Iturralde, as well as [Chapter 3](#), by Libardo José Ariza, on the economic and social rights of prisoners in Colombia.

15 Since the controversial run-up to, and assumption of, Jacob Zuma's presidency of South Africa (on April 6, 2009, on the eve of national and provincial elections, the National Prosecuting Authority dropped various fraud and corruption charges against Zuma, citing political interference, and, in doing so, cleared the way for Zuma to become president, which he did following the elections of April 22, 2009), there has been tangible hostility between the polity and the judiciary. The judiciary (along with the mainstream print media) has been publicly accused by senior African National Congress (ANC) officials of being “untransformed” and acting in the interests of conservative elements of society. For example, in July 2008, ANC Secretary-General Gwede Mantashe was quoted as saying that Constitutional Court judges were “counter-revolutionaries” “preparing to pounce on Zuma” (<http://www.businessday.co.za/Articles/Content.aspx?id=50316>). And, judgments such as *Glenister v. President of the Republic of South Africa and Others* (3) SA 347 (CC) (2011) – in which the Constitutional Court (narrowly – with five judges concurring in the majority judgment and four dissenting) ruled that the legislation that disbanded a specialist anticorruption unit (the Directorate of Special Operations, which had been very actively pursuing corruption) was constitutionally invalid – are thought to have been behind recent statements by senior ANC officials calling into question the judiciary's standing. For example, in September 2011, Ngoako Ramatlhodi (ANC National Executive Committee member, chairperson of the ANC's Elections Committee, and Deputy Minister of Correctional Services) issued a statement in which he accused the judiciary of frustrating “the transformation agenda,” pandering to “white-dominated law societies,” and being dominated by “forces against change” (available at <http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions>). The tensions between the ANC and the judiciary are complex, with ANC leaders pointing to legitimate concerns over the slow pace of racial transformation in the judiciary (generally). However, it is clear that the ANC is instrumentally using this issue to undermine the judiciary more generally, and specifically because of judgments such as the *Glenister* judgments, which are viewed as pushing a (white), liberal rule of law and/or anti-corruption agenda that the ANC is nervous about. Part of the resultant (disingenuous)

and, on the other hand, disinterest and distrust by the majority poor citizenry.¹⁶

In analyzing the Court's jurisprudence using a pro-poor lens, I first outline the dimensions and consequences of structural poverty in South Africa. I then examine the two main problems poor litigants encounter in accessing justice. First, simply getting to the Court and, second, the jurisprudential obstacles faced by such litigants if they manage to reach the Constitutional Court. I conclude that the Constitutional Court needs to develop a more robust approach to poor litigants bringing socioeconomic rights claims if it is going to move from a purely ameliorative role to a transformative one.

1 Dimensions and Consequences of Structural Poverty

Although poverty per se has slightly decreased in South Africa between 1993 and 2012 (mainly through social grants and the extension of basic services to poor households),¹⁷ there are two worrying socioeconomic

complexity is that – notwithstanding critiques (such as in this chapter) of the Constitutional Court not being sufficiently pro-poor or transformative – in fact, in ruling against the government in most of the socioeconomic rights cases to have come before the Constitutional Court, the Court has certainly not done so in the service of white, liberal antitransformation interests. On this point, see, for example, the op-ed by Jackie Dugard and Kate Tissington, "In Defence of the ConCourt," *The Star* (Dec. 14, 2011), available at <http://www.iol.co.za/the-star/in-defence-of-the-concourt-1.1198152>.

16 A 2008 survey on attitudes to public institutions conducted by the Human Sciences Research Council found a gradual erosion of public trust in the courts since 2004, with only 49 percent of respondents having trust in the courts in 2007 compared with 58 percent in 2004 (R. Roberts, *Between Trust and Scepticism: Public Confidence in Institutions*, 6(1) HUMAN SCIENCES RESOURCE COUNCIL SOCIAL ATTITUDES SURVEY 10 (2008), available at <http://www.hsrc.ac.za/index.php?module=pagesetter&ndtype=file&func=get&ndtid=25&ndfid=pdf&ndpid=23> (last accessed Feb. 9, 2012). Among the likely reasons for the popular erosion of trust is that the majority (poor and black) members of society do not view the courts as doing enough to tackle inequality and advance socioeconomic justice, while they do see courts as regularly defending rule of law matters.

17 See, for example, Murray Leibbrandt, Ingrid Woolard, Arden Finn, and Jonathan Argent, "Trends in South African Income Distribution and Poverty since the Fall of

indicators for the same period: Inequality has increased, and the racialized nature of poverty has hardly shifted since 1994. Indeed, in sharp contrast to the Constitutional objective of achieving equality,¹⁸ South Africa is becoming an ever more unequal society. Although some blacks have become rich, the gap between the poorest and richest South Africans has widened. And race remains a predominant factor in poverty and inequality. For example, although unemployment is chronic and formally estimated at around 25 percent of the economically active population,¹⁹ it is overwhelmingly racialized: In 2009 approximately 27.9 percent of Africans were unemployed, whereas only 4.6 percent of whites were unemployed.²⁰ And, in terms of wage differentials, the average black worker earns US\$1,524 per annum whereas the average white worker earns approximately US\$8,270.²¹ A recent study by Murray Leibbrandt and Ingrid Woolard indicates that, by all measures – including the Gini coefficient (the Gini coefficient measures inequality on a ratio of 0 to 1, with 0 representing an equal society; for South Africa, the Gini coefficient was 0.66 in 1993 and 0.70 in 2008) – inequality has grown between races and within races, and South Africa has the highest inequality between race groups in the world.²²

Apartheid,” OECD Social, Employment and Migration Working Papers, No. 101, OECD Publishing (2010), available at <http://www.npconline.co.za/MediaLib/Downloads/Home/Tabs/Diagnostic/Economy2/Trends%20in%20South%20African%20Income%20Distribution%20and%20Poverty%20since%20the%20Fall%20of%20Apartheid.pdf> (last accessed Feb. 9, 2012).

18 Section 1(a) of the Constitution.

19 The unemployment figure is about 15 percent higher, at around 40 percent if the informal economy is excluded from employment statistics.

20 South African Institute of Race Relations (SAIRR), SOUTH AFRICA SURVEY 2008/2009 193 (Johannesburg: SAIRR 2009).

21 Kallie Szczepansk, “Poverty and Inequality in South Africa,” p. 1 (2008), available at <http://helium.com/items/1002622-poverty-and-inequality-in-south-africa>.

22 Murray Leibbrandt and Ingrid Woolard, “Trends on Inequality and Poverty: What Kind of Society Is, or Societies Are, Emerging?,” presentation at the Conference on Overcoming Inequality and Structural Poverty in South Africa: Towards Inclusive Growth and Development, Birchwood Conference Centre, Ekurhuleni, Sept. 20–22

And, despite significant extension of infrastructure, access to housing and basic services are still heavily conditioned on apartheid spatial geography, which located black workers in dormitory townships and perirural areas on the outskirts of white towns and cities, meaning that the richer suburbs with houses and advanced access to services tend to be white, whereas the poorer townships, informal settlements, and rural areas with inferior houses and services are overwhelmingly black. To the extent that there has been provision, there are problems with access and quality. For example, state-supplied or state-subsidized houses are usually provided on the urban periphery, where there are limited employment opportunities and transport is too expensive to allow for urban integration. And basic services have been criticized for being too expensive, despite minimal free basic water and electricity provisions, resulting in widespread disconnections. Moreover, notwithstanding a doubling of fiscal expenditure on healthcare since 1994, health outcomes have deteriorated, evidenced by a fall in life expectancy (mainly due to HIV/AIDS). Similarly, notwithstanding relatively high expenditure on education,²³ the quality of education in most of rural (black) South Africa remains poor, and most school leavers are unable to find work. As such, poverty in South Africa is structural and strongly linked to the subsisting legacy of apartheid's racialized system of oppression and disadvantage. According to the United Nations (UN) Habitat (2008) *State of the World's Cities Report 2008–2009*:

Inequalities were not only increasing in South Africa's urban centres but were also becoming more entrenched which suggests that failures in wealth distribution are largely the result of structural or systemic flaws... South Africa stands out as a country that has yet to break out of an economic and political model that concentrates resources.

2010. See also Jeremy Seekings, "Poverty and Inequality after Apartheid," CSSR Working Paper No. 220, Centre for Social Science Research, University of Cape Town, 2007.

23 In 2007, public expenditure on education accounted for approximately 5.4 percent of gross domestic product, amounting to 17.4 percent of total government expenditure. This is a higher proportion than, for example, Germany (SAIIR, *supra* note 20, at 379).

This reality raises serious questions for South Africa's quest to consolidate democracy. Structural poverty, especially when it encompasses such extreme (racially delineated) inequality, has a fundamentally undermining effect on social cohesion and stability.²⁴ As set out in *The Spirit Level*,²⁵ inequality is bad for society as a whole, rich and poor. Certainly, in South Africa, the effects of structural poverty, with its extreme inequality dimension, include serious violence and particularly gender-based violence.²⁶ And – together with the narrowing of formal democratic spaces, which are dominated by an increasingly defensive, remote, and autocratic African National Congress (ANC)²⁷ – this has led to an explosion of local protests in township and informal settlement areas across the country since 2004.

In this truncated political and economic context, rising discontent over structural poverty has had two main outlets: protest and litigation. To date, and partially linked to the problems of access to justice outlined later, protest has been the main site of socioeconomic

24 Multi-stakeholder Report, documenting the Conference on Overcoming Inequality and Structural Poverty in South Africa: Towards Inclusive Growth and Development, Birchwood Conference Centre, Ekurhuleni, Sept. 20–22, 2010, p. 3.

25 Richard Wilkinson and Kate Pickett, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* (Bloomsbury Press 2010).

26 See, for example, Centre for the Study of Violence and Reconciliation (CSV), “Tackling Armed Violence: Key Findings and Recommendations of the Study on the Violent Nature of Crime in South Africa” (March 2010), available at http://www.csvr.org.za/docs/study/6.TAV_final_report_13.03.10.pdf (last accessed Feb. 9, 2012).

27 There is increasing evidence of corruption and mismanagement, especially at the municipal level, which is the developmental arm of government. This malaise has set in for a range of reasons, including the list system of political representation, in terms of which members of Parliament and members of provincial assemblies do not have constituencies and are largely absent from local politics, which, particularly for poor communities, has become captured by patronage politics. In addition, the local vehicles for public participation, such as ward committees, have also become captured by local politics. See, for example, Peter Alexander, *Rebellion of the Poor: South Africa's Service Delivery Protests – A Preliminary Analysis*, 37(2) REV. AFR. POL. ECON. 25–40 (2010); and Laurence Piper and Lubna Nadvi, *Too Dependent to Participate: Ward Committees and Local Democratisation in South Africa*, 35(4) LOCAL GOV'T STUD. 415–33 (2009).

contestation. The phenomenon of “service delivery” or local protests in post-apartheid South Africa is a relatively recent one, beginning in 2004²⁸ and escalating in 2009,²⁹ when there was an estimated average of 19.18 protests per month.³⁰ A recent study by the Community Law Centre (CLC) of local protests between 2007 and 2010 found that there was a common mix of issues in the articulated concerns of protesters across the country, all either directly or indirectly related to socioeconomic rights, with access to housing the single most cited concern (36.33 percent). After housing, the highest expressed concerns of protesters were access to water (18.36 percent), access to electricity (18.16 percent), poor service delivery generally (15.62 percent), sanitation (13 percent), and corruption generally (11.47 percent).³¹ Thus, broadly speaking, protests are about both poor service delivery and unresponsive or remote government. As argued by Richard Pithouse, the protests are best understood as being about “the material benefits of full social inclusion … as well

28 Although there are grounds to trace current protests back to the apartheid era, most commentators on local protests date the contemporary protest phenomenon as beginning in 2004. See, for example, Susan Boysen, *With the Ballot and the Brick: The Politics of Attaining Service Delivery*, PROGRESS IN DEV. STUD., 7(1)21–32, 2007. It is possible that the onset of the current wave of protests in 2004 relates to the consolidation of the powers of local government and the first round of local government elections in December 2000, and civil society’s growing dissatisfaction over the subsequent months and years with the failures of the local government realm.

29 There is evidence that protests have escalated since the election of President Jacob Zuma in April 2009. According to Municipal IQ, a private research company, there were more “service delivery” protests in the first seven months of the Zuma administration than in the last three years of the Mbeki administration (Municipal IQ, Dec. 1, 2010). Explanations for the rise in incidents of protest under President Zuma relate to the raised, and then dashed, expectations of his presidency (compared with that of President Thabo Mbeki, considered a technocrat and removed from “the people”).

30 Hirsch Jain, “Community Protests in South Africa: Trends, Analysis and Explanations,” 1 LOCAL GOVERNMENT WORKING PAPER SERIES (2009), Community Law Centre, University of the Western Cape, available at <http://www.ldphs.org.za/publications/publications-by-theme/local-government-in-south-africa/community-protests/Final%20Report%20-%20Community%20Protests%20in%20South%20Africa.pdf>, p. 4 (last accessed Feb. 9, 2012).

31 *Id.* at 29–30.

as the right to be taken seriously when thinking and speaking through community organisations.”³² According to Abahlali baseMjondolo:

But we have not only been sentenced to permanent physical exclusion from society and its cities, schools, electricity, refuse removal and sewerage systems. Our life sentence has also removed us from the discussions that take place in society.³³

As discussed later, these are the same issues that poor people bring (or try to bring) litigation claims over. Although it is as yet unclear what impact the rising rebellion of the poor will have on the political economy, there are some indications that it might have adverse consequences, particularly from a human rights paradigm. For example, a recent report by the Centre for the Study of Violence and Reconciliation (CSV) and the Society, Work and Development Institute (SWOP) reveals that, in many communities, protests (and particularly violent protests) have an undermining effect on community cohesion and result in, *inter alia*, women withdrawing from the public sphere.³⁴ In addition, protest carries with it the very real risks of arrest, imprisonment, and even death. The latter risk was poignantly demonstrated on April 13, 2011, when Andries Tatane, a community activist from Maqheleng township (Ficksburg in the Free State) was shot dead by police officers who lost control during a protest by the community over their right to water. Such realities suggest that it is critical for constitutional litigation to be a serious avenue

32 Richard Pithouse, “‘Our Struggle Is Thought, on the Ground, Running’: The University of Abahlali baseMjondolo” (2007), available at <http://abahlali.org/node/2814> (last accessed Feb. 9, 2012).

33 S’bu Zikode and Zodwa Nsibande, “Serving Our Life Sentences in the Shacks” (July 16, 2010), available at <http://www.abahlali.org/node/7187> (last accessed Feb. 9, 2012).

34 Karl von Holdt, Malose Langa, Sepetla Malapo, Nomfundo Mogapi, Kindiza Ngubeni, Jacob Dlamini, and Adele Kirsten, *THE SMOKE THAT CALLS: INSURGENT CITIZENSHIP, COLLECTIVE VIOLENCE AND THE STRUGGLE FOR A PLACE IN THE NEW SOUTH AFRICA: EIGHT CASE STUDIES OF COMMUNITY PROTEST AND XENOPHOBIC VIOLENCE* (Centre for the Study of Violence and Reconciliation [CSV] and Society, Work and Development Institute [SWOP], University of the Witwatersrand 2011), available at <http://www.csvr.org.za/docs/thesmokethatcalls.pdf>.

for contesting the lived realities of poverty. This is all the more important given current populist perceptions by some ANC leaders and many poor black South Africans that the Constitution is an elite document, and the Constitutional Court serves mainly elite interests.³⁵ Naturally, I do not suggest that the Court can, on its own, alter the balance of economic forces that sustains structural poverty. I do, however, suggest that the Court has underestimated or misinterpreted the role it can play in promoting access to justice by advancing access to, and meaning within, the judicial system. I also suggest that if the Court were to embrace a more substantively pro-poor role, this could contribute not only to material change and socioeconomic justice, but also to the consolidation of democracy in South Africa.

2 Access to Justice

The first hurdle a poor person must overcome in any justice system is accessing that system. But access to justice means more than mere physical access to courts – it incorporates the ability to be effectively heard and responded to. In South Africa, the normal difficulties of accessing justice are exacerbated by structural poverty (as outlined earlier), which means that the poor are not in a position to pay for private legal representation and often feel disempowered when it comes to making complex legal claims. In light of the injustices of the past, some of which related to a conservative legal order that propped up the apartheid regime, and the related inability for the majority of South Africans to access justice,³⁶

35 See commentary and references *supra* notes 15 and 18, and also some of the subsequent debates about the nature and limits of the Constitution (and, concomitantly, Constitutional Court) such as Jane Duncan, “The Problem with South Africa’s Constitution” (Sept. 5, 2011), available at <http://www.sacsis.org.za/site/article/741.1> (last accessed Feb. 9, 2012); and Dale McKinley “The Majority and the ‘Meaning’ of the Constitution” (Oct. 4, 2011), available at <http://www.sacsis.org.za/site/article/760.1> (last accessed Feb. 9, 2012).

36 See, for example, John Dugard, *HUMAN RIGHTS AND THE APARTHEID LEGAL ORDER* (Princeton University Press 1978), for an account of how the judiciary under apartheid

it follows that it should be a fundamental preoccupation of the post-apartheid judiciary to secure legal representation for poor litigants. Yet, as an institution, the judiciary has not done enough to address the problem of the unrepresented poor from a systemic perspective.³⁷

Getting to the Court

Although, for the most part, poor people facing serious criminal charges do receive legal representation at state expense (mainly through Legal Aid South Africa), this is not the case for civil and political litigation, including socioeconomic rights-related challenges. Although the judiciary as a whole – and the Constitutional Court as the highest court in all constitutional matters, specifically – cannot assume the full burden of the weight of ensuring physical access to the Court, there are at least two critical ways in which the Constitutional Court could have overcome barriers to poor people getting their cases heard. First, the Constitutional Court could have prioritized delineating a comprehensive right to legal representation at state expense for all matters (whether criminal or civil). Second, the Court could have developed an expansive practice regarding direct access. As argued later, the Court can be criticized for not going far enough on both fronts.

Failure to Delineate a Comprehensive Right to Legal Representation at State Expense in Civil Matters

In recognition of the facts that legal representation lies at the core of access to justice and that poor people are unlikely to be able to afford lawyers' fees, section 35(3)(g) of the South African Constitution gives accused persons the right to a legal practitioner at state expense, "if

legitimized the apartheid state and in general failed to take any gaps to advance human rights.

³⁷ I do not include in my criticism of the judiciary's failure to systemically advance access to justice individual judge's ad hoc attempts to remedy specific unrepresented clients through referrals to the Legal Aid Board or to law societies and the like.

substantial injustice would otherwise result.” Yet, with the exception of children,³⁸ there is no explicit right to legal representation at state expense in civil cases, including noncriminal constitutional matters. As I discuss later, there are compelling arguments to interpret section 34’s right to a “fair public hearing” as implying a right to legal representation at state expense using the same caveat as section 35(3)(g)’s “if substantial injustice would otherwise result.”

In the context of criminal cases, the Constitutional Court has gone some way toward clarifying the parameters of the phrase “if substantial injustice would otherwise result.” The fourth judgment handed down by the Court, *S. v. Vermaas; S. v. Du Plessis*,³⁹ took the form of a consolidated referral of two criminal cases from the Transvaal Provincial Division of the High Court in which the accused both ran out of money in the course of the proceedings and sought to rely on the right to legal representation at state expense in section 25(3)(e) of the interim Constitution.⁴⁰ The two trial judges independently decided that the accused were not entitled to rely on section 25(3)(e) because the trials had commenced prior to the interim Constitution taking effect. Nevertheless, both judges suspended the trials and referred the possible application of the right to legal representation at state expense to the Court, in case it might take a different view.

As it turned out, the Court did not take a different view, holding that the interpretation of section 25(3)(e)’s qualification – “where substantial injustice would otherwise result” – was within the concurrent jurisdiction of the Appellate Division (later named the Supreme Court of Appeal) and, as such, had been incorrectly referred to the

38 Section 28(1)(h) of the Constitution.

39 *S. v. Vermaas; S. v. Du Plessis* (3) SA 292 (CC) (1995).

40 The interim Constitution of the Republic of South Africa Act 200 of 1993 was a transitional arrangement, which was replaced by the Constitution in 1996. Like the qualification in section 35(3)(g) of the Constitution, the right to legal representation in the interim Constitution, too, was qualified by the phrase, “where substantial injustice would otherwise result” (section 25(3)(e) of the interim Constitution).

Court.⁴¹ The Court furthermore declined to answer the substantive question put to it, remitting the two cases back to their respective trial courts.⁴² However, despite such avoidance, in the *Vermaas* judgment, the Court did venture to establish some guidelines for trial courts considering whether to order the state to pay for an accused person's defense. These are the need to assess "the accused person's aptitude or ineptitude to fend for himself or herself," and the "ramifications [of the decision to grant legal representation] and their complexity or simplicity[,]...how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be 'substantial injustice.'"⁴³ Simply put, in *Vermaas* the Court established that, to assess if "substantial injustice" would result from the failure to provide legal representation at state expense in a criminal case, a court should take into account the complexity of the case, the accused person's ability to fend for her- or himself, and the gravity of the possible consequences of a conviction.⁴⁴ The Court further expressed its concern about the steps that the state had thus far taken to put in place "mechanisms that are adequate for the enforcement of the right [to legal representation]."⁴⁵

Turning to civil cases, Geoff Budlender has persuasively argued that the alteration of the wording of the relevant section on civil trials between the interim Constitution (section 22) and the Constitution (section 34) has had the effect of constitutionalizing a right to legal

41 *Vermaas*, *supra* note 39, at para. 12. Under the interim Constitution, the Court was inserted into the existing judicial structure at the same level as the Appellate Division, both as divisions of the Supreme Court with concurrent jurisdiction, neither being able to hear appeals from the other.

42 The intermediate question of whether the rights in the interim Constitution applied to pending cases was settled in *S. v. Mhlungu* (3) SA 867 (CC) (1995), a decision handed down between the referral of the two high court cases to the Court and its decision in *Vermaas*, *supra* note 39.

43 *Vermaas*, *supra* note 39, para. 15.

44 Geoff Budlender, *Access to Courts*, 121 SALJ 339, 342 (2004).

45 *Vermaas*, *supra* note 39, at para. 16.

representation in civil cases. To explain this train of logic, it is necessary to summarize *Bernstein v. Bester*,⁴⁶ in which section 22 of the interim Constitution, which guaranteed “the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum,” came before the Court. In *Bernstein*, the Constitutional Court contrasted this section 22 provision with the guarantee of a “fair and public hearing” in article 6(1) of the European Convention on Human Rights (ECHR).⁴⁷ It held that, whereas article 6(1) of the ECHR constitutionalizes the right to a fair civil trial (in European member states), the use of clearly different wording in section 22 indicated that the framers of South Africa’s interim Constitution “deliberately elected not to constitutionalise the right to a fair civil trial,” meaning that, in contrast to the ECHR, South Africa’s interim Constitution did not guarantee a right to a fair civil trial.⁴⁸ Yet, for the Constitution, the framers reverted to the ECHR wording, including in section 34’s formulation the right to a “fair public hearing.” The fact that section 34 of the Constitution follows the formulation in the ECHR prompts Budlender to argue: “it is difficult to avoid the conclusion that this constitutionalises the right to a fair civil trial” in South Africa.⁴⁹

Critical to an interpretation of the right to a fair civil trial, the ECHR clarified in *Airey v. Ireland*⁵⁰ that the right of access to a fair civil trial includes the right to be able to place one’s case effectively before a court, which, in many circumstances, will require the assistance of a lawyer. In the context of assessing whether Mrs. Airey’s right of access to court (implicit in the guaranteed right to “a fair and public hearing”) had been breached by virtue of her not being able to afford legal representation

46 *Bernstein v. Bester* (2) SA 751 (CC) (1996).

47 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) CETS No. 005 (1950).

48 *Bernstein*, *supra* note 46, at para. 106.

49 Budlender, *supra* note 44, at 342.

50 *Airey v. Ireland* 32 Eur Ct. HR Ser. A (1979).

to obtain a decree of judicial separation from her husband (divorce not being permissible in Ireland), the Court reasoned:

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial ... It must therefore be ascertained whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and effectively.⁵¹

In coming to its conclusion that Mrs. Airey's inability to afford legal representation in the absence of legal aid in Ireland had violated her right of access to court, the ECHR assessed a number of factors not dissimilar to the guidelines suggested by the South African Court in *Vermaas*, including the complexity of the case.⁵² The South African Land Claims Court (LCC)⁵³ in *Nkuzi Development Association v. Government of the Republic of South Africa*⁵⁴ seems to support this interpretation of the right to a fair hearing involving an assessment of the right to legal representation at state expense, in certain circumstances. Considering the question of whether "persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act (ESTA)⁵⁵ and the Land Reform (Labour Tenants) Act⁵⁶ and whose tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense under certain conditions,"⁵⁷ the LCC found:

51 *Id.* at para. 24.

52 *Id.*

53 The Land Claims Court (LCC) is a specialist court with the same status as the high courts, which was established in 1996 to have jurisdiction over the Restitution of Land Rights Act 22 of 1994, the Land Reform (Labour Rights) Act 3 of 1996, and the Extension of Security of Tenure Act 62 of 1997.

54 *Nkuzi Development Association v. Government of the Republic of South Africa* (2)SA 733 (Land Claims Court (LCC) (2002).

55 Extension of Security of Tenure Act 62 of 1997.

56 Land Reform (Labour Tenants) Act 3 of 1996.

57 *Nkuzi*, *supra* note 54, at para. 1.

There is no logical basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand. Failure by a judicial officer to inform these litigants of their rights, how to exercise them and where to obtain assistance may result in a miscarriage of justice.⁵⁸

It concluded that the people concerned “have a right to legal representation or legal aid at state expense,”⁵⁹ and it declared that the state was under a duty to “provide such legal representation or legal aid through mechanisms selected by it.”⁶⁰ The LCC further ordered the Minister of Justice and the Minister of Land Affairs to “take all reasonable measures to give effect to this order, so that people in all parts of the country who have rights as set out in this order, are able to exercise those rights effectively.”⁶¹

It is noteworthy that, in deriving a right to legal representation in certain circumstances, presumably from section 34’s “guarantee of a ‘fair public hearing’,”⁶² the LCC used section 35(3)(g)’s caveat of “if substantial injustice would otherwise result,”⁶³ which does not seem to be an unreasonable extension of the criminal case logic. Indeed, in his Heads of Argument in the LCC case *The Richtersveld Community and The Government of the Republic of South Africa and Others*,⁶⁴ Geoff Budlender

58 *Id.* at para. 11.

59 *Id.* at para. 1.1.

60 *Id.* at para. 12, Order para. 1.2.

61 *Id.* at para. 12, Order para. 2.

62 Stephen Ellmann, *Weighing and Implementing the Right to Counsel*, 121 S. AFR. L.J. 318, 319 (2004).

63 Nkuzi, *supra* note 54, at para. 12, Order at para. 1.1. The paragraph reads: “the persons... have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources.”

64 Applicant’s Heads of Argument, *The Richtersveld Community v. The Government of the Republic of South Africa and Others* (unreported Land Claims Court Case No. 63/05). The government settled the matter after the case had been argued and before judgment in order not to set a jurisprudential precedent regarding the right to legal assistance at state expense (e-mail to author from Geoff Budlender, July 3, 2006).

argues that “the fact that an element expressly required for a fair criminal trial has not been expressly required for a fair civil trial, does not mean that it is by implication excluded in civil trials . . . Just as, in a criminal trial, the right to a fair trial is broader than the list of specific rights set out in the Constitution.”⁶⁵

Taking this further, in assessing if substantial injustice would otherwise result in the context of civil trials, Budlender suggests supplementing the list of factors to be considered as established by the Constitutional Court in *Vermaas*, with the issue of “equality of arms.”⁶⁶ By this he means that one of the factors that should be considered when assessing if “substantial injustice” would result if legal representation is not provided at state expense is the extent to which the opponent is represented and if this will place any party at a substantial disadvantage.

Ultimately, whenever any issue of legal representation for a civil matter comes to being tested, as is the case for criminal matters, it should occur on a case-by-case basis, grounded in reality. As defined by the Court in *Airey*, in the context of Europe, so, in South Africa, rights are not legal fictions, and they are meaningless if they are not rendered practicable and effective. As argued by Budlender:

Access to court therefore means more than the legal right to bring a case before a court. It includes the ability to achieve this. In order to be able to bring his or her case before a court, a prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be about to initiate the case and present it to the court. In South Africa the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems effectively before the courts.⁶⁷

65 Nkuzi, *supra* note 54, at para. 53, including footnote 26.

66 Budlender, *supra* note 44, at 344.

67 *Id.* at 341.

Failure to Advance Direct Access to the Constitutional Court in the Public Interest

In a 2006 article about the Constitutional Court’s “pro-poor” record,⁶⁸ I argued that the Court had not always functioned as an institutional voice for the poor – evident in the relatively low number of cases brought by poor people as a percentage of the total number of cases in which decisions are handed down by the Court.⁶⁹ I suggested that one way in which the Court could live up to its transformative promise of functioning as an institutional voice for the poor was to utilize the direct access mechanism to allow constitutional matters to be brought directly to it by poor people who have been unable to secure legal representation.⁷⁰ I pointed out that in its first decade (1995–2006), the Court had interpreted its rules overwhelmingly restrictively,⁷¹ only granting direct access in eight instances⁷²

68 Jackie Dugard, *Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court*, 22 S. Afr. J. HUM. RTS. 261, 261–82 (2006).

69 Out of the twenty-four cases in which judgments were handed down in the course of 2005, the applicant-appellant was poor (by any objective South African standard) in only three cases. See *supra* note 69, at 275.

70 Section 167(6)(a) of the Constitution provides, “National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court – (a) to bring a matter directly to the Constitutional Court.”

71 The applicable Court rule (rule 17(1) of the 1995 Rules, succeeded by rule 18 of the 2003 Rules, available at <http://www.constitutionalcourt.org.za/site/thecourt/rulesofthecourt.htm>) allowing direct access has been restrictively interpreted to refuse applicants for direct access on the grounds of finding noncompliance with the following criteria: “exceptional circumstances,” “urgency,” and “public importance”; as well as under the evolving principle that “this Court should ordinarily not deal with matters as both a Court of first and as one of last resort.”

72 I excluded the leave to appeal applications that were disguised as direct access applications. The eight instances are Brink v. Kitshoff NO 1996 (4) SA 197 (CC), S. v. Dlamini (heard with S. v. Dladla; S. v. Joubert; S. v. Schietekat) 1999 (4 SA 623 (CC), Mosenke v. The Master 2001 (2) SA 18 (CC), Satchwell v. President of the Republic of South Africa 2003 (4) SA 266 (CC), Minister of Home Affairs v. National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) 2005 (3) SA 280 (CC), Bhe and Others v. Magistrate Khayelitsha and Others (heard together with Shibi v. Sithole and Others; South African Human Rights Commission and Another v. President Republic of South Africa and Another) 2005 (1) SA 580 (CC), Mkontwana v. Nelson Mandela Metropolitan Municipality and Another (heard together with Biset

and never allowing an “off the street” complaint by a poor person to be heard.⁷³ Indeed, as I had observed – while spending two weeks in the Registry conducting archival research during February 2005 – poor people who came to the Court Registry window to seek justice were sent away with a copy of the Court rules, regardless of whether their complaint raised substantive constitutional issues. Such severe gatekeeping occurred in the context of a low caseload,⁷⁴ which suggested to me that the Court could hear a number of direct access cases each year, if these were appropriately screened for raising constitutional issues in the public interest. I concluded that the Court’s practice of restricting its roll rather than actively facilitating direct access by the poor meant that – in contrast with, for example, the Constitutional Court of Costa Rica (*Sala Constitucional* of the Supreme Court, located in San José), which accepts any kind of direct claim (called *amparo*) written in any form, and considers around 17,000 *amparo* cases each year,⁷⁵ or the Constitutional Court of Colombia, which, until 2011, considered approximately eight hundred

and Others v. Minister of Provincial Affairs and Constitutional Development; Transfer Rights Action Campaign and Others v. MEC for Local Government and Housing in the Province of Gauteng and Others) 2005 (1) SA 530 (CC), and Minister of Home Affairs v. Fourie and Another; Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others 2006 (1) SA 524 (CC).

73 The granting of direct access in these eight cases appears to have been motivated by the need to remedy some procedural defect in the circumstances around which the case came before the Court or to attach what served as an essentially amicus-type intervention by a relevant interest group to an existing matter.

74 Between February 1995 and January 2006, the Court delivered 254 written judgments, averaging 23 per year (with a low of 14 in 1995 and a high of 34 in 2002). This same practice has persisted until 2012, with an average of twenty-three cases heard per year between January 2006 and January 2012. This is a very low roll compared with other constitutional or apex courts. What this means is that the South African Constitutional Court is a cautious court that elects to maintain a low roll. Although there are no definitive authoritative explanations of this practice, it is often said that, in controlling its roll generally and denying direct access specifically, the Court has been responding to the perceived “floodgates” problem experienced by the Supreme Court of India, which has too many cases to deal with and ends up with many judgments not upheld by the government.

75 E-mail communication with Professor Bruce Wilson, University of Central Florida, Orlando, Florida, Oct. 1, 2008.

tutela cases each year, and for 2011 considered 449 direct access cases⁷⁶ – the Court risked becoming an elite institution, increasingly inaccessible to the poor.

Over the past six years, the Court has not significantly changed its practice of avoiding direct access.⁷⁷ I still maintain that direct access is a potentially powerful mechanism for facilitating constitutional matters to be heard that otherwise would not make it through the normal judicial hierarchy. And I still believe that, to become relevant to the majority of South Africans, the Court needs to reverse its stance on direct access, energetically promoting it rather than discouraging it. However, I have subsequently refined my argument. Taking into account a possible criticism that granting direct access to the Court to unrepresented poor litigants might not be the optimal way for constitutional matters to be effectively dealt with, especially in a common law system where precedent is strictly pursued, I suggest a pivotal role for public interest organizations in facilitating such direct access. I envisage that this could work in two ways, to the benefit both of affording greater access to justice to the poor and to the development of South Africa's socioeconomic rights jurisprudence.

First, an appropriately staffed Court Registry office (perhaps using volunteers or interns who have undergone a relevant training course)

76 E-mail communication with Professor César Rodríguez-Garavito, University of the Andes, Bogotá, Feb. 8, 2012. Rodríguez-Garavito explains that the decrease in *tutela* cases in 2011 is in line with the Constitutional Court's new practice since 2011 of streamlining and drawing together similar cases to avoid repetitive rulings.

77 On my count, between January 2006 and January 2011, the Court heard only seven direct access cases. Of these, it only granted direct access in one instance, and this was not to assist a poor litigant to gain access to justice. In *Independent Newspapers (Pty) Ltd. v. Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetsha v. President of the Republic of South Africa and Another* (5) SA 31 (CC) (2008), the Court granted direct access in order to compel the disclosure of discreet portions of a record of proceedings related to national intelligence under way in the Constitutional Court. Here, the Court found that it was in the public interest to grant direct access, not least as “none of the parties is opposed to us adjudicating the matter” (para. 20). The practice of denying direct access continues to impact negatively on the profile of cases the Court hears, meaning that the Court hears very few cases brought proactively by poor litigants (as opposed to criminal cases).

should scan complaints from poor people approaching the Registry window for substantive constitutional matters. When such matters are identified, the staff member (in consultation with senior Court Registry staff) should proceed with a formal process of referring the matter to a relevant public interest organization, requesting the organization to represent the applicant in a direct access application to the Court.⁷⁸ Second, the Court should actively encourage public interest organizations wishing to take up their own constitutional matters (or such matters on behalf of poor people or in the public interest) by allowing them to utilize the direct access route. If public interest organizations with relevant cases could bypass the normal judicial hierarchy,⁷⁹ this would greatly reduce the costs and time involved in litigating for them, and it is likely to encourage more organizations to take up public interest litigation. Regardless of whether such public interest legal assistance avenues are pursued, it might still be necessary for the Court to rethink its style of adjudication in the interest of significantly increasing its case load. In this regard, the Court might consider the practice of the Costa Rican Constitutional Court, which – in order to consider 17,000 *amparo* cases per year – makes extensive use of *leterados* (trained legal clerks) to screen direct access applications for merit and typically hands down very concise rulings.⁸⁰

On a number of occasions, I have heard Court judges bemoan the absence of socioeconomic rights cases coming before them.⁸¹ Yet the

78 The Court could, perhaps, facilitate fund-raising to assist public interest organizations to take up such litigation. If the litigation can proceed on a direct access basis, the costs of litigating will be substantially reduced compared to proceeding through the normal judicial hierarchy.

79 In the normal course, a constitutional matter is first heard in the High Court, then it is usually appealed to the Supreme Court of Appeal, before reaching the Court (it is possible to apply for leave to appeal directly from the High Court to the Court, however, such applications are often dismissed). The process can take years and the cost can be exorbitant.

80 E-mail communication with Professor Bruce Wilson, University of Central Florida, Orlando, Florida, Oct. 1, 2008.

81 I have heard two Court judges speak specifically about their wish to see a case come before them about “school children still being taught under trees.”

Court has done little to address systemic access-related obstacles in the interest of poor people. Specifically, the Court has not delineated a comprehensive right of access to justice at state expense for civil or constitutional matters, and it has failed to utilize its own direct access mechanism in the public interest. As a consequence, the Court remains a relatively inaccessible institution, and it loses countless opportunities to develop constitutional law in the interests of the poor. As detailed later, for the few poor litigants who make it to the Constitutional Court, the Court's weak socioeconomic rights record has further undermined the promise of transformative justice.

Being Heard

Moving beyond the Court's international reputation for having formally declared socioeconomic rights justiciable,⁸² much has been written about the Court's substantively weak approach to socioeconomic rights adjudication and the dampening effect this has had on the number of related cases coming before the Court, as well as how this has been detrimental to the development of socioeconomic rights jurisprudence generally.⁸³ As of October 2011, only twelve substantive socioeconomic rights cases had come before the Court since its establishment in 1995.

82 For example, in certifying the 1996 Constitution, the Court stated: "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." *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution 1996* (4) SA 744 (CC) (1996), para. 76.

83 David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 118 S. Afr. L.J. 484, 448–501 (2002); David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence*, 19 S. Afr. J. HUM. RTS. 1, 1–26 (2003); Sandra Liebenberg, *The Interpretation of Socio-Economic Rights*, in *CONSTITUTIONAL LAW OF SOUTH AFRICA* (2nd ed., Chaskalson et al. eds., Oxford University Press 2004); Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. Afr. J. HUM. RTS. 383, 383–417 (2004); and Jackie Dugard and Theunis Roux (*supra* note 14).

Six of these decisions were handed down between 2008 and 2009⁸⁴ – two on healthcare rights,⁸⁵ six on housing rights,⁸⁶ one on social assistance rights,⁸⁷ one on water rights,⁸⁸ one on electricity rights⁸⁹ and one on sanitation rights.⁹⁰ Some socioeconomic rights have never been adjudicated at Constitutional Court level, including the right of access to sufficient food (section 27(1)(b) of the Constitution).⁹¹

To a large extent, the paucity of socioeconomic rights cases having come before the Court relates to those obstacles to access set out earlier. The barriers to poor people accessing courts independently (such as no comprehensive right to legal representation at state expense in civil matters) mean that very few socioeconomic rights-related cases are taken up at all, and fewer still make it all the way to the Court. Another reason for the low number of socioeconomic rights cases relates to how the Court has approached the few socioeconomic rights cases that it has heard. With Theunis Roux, I have previously written about two of these specific

84 I classify a “substantive socio-economic rights case” by whether the ratio of the decision was linked to a cause of action founded on any of the socioeconomic rights in the Constitution.

85 Soobramoney v. Minister of Health, Province of KwaZulu-Natal (1) SA 765 (CC) (1998), and Minister of Health and Others v. Treatment Action Campaign and Others (No. 2) (5) SA 721 (CC) (2002).

86 Government of the Republic of South Africa and Others v. Grootboom and Others (1) SA 46 (CC) (2001); Port Elizabeth Municipality v. Various Occupiers (1) SA 217 (CC) (2005); Jaftha v. Schoeman; Van Rooyen v. Scholtz (2) SA 140 (CC) (2005); Occupiers of 51 Olivia Road, Berea Township and Another v. City of Johannesburg and Others (3) SA 208 (CC) (2008); Residents of the Joe Slovo Community, Western Cape v. Thubelisha Homes and Others (3) SA 454 (CC) (*Thubelisha Homes*) (2010); and Abahlali baseMjondolo v. Premier of KwaZulu Natal Province and others (2) BCLR 99 (CC) (2010).

87 Khosa and Others v. Minister of Social Development and Others (6) SA 505 (CC) (2004).

88 Mazibuko and Others v. City of Johannesburg and Others (4) SA 1 (CC) (2010).

89 Joseph v. City of Johannesburg (4) SA 55 (CC) (2010).

90 Nokotyana and Others v. Ekurhuleni Municipality (4) BCLR 312 (CC) (2010).

91 Just after writing this chapter, the Court handed down a string of four socioeconomic rights judgments in December 2011, all dealing with the right to housing. None of these judgments reflects a fundamental change in the Court’s adjudicative style.

disincentives.⁹² First, we argued that the Court’s decision to adopt a reasonableness standard of review, instead of a more robust rights-based or violations-related standard (including a minimum core content approach), has “the potential to diminish the capacity of the Court to function as an institutional voice for the poor since it requires expert understanding of complex policy and budgetary issues, making it all but impossible for poor people to bring [socioeconomic] rights cases without extensive technical and financial support.”⁹³ This has been exacerbated by the Court’s not providing much clarification in terms of the content of socioeconomic rights.⁹⁴ Second, we argued that the kinds of “conventional and somewhat limited relief”⁹⁵ pursued by the Court in socioeconomic rights cases acted as a further deterrent to poor people opting for *litigation* as a means of enforcing their socioeconomic rights (as opposed to direct protest, political action, etc.). We noted that – despite section 172(1) of the Constitution providing that “[w]hen deciding a constitutional matter within its power, a court... (b) may make any order that is just and equitable” – the Court has always opted to provide programmatic or policy relief rather than providing direct relief to the affected individuals, and it has failed to utilize structural interdicts or to

92 Dugard and Roux (*supra* note 14).

93 *Id.*, at 116. There is another troubling consequence of the Constitutional Court having adopted the weak and overly deferential reasonableness test – it has entrenched a perception among the executive that judges may not review socioeconomic rights-related policy. This attitude was recently revealed in the unscripted comments of Amos Masondo, Executive Mayor of the City of Johannesburg, at a press conference on May 15, 2008, at which he announced the city’s intention to appeal the *Mazibuko* judgment. Attacking Justice Tsoka directly, Masondo warned: “Judges must limit their role to what they are supposed to do. If they want to run the country they must join political parties and contest elections. In that way they can assume responsibilities above their powers”; reported in KINGDOM MABUZA, “Jozi to Contest Ruling on Water” (May 15, 2008), available at <http://www.sowetanlive.co.za/sowetan/archive/2008/05/15/jozi-to-contest-ruling-on-water> (last accessed Feb. 9, 2012).

94 David Bilchitz, *POVERTY AND FUNDAMENTAL RIGHTS* (Oxford University Press 2007).

95 K. Pillay, “Addressing Poverty through the Courts: How Have We Fared in the First Decade of Democracy?” paper presented at the conference “Celebrating a Decade of Democracy,” Durban, Jan. 23–25, 2004, p. 7.

set itself up as an institution with oversight over the enforcement of its socioeconomic rights judgments.⁹⁶ This has meant that the few litigants who have brought socioeconomic rights claims to the Court have not secured any direct benefits from the litigation, a further disincentive to future litigants.

A further disappointing characteristic of the Court's socioeconomic rights record is its practice of not grasping opportunities to pronounce on potentially transformative issues unless forced to.⁹⁷ The Court has all along adopted a cautious adjudication style, which Ian Currie (following Cass Sunstein) has referred to as one of "judicious avoidance."⁹⁸ This style of adjudication is characterized by a "reluctance on the part of the Court to pronounce on any issue that does not have to be decided for the purposes of settling the case."⁹⁹ This practice resulted in the Court passing over the opportunity presented in *Vermaas* to delineate a comprehensive right to legal representation at state expense (an opportunity that has not again arisen in the Court's subsequent cases, and one that could have greatly contributed to advancing transformative justice). Judicious avoidance has also had a deadening effect on socioeconomic rights jurisprudence. It has, for example, resulted in the Court's most recent socioeconomic rights judgment adding very little to the jurisprudence. In *Olivia Road*, the Court sat on an appeal from the Supreme Court of Appeal on the nature of the state's obligations toward 67,000 desperately poor people facing eviction from buildings in the inner city of Johannesburg under the terms of the city's urban regeneration strategy.

96 In *Grootboom* (*supra* note 86), the Constitutional Court did remark in passing that the South African Human Rights Commission (which appeared as amicus curiae in the case) should "monitor and report" on the state's progress in complying with the judgment (*supra* note 104, at para. 97). However, the Court did not incorporate this oversight function in its order, and as a consequence, when the Commission attempted to report back to the Court on the ongoing intolerable conditions still prevailing in the claimant community, the Court refused to engage with it.

97 Dugard, *supra* note 2.

98 See I. Currie, *Judicious Avoidance*, 15 S. Afr. J. HUM. RTS. 138 (1999), drawing on C. Sunstein, *LEGAL REASONING AND POLITICAL CONFLICT* (Oxford University Press 1996).

99 Dugard and Roux, *supra* note 13, at 110.

By the time the dispute reached the Court, an obligation to provide at least temporary alternative shelter had been conceded. The remaining issues over which the parties sought clarification from the Court included:

Whether the right of access to adequate housing, as guaranteed by section 26 of the Constitution, requires a consideration of location in the provision of alternative accommodation (i.e., what weight should be attached to the benefits poor people facing eviction derive from their present location?)

Whether or not, in failing to make any provision for the poor in its inner-city housing plans, the City of Johannesburg's housing policy was unconstitutional

Whether a 1977 law (the National Building Standards and Building Regulations Act 103 of 1977) – which gave a local authority the right to evict occupiers of buildings it considered to be unsafe without considering the availability of alternative accommodation) was inconsistent with the Constitution

Choosing to avoid these issues, the Court focused instead on establishing the requirement for a local authority to meaningfully engage with occupiers facing eviction. Finding that the City of Johannesburg had failed to make an effort to engage with the occupiers at any time before proceedings for their eviction were brought, the Court ruled that the subsequent eviction was unlawful. However, although a welcome innovation, the concept of meaningful engagement does not provide poor people with any concrete protections against eviction, nor does it help to delineate the right to housing. In refusing to decide on the issues just listed, which were squarely placed before the Court, the Court missed an important opportunity to develop the right to housing jurisprudence beyond its decision in *Grootboom*. By so doing, the Court failed to tackle the policies and practices at the core of the vulnerability of poor people living in locations earmarked for commercial development, and it failed to

establish critical rights-based safeguards for extremely vulnerable groupings, despite having all the material before it to do so.

As Stuart Wilson and I have argued, in assessing the adjudication of socioeconomic rights over the past eighteen years, it is apparent that the Court has failed to take seriously and to operationalize within its judgments the issue of structural poverty.¹⁰⁰ Indeed, the Court has consistently “turned away from what claimants say about their lived experiences of poverty in favour of an abstract evaluation of the state’s justifications for its refusal to respond to them”; furthermore, the judges’ interpretive moves

construct poverty not as a *prima facie* transgression of legal norms, but as a banal feature of the social order, which Judges are enjoined to “manage” rather than to attempt to eliminate. They have contributed to the depoliticisation and domestication of poverty within fundamentally unjust pre-existing patterns of resource distribution, social control and disempowerment.¹⁰¹

By way of examples, we point to the Court’s failure to engage with the substantive evidence regarding the water needs of the residents of Phiri, Soweto, in the *Mazibuko* case,¹⁰² which dealt with, *inter alia*, section 27(1)(b) of the Constitution, the right to sufficient water.¹⁰³ In this case, which is also dealt with in Chapter 1, by David Bilchitz, the Court

100 Stuart Wilson and Jackie Dugard, *Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights*, 3 STELLENBOSCH L. REV. 664–82 (2011).

101 *Id.*, at 664–65. In reference specifically to the potential of law and litigation to domesticate and depoliticize issues and movements, see also Danie Brand (2005) *The “Politics of Need Interpretation” and the Adjudication of Socio-Economic Rights Claims in South Africa*, in THEORIES OF SOCIAL AND ECONOMIC JUSTICE 17–36 (A. J. van der Walt, ed., Stellenbosch University Press 2005).

102 *Supra* note 88.

103 *Mazibuko* was quite a complex case, brought on a number of legal grounds. For a critique of the judgment, see Sandra Liebenberg, *SOCIO-ECONOMIC RIGHTS ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION* 466–80 (Juta 2010); and Lucy Williams, *The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study*, 3 CONST. COURT REV. 141–99 (2011). And for a broader analysis of the impact of public interest litigation beyond the judicial outcome, which examines

overlooked the underlying material problem and considerable contextual evidence provided by the applicants – this included direct testimony from very poor, female-headed, multidwelling, jobless families that ran out of the government’s free basic water supply halfway through each month and could not afford additional water once this supply was automatically disconnected by a prepayment water meter – in favor of taking refuge in a highly deferential approach to the policy choices of the government that effectively “divorces the question of the sufficiency of the free basic supply from the hardship caused by the disconnection of water once the free component had been exhausted.”¹⁰⁴ As we explain, because the government’s policy is assessed separately from the particularities of the applicant’s needs and their context (including water-borne sanitation), and the automatic disconnection of their water supply is ignored altogether, the policy appears reasonable.¹⁰⁵

We provide another example of the Court not front-loading a contextual analysis of structural poverty and, as such, not “taking poverty seriously” in its ruling in *Thubelisha Homes*,¹⁰⁶ a case concerning the proposed eviction and relocation by the City of Cape Town of approximately 20,000 poverty-stricken residents of Joe Slovo informal settlement to a barren location some fifteen kilometers away. Here, the residents and expert nongovernmental organizations presented substantially undisputed evidence of the likely catastrophic impacts of the move, including that the proposed relocation would cause considerable hardship and fundamentally compromise residents’ access to hospitals, schools, employment, and social, cultural, and family life. Yet, in upholding the eviction,¹⁰⁷ the Court trivialized the clearly devastating impact of

Mazibuko in depth, see Jackie Dugard and Malcolm Langford, *Art or Science? Synthesizing Lessons from Public Interest Litigation and the Dangers of Legal Determinism*, 27(1) S. Afr. J. HUM. RTS. 39–64, 42–45, 57–59 (2011).

¹⁰⁴ Wilson and Dugard, *supra* note 101, at 676–77.

¹⁰⁵ *Id.*

¹⁰⁶ *Thubelisha Homes*, *supra* note 86.

¹⁰⁷ The ruling did place conditions on the eviction and, as it subsequently transpired, the city failed to meet these conditions, resulting in the Court discharging the eviction

the move. It effectively reduced the residents' interest in their location to one of mere "convenience"¹⁰⁸ – the Court stated that while being relocated would be "an inevitably stressful process,"¹⁰⁹ "there are circumstances in which there is no choice but to undergo traumatic experiences so that we can be better off later."¹¹⁰

Together with the other weaknesses in the Court's approach to access and the adjudication of socioeconomic rights outlined earlier, this trivialization of poverty serves to further reduce the relevance of the courts as a forum for democratic participation by poor people and thereby to reinforce perceptions of a remote and elite-serving judiciary, as well as restricting options for civic action and pushing people toward protest and other "extra-system" activities. This remoteness from the lives of the majority of South Africa's residents, in turn, renders the Court weaker in the face of increasing hostility from the polity. As things stand, if the Constitutional Court came under concerted political pressure, it is likely that only elite groups would come to its defense, a reality that would probably seal the Court's fate. It is therefore more critical than ever that the Court moves beyond rhetorical lip service to develop a meaningfully pro-poor approach, even if this means revisiting some of its previous judgments and practices.

Conclusion

In attempting to understand the South African Constitutional Court's failure to advance direct access and robustly adjudicate socioeconomic rights (in the absence of much elucidation by the judges themselves),¹¹¹

order. See *Residents of the Joe Slovo Community, Western Cape v. Thubelisha Homes* 7 BCLR 723 (CC) (2001), and also see the analysis of the Thubelisha case in Wilson and Dugard, *supra* note 101, at 678–79.

108 *Thubelisha Homes*, *supra* note 86, main judgment of Justice O'Regan at para. 321.

109 *Id.*, concurring judgment of Justice Sachs, at para. 399.

110 *Id.*, concurring judgment of Justice Yacoob, para. 107.

111 The Constitutional Court is still too young for much self-reflection, and those judges who have retired have not yet been very forthcoming about why particular interpretive or adjudicative styles were selected over others.

one set of related explanations about the role of legal culture seems persuasive. A good starting point is an article by Theunis Roux concerning another post-apartheid judicial institution, the Land Claims Court, entitled: “Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court.”¹¹² In this article, which raises some of the same problems with the Land Claims Court’s interpretive styles that I have raised here in relation to the Constitutional Court, Roux answers his own question: “why did the specialist court . . . interpret social rights so narrowly that they were rendered virtually meaningless?” by first eliminating two usual variables of judicial performance: social composition and underlying legal framework. As Roux points out, the Land Claims Court – like the Constitutional Court – was established as a post-apartheid institution; the appointments have been broadly representative, with many of the judges having grown up under apartheid-imposed disadvantage, and the underlying legislation (as with the Constitution) remains explicitly pro-poor.¹¹³ Having discounted social composition and underlying legal framework, Roux considers the most compelling explanation for the Land Claims Court’s disappointing (“anti-poor”¹¹⁴) outcomes at the time of writing to relate to the influence of formal legal culture, with all the judges having gone through university legal education at a time when university legal education in South Africa was overwhelmingly formalistic and executive minded, and not oriented toward seizing gaps and crafting creative remedies in the interests of justice.¹¹⁵

This reflection is equally valid in respect of the Constitutional Court and its judges, all of whom have been through the same legal education

112 Roux, *supra* note 12.

113 *Id.*, at 513.

114 Roux stresses that he does not suggest that the judges are anti-poor – indeed, he alludes to their social background as being pro-poor. Rather, he uses the term “anti-poor” as the binary of “pro-poor” to relate to the interpretive approach of the court (as opposed to its judgments *per se*, which he does not analyze for their correctness): Specifically, he uses this term in the context where “plausible, pro-poor” options were open to the Court that they rejected or ignored (Roux, *supra* note 12, at 515).

115 Roux, *supra* note 12, at 532.

system as the Land Claims Court judges. Indeed, as Roux points out,¹¹⁶ after the first year of the Court's operation, Alfred Cockrell published a now frequently cited article in which he argued that the Constitutional Court's failure to develop a coherent "substantive vision of law," as required by the new Constitution, was largely a consequence of the lag effect of the judges' training in a rule-bound, "formal vision of law."¹¹⁷ Two years later, Karl Klare wrote an equally celebrated article in which he remarked that a "visiting U.S. lawyer cannot help but be struck by the conservatism of South African legal culture," explaining that he was not referring to "conservatism" in the form of political ideology, but "cautious traditions of analysis common to South African lawyers of all political outlooks."¹¹⁸ Subsequently, Cora Hoexter defined South African legal formalism as "a judicial tendency to attach undue importance to the pigeonholing of a legal problem and to its superficial or outward characteristics; and a concomitant judicial tendency to rely on technicality rather than substantive principle or policy, and on conceptualism instead of common sense."¹¹⁹ As Roux notes, although this approach to legal interpretation is not necessarily conservative (even under apartheid, formalism could sometimes be "flipped" by progressive lawyers to achieve progressive outcomes),¹²⁰ where judges are required to engage in substantive reasoning, "a culture of legal formalism may work against the achievement of the objectives" of social transformation.¹²¹

Building on this explanation, I believe that the Court's cautious approach to direct access and socioeconomic rights can best be understood as reflecting a jurisprudential conservatism that arises from a legal culture and training in which access to justice for the poor and

¹¹⁶ *Id.*, at 533–34.

¹¹⁷ Alfred Cockrell, *Rainbow Jurisprudence*, 12 S. Afr. J. HUM. RTS. 1–192, 1, 35 (1996).

¹¹⁸ Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. Afr. J. HUM. RTS. 146–88, 146, 168 (1998).

¹¹⁹ Cora Hoexter, *Contracts in Administrative Law: Life after Formalism?*, 121 S. Afr. L.J. 595–618 (2004).

¹²⁰ Roux, *supra* note 12, at 534, citing Rick Abel, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID*, 1980–1994, 490 (Routledge 1995).

¹²¹ *Id.*, at 534.

socioeconomic rights do not feature strongly. Without clear pointers, South African judges are ill equipped to deal with many of the current challenges regarding structural poverty, and consequently, they appear uncomfortable with playing an activist, pro-poor role.

However, as I have argued in this chapter, it has never been more critical for the Court to embrace a role as a dedicated institutional voice for the poor. For its own survival, as well as the survival of democracy in South Africa, the Court needs to become more responsive and accessible to poor people. Constitutional Court judges are, in fact, well placed to pursue a more redistributive vision of adjudication, with the Court having a conducive social composition and underlying legal framework. Indeed, unlike judges of other courts, such as the Indian Supreme Court, which has had to overcome much more to open access to justice, the judges of the South African Constitutional Court only have to overcome one hurdle: a conservative legal culture.¹²² It is essential that they do so. In the words of Enoch Dumbutshena, a former Chief Justice of Zimbabwe:

Judges must use their judicial power in order to give social justice to the poor and economically and socially disadvantaged. South Africa is best equipped to do this. Its bill of rights contains social and economic rights. In interpreting those provisions which protect social and economic rights, judges should remember that they cannot remain aloof from the social and economic needs of the disadvantaged. Through their activism, judges can nudge their governments so that they can move forward and improve the social and economic needs of the disadvantaged. In South Africa, the bill of rights is, without interpretation, activist in its own right. However, it requires activist judges to make its provisions living realities.¹²³

122 This is not to underestimate the power of legal culture. Nor is it to deny that there are other factors at play, and mounting political pressure might result in more politically expedient rulings in the future (until now, it is fair to say that the Court has been robust in defending its right to rule against the executive, and has been robust in doing so, especially regarding civil and political rights).

123 Enoch Dumbutshena, *Judicial Activism in the Quest for Justice and Equality*, in THE JUDICIARY IN AFRICA 188 (B. Ajibola and D. Van Zyl eds.), 1998.

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8 Access to Justice in India

The Jurisprudence (and Self-Perception) of the Supreme Court

Menaka Guruswamy and Bipin Aspatwar

THE INDIAN SUPREME COURT IS WELL KNOWN FOR ITS rather robust judicial activism.¹ This past year, the Court banned state-sponsored private militia, thereby challenging the official counterinsurgency policy,² annulled the appointment of the key official charged with pursuing corruption (the Chief Vigilance Commissioner),³ banned suspect mining in a mineral-rich state in India,⁴ and constituted a special body to investigate the alleged ill-gotten wealth of prominent citizens deposited in European banks.⁵ More recently, this

1 See S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 29 (2001); Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8(1) WASH. U. GLOBAL STUD. L. REV. 1 (2009); T. R. Andhyarujina, *JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA* (N. M. Tripathi 1992).

2 Nandini Sundar v. State of Chhattisgarh 7 S.C.C. 547 (India) (2011). The anti-insurgency policy of the state of Chhattisgarh was challenged in this case on the ground that the state was arming and supporting civilian vigilante groups who perpetrated human rights abuses of local populations. The state of Chhattisgarh, funded by the federal government, appointed tribal youth as “special police officers,” provided them little by way of training, and armed them to allegedly counter “naxalism,” or left-wing extremism. These appointments and the arming of young tribals was held to be unconstitutional by the Supreme Court on the grounds that the lives of these tribal youth were being placed in grave danger and they were unfairly subjected to the same levels of danger as members of the police and armed forces. The Court also directed the federal government to stop funding such recruitment of special police officers.

3 Centre for P.I.L. v. Union of India 4 S.C.C. 1 (India) (2011).

4 Government of Andhra Pradesh v. M/S Obalipuram Mining Co. Pvt. Ltd., S.L.P. (C) No. 7366/2010 (India) (Aug. 5, 2011).

5 Ram Jethmalani v. Union of India 8 S.C.C. 1 (India) (2011).

Court upheld the validity of a law that set aside 25 percent of seats in private schools for children from disadvantaged backgrounds.⁶ This is indicative of the self-confidence of the Court in the legitimacy it enjoys, and also reflects the consistent growth in stature of this institution since independence in 1947 from the British colonial power.

Perhaps one of the critical ingredients of enduring democratic constitutionalism in India has been the role of its highest court and the extraordinary legitimacy that it has come to enjoy. The Court crafted the doctrine of a “basic structure” of the Constitution in the late 1970s, to protect the essence of the constitution that a marauding prime minister was not allowed to amend.⁷ This was a battle that threatened the constitutionally designed separation of powers paradigm. More recently, the Supreme Court oversaw the supervision of the distribution of food to disadvantaged citizens. India’s highest court has taken upon itself an extraordinary role.⁸ However, as has been pointed out elsewhere, courts cannot “supplant either political activism or the legislative process.”⁹ Sandra Fredman says that the democratic role for the courts entails enhancing accountability, facilitating deliberative democracy, and promoting equality.¹⁰ A fourth marker must be added to this list: facilitating access to justice irrespective of social or economic status.

The Indian Supreme Court prides itself on ensuring the widest possible access by mitigating the need for standing. And it has done so through the jurisprudence it crafted on access to justice. If justice is a key end goal of the process of going to court, then accessing the courts that enable

6 Society for Un-aided Private Schools of Rajasthan v. Union of India 6 S.C.C. 1 (India) (2012).

7 See Kesavananda Bharati v. State of Kerala 4 S.C.C. 225 (India) (1973).

8 See People’s Union for Civil Liberties v. Union of India, W.P.(C) 196/2001. For recent orders, see People’s Union for Civil Liberties v. Union of India 5 S.C.C. 423 (India) (2010); People’s Union for Civil Liberties v. Union of India 13 S.C.C. 63 (India) (2010); People’s Union for Civil Liberties v. Union of India 12 S.C.C. 176 (India) (2010).

9 Sandra Fredman, *Restructuring the Courts: Public Interest Litigation in the Indian Courts*, in HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 124, 125 (Oxford University Press 2008).

10 *Id.*

justice must be explored. Therefore, the primary aim of this chapter is to examine the jurisprudence of access to justice as evolved by the Supreme Court of India.

While doing so, the chapter will explore three patterns. First, how has the court ensured such access by reformulating traditional principles of “standing”? Second, how has it then applied progressive strands within both constitutional text and constitutional jurisprudence to its conceptions of access to justice? And finally, have there been certain kinds of cases in which the Court has applied expanded standing to ensure access to justice, as opposed to other classes of cases in which it has not? This chapter argues that the Court has enhanced access by doing away with the traditional understanding of *locus standi* and bringing in public interest litigation (PIL). Second, whereas the court has been enthusiastic about applying its jurisprudence of enhanced access to just outcomes in large constitutional cases where there is perceived to be larger public interest, it has been less willing to apply this to ordinary cases.

1 The Supreme Court of India and Its Self-Perception

India’s court system is monolithic, with the Supreme Court at the apex of the pyramid, a high court for more or less each state and district, and subordinate courts below them.¹¹ The Constitution envisages that the law declared by the Supreme Court shall be binding on all courts in the country.¹² The Court, with original, appellate, and advisory jurisdiction, acts as a platform for dispute resolution,¹³ as well as holding the role of law maker¹⁴ and interpreter of the Constitution. A typical case at the Supreme Court could be one between the federal government and a state

11 See Indian Constitution, arts. 124, 132–34, 141, 214, 227.

12 Indian Constitution, art. 141: “Law declared by Supreme Court to be binding on all courts. – The law declared by the Supreme Court shall be binding on all courts within the territory of India.”

13 See Indian Constitution, arts. 131–34, 136 and 143.

14 See Indian Constitution, art. 141.

on taxation,¹⁵ or between two private parties over a breach of contract,¹⁶ or an interpretation of a grave constitutional question, such as whether a law requiring all private schools to set aside a percentage of seats for disadvantaged children is in consonance with the constitutional right to education.¹⁷

The Indian Constitution guarantees fundamental rights, such as the right to life and liberty,¹⁸ freedom of expression,¹⁹ and freedoms of trade and association.²⁰ The Constitution also provides remedies for enforcement of these rights under article 32, which provides for the right to approach the Supreme Court of India.²¹ Further, article 142 of the Constitution empowers the Supreme Court to do “complete justice” in any case pending before the court. The Court has exercised this power to issue far-reaching guidelines in the absence of specific legislation addressing the issue before it. For instance, in one case, the Court crafted guidelines against sexual harassment, and in another, rules concerning adoption of children by foreigners, in the absence of statutory frameworks.²²

15 See *New Delhi Municipal Committee v. State of Punjab* 7 S.C.C. 339 (India) (1997).

16 *Swarnam Ramchandran v. Aravacode Chakungal Jayapalan* 8 S.C.C. 689 (India) (2004).

17 *Society for Un-aided Private School of Rajasthan v. Union of India*, 6 S.C.C. 1 (India) (2012). A group of private schools challenged a law guaranteeing the right to education for all children between six and fourteen years of age. This law, among other rights, set aside 25 percent of seats for disadvantaged students. The Supreme Court of India upheld this law.

18 Indian Constitution, art. 21.

19 Indian Constitution, art. 19(1)(a).

20 Indian Constitution, art. 19(1)(c).

21 Indian Constitution, art. 32.

22 See *Lakshmi Kant Pandey v. Union of India* 2 S.C.C. 244 (India) (1984), in which guidelines for adoption of minor children by foreigners were laid down; *Vishaka v. State of Rajasthan* 6 S.C.C. 241 (India) (1997), in which guidelines were laid down to set up a mechanism to address the issue of sexual harassment at the workplace; *Vineet Narain v. Union of India* 1 S.C.C. 226 (India) (1998), in which directions were issued to ensure the independence of the Vigilance Commission; *Erach Sam Kanga v. Union of India*, W.P. No. 2632/1978 (India) (Mar. 3, 1979), in which a Constitution bench laid down certain guidelines relating to the Emigration Act of 1983; *K. Veeraswami v.*

India's population is more than 1.2 billion,²³ out of which a staggering 37 percent are classified as living below the (highly suspect and overly conservative) official poverty line.²⁴ Out of the total population, approximately 26 percent of the population is illiterate.²⁵ The judge-to-population ratio in India is dismal, at only 14 per million population (as of 2008),²⁶ compared to a country like the United States, which has a judge-to-population ratio of 104 per million people (as of 1999).²⁷

Union of India 3 S.C.C. 655 (India) (1991), in which guidelines were laid down to maintain the independence of judiciary; Union Carbide Corporation v. Union of India 4 S.C.C. 584 (India) (1991), in which guidelines were issued for disbursement of amounts in compensation relating to the Bhopal gas tragedy; Delhi Judicial Service Association v. State of Gujarat, 4 S.C.C. 406 (India) (1991), in which guidelines were laid down to be followed in case of arrest and detention of a judicial officer; Common Cause v. Union of India 1 S.C.C. 753 (India) (1996), in which directions were issued for revamping the system of blood banks in the country; Supreme Court Advocates-on-Record Association v. Union of India 4 S.C.C. 441 (India) (1993), which laid down guidelines and norms for the appointment and transfer of High Court judges; Vishwa Jagriti Mission v. Central Government 6 S.C.C. 577 (India) (2001), in which guidelines were laid down to curb ragging in educational institutions; Destruction of Public and Private Properties v. State of Andhra Pradesh 5 S.C.C. 212 (India) (2009), in which detailed guidelines were issued to assess damage to public property during demonstrations and for the effective implementation of the Prevention of Destruction and Loss of Property Act of 1981.

23 "Provisional Population Totals Paper 1 of 2011 (India)," available at http://www.censusindia.gov.in/2011-prov-results/prov_results_paper1.india.html.

24 Planning Commission, "Press Note on Poverty Estimates: Government of India" (2011), available at <http://planningcommission.nic.in/reports/genrep/Press.pov.27Jan11.pdf>. See also, Gargi Parsai, *Tendulkar Poverty Line Will Remain Reference Point*, THE HINDU (Oct. 4, 2011), available at <http://www.thehindu.com/news/national/article2509910.ece>.

25 http://www.censusindia.gov.in/2011-prov-results/data_files/india/Final%20PPT%202011_chapter6.pdf.

26 Press Information Bureau, "Judge Population Ratio" (2008), available at <http://pib.nic.in/newsite/ererelease.aspx?relid=38105>. The 120th Report of the Law Commission of India in 1987 recommended increasing the judge-to-population ratio to fifty judges per million of population. The Supreme Court of India in All India Judges Association v. Union of India 4 S.C.C. 247 (India) (2002) also directed the Union Government to increase the judge-to-population ratio to fifty judges per million of population.

27 PRS Legislative Services, "Pendency of Cases in Indian Courts" (2009), available at <http://www.prssindia.org/administrator/uploads/general/1251796330~~Vital%20>

Given these circumstances, in a country with immense disparity and inequality, and a high rate of poverty and illiteracy, accessing justice through the court system is not an option for most.²⁸ This vulnerable section of population living below the poverty line does not have the resources either to access the court system or to “fight long drawn procedures” in courts.²⁹ This sector also faces major institutional barriers to accessing justice. These obstacles exist in the form of monetary costs in pursuing cases, the complicated nature of the court procedure, a lack of efficient legal aid, and language barriers.³⁰

How does a poor citizen then access the court? And, if that poor citizen does get to court, what is his or her chance of securing justice? What has the Supreme Court done to facilitate access to justice in India? And what, if any, is its conception of access to justice? And, given the “radical and unparalleled achievements” of the Supreme Court,³¹ has it made access to justice more possible for the average citizen? These are some of the issues dealt with in the following sections.

1.1 *Self-Perception of the Court*

The Court’s commitment to enabling access to justice stems from the role it ascribes to itself. And it declares its belief rather categorically through case law. It is pertinent to mention that the Indian Supreme Court does not sit *en banc*. It sits in benches of two or three or five judges, depending

Stats%20-%20Pendency%20of%20Cases%20in%20Indian%20Courts%2026Aug2009%20v10.pdf.

28 See Menaka Guruswamy and Aditya Singh, *Village Courts in India: Unconstitutional Forums with Unjust Outcomes*, 3(3) J. ASIAN PUB. POL’Y 281 (2010).

29 N. R. Madhava Menon, “Law and Justice: A Look at the Role and Performance of Indian Judiciary,” Berkeley Seminar Series on Law and Democracy (2008), available at <http://indiandemocracy08.berkeley.edu/docs/Menon-LawANDJustice-ALook%20.pdf>.

30 S. Muralidhar, “Access to Justice” (2005), available at <http://www.india-seminar.com/2005/545/545%20s.%20muralidhar1.htm>.

31 Fredman, *supra* note 9, at 124.

on the case and the questions of law. Generally, matters of grave constitutional importance are heard by a bench of five or more judges. Therefore, although in legal writing the Court is portrayed as a singular entity, in reality, it is a dynamic institution defined by various benches and individual judges, all shepherded along by the Chief Justice. Therefore, needless to say, there are some judges more committed to litigation that addresses issues of national importance and an expanded role for the Court as compared to others.

The Court's motivations for an expanded role, from entertaining postcard petitions to monitoring forestation, are found in its jurisprudence. And here, on vivid display, is the avidly ideological perception of how the Court perceives its role and also how it views the potential of the law. In *S. P. Gupta v. Union of India*,³² the Supreme Court explained the role of the judiciary by saying that it has "to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socio-economic justice."³³

The Court, in distinguishing its role from the British concept of judging (wherein a judge is only a neutral and passive umpire who merely hears and determines issues of fact and law), says: "[N]ow this approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, *dalit* justice and equal justice between chronic unequals."³⁴

India's judiciary and executive have been involved in tussles since independence. The Supreme Court, shortly after independence, slowly but steadily set upon a path of checking the executive and Parliament, and, while doing so, simultaneously expanding its own role. Therefore,

³² Supp. (1) S.C.C. 87 (India) (1981).

³³ *Id.* at para. 27.

³⁴ *Id.*

the process of becoming what S. P. Sathe has called the “most powerful court in the world” has been a fascinating one.³⁵ The crafting by the Court of a welfarian jurisprudence facilitated by easy access to it, has contributed greatly to its status as a potent and powerful court. Giving expression to this, Pratap Bhanu Mehta says that, in contemporary India, “unelected judges have effectively replaced the notion of separation of powers among three governmental branches with a unitarian claim of formal judicial supremacy.”³⁶ Mehta seems to suggest that the Indian courts have vitiated the boundaries of separation of powers as understood in a parliamentary democracy and adopted a role indicative of supremacy of the judiciary. It may well be argued that the access to justice jurisprudence evolved is one example of the Court using rights to expand its power and status in the constitutional democracy that is India.

2 Access to Justice and the Constitution of India

2.1 *Social, Economic, and Political Justice: A Constitutional Promise*

The Constitution’s conception of justice and access to justice can be located in the Preamble, the Bills of Rights chapter (part 3 – Fundamental Rights), and the obligations enumerated in the “Directive Principles of State Policy.” The Constitution in its Preamble promises its citizens social, economic, and political justice.³⁷ It also guarantees equality before the law and equal protection of the laws to every person, including noncitizens.³⁸ Further, to make good on the constitutional promise of justice, it warrants that the state must secure “that the operation of

35 S. P. Sathe, *India: From Positivism to Structuralism*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 265 (Jeffrey Goldsworthy ed., Oxford University Press 2006). Sathe says that by virtue of the Court assuming the power to review constitutional amendments, it has become the most powerful court in the world.

36 Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18(2) J. DEMOCRACY 70 (2007).

37 Indian Constitution, preamble.

38 Indian Constitution, art. 14.

the legal system promotes justice, on a basis of equal opportunity.”³⁹ Further, the Directive Principles of State Policy of the Constitution also mandate that such equality of opportunity must include the provision of free legal aid by the state to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.⁴⁰

As the name suggests, the Directive Principles of State Policy (part 4) specify the goals to be achieved by the state.⁴¹ Article 39 of the Constitution explicitly states that these principles are not enforceable by any court, but are fundamental in the governance of the country. It is the “duty” of the state to apply these principles in making laws. In spite of this limiting provision, the Supreme Court has given a different role to the Directive Principles. The Court has given wider meaning to fundamental rights by reading in these Directive Principles.⁴² In *Minerva Mills*, the Supreme Court held that “the socio-economic rights embodied in the Directive Principles are as much a part of human rights as the Fundamental Rights.”⁴³ It was further observed that Directive Principles and the fundamental rights

are intended to carry out the objectives set out in the Preamble of the Constitution and to establish an egalitarian social order informed with political, social and economic justice and ensuring dignity of the individual not only to a few privileged persons but to the entire

39 Indian Constitution, art. 39A.

40 *Id.*

41 *Minerva Mills Ltd. v. Union of India* 3 S.C.C. 625, para. 107 (India) (1980).

42 See P. P. Craig and S. L. Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India*, 9(3) OXFORD J.L. STUD. 356, 365 (1989); Surya Deva, *Public Interest Litigation in India: A Critical Review*, 28(1) C.J.Q. 19, 22 (2009). See Vijayshri Shripathi, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 TUL. J. INT'L & COMP. L. 49, 95 (2007). For example, in *Bandhua Mukti Morcha v. Union of India*, 3 S.C.C. (India) (1984), the Supreme Court of India, in a case concerning bonded labor, held that the right to life guaranteed under the Indian Constitution, deriving its “life breath” from the Directive Principles, must include protection of the health and strength of workers, men, women, and children.

43 *Minerva Mills Ltd.* 3 S.C.C. (1980), at para. 105.

people of the country including the have-nots and the handicapped, the lowliest and the lost.⁴⁴

Therefore, with this ruling, the Supreme Court ensured not only that the nonjusticiable Directive Principles are brought forth into the domain of the enforceable, but also specifically that free legal aid becomes a compellable mandate, as article 39A of the Constitution exhorts the state to provide free legal aid.

Therefore, the text of the Constitution lays bare its progressive nature by recognizing three critical ingredients that the contemporary discourse on access to justice recognizes. First, that the legal system must promote justice. Second, that an access to such a justice-driven legal system must be assured to even the poor, and that legal aid will ensure that even those who cannot afford counsel will be given lawyers by the state. And finally, that justice is holistic – it includes social, economic, and political justice. And the Court has formulated jurisprudence that greatly expands, improves, and attempts to enforce the commitments of the constitutional text.

2.2 *Access to Justice*

Before we proceed further, let us unpack the concept of access to justice. According to Galanter, the phrase “access to justice” earlier referred to access to “government’s judicial institutions” but acquired a newer meaning in the late 1970s.⁴⁵ The broader meaning of this phrase indicated the ability of an individual to avail of various institutions (judicial and nonjudicial) to pursue justice. This vision culminated in the Florence Access to Justice Project. In this project, under Mauro Cappelletti’s direction, a broad notion of access to justice was codified.⁴⁶

⁴⁴ *Id.* at para. 105.

⁴⁵ Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORD-HAM URB. L.J. 115 (2004).

⁴⁶ *Id.*

Cappelletti and Garth state that the legal system is that by which people vindicate their rights and/or resolve their disputes under the general auspices of the state.⁴⁷ They define access to justice as having two prongs: first, that the legal system must be equally accessible to all; and second, that it must lead to results that are individually and socially just.⁴⁸ Therefore, the citizen must be able to approach and get his or her matter or dispute admitted into the court system. And, when the dispute is being heard by the court system, that should eventually lead to an individually and socially just conclusion. This second prong is more challenging in that it suggests that the outcome of the dispute being heard is one that is just from the perspective of the individual as well as society. And this is the more critical challenge, to ensure that justice is arrived at not just from the perspective of the individual but also from that of the society.

We have located the jurisprudence of the Supreme Court of India in the concept of access to justice as envisaged by Cappelletti and Garth. Cappelletti and Garth's work continues to be relevant.⁴⁹ We have not relied on other available literature, as these writings primarily deal with narrower conceptions of access to justice. The conventional conception of access to justice, especially in Western scholarship, deals with only access to lawyers, expanding scope of legal assistance, legal aid, inadequacies in legal assistance programs for the poor,⁵⁰ and *pro bono* lawyering.⁵¹ It leaves out the role played by the courts in ensuring access

⁴⁷ Mauro Cappelletti and Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 182 (1977–78).

⁴⁸ *Id.*

⁴⁹ See Mary Jane Mossman, Karen Schucher, and Claudia Schmeing, *Comparing and Understanding Legal Aid Priorities: A Paper Prepared for Legal Aid Ontario*, 29 WINDSOR REV. OF LEGAL & SOC. ISSUES 149 (2010); Ronald Sackville, *Some Thoughts on Access to Justice*, 2 N.Z. J. PUB. INT'L L. 85 (2004); Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. INT'L L. 405 (2001).

⁵⁰ Deborah Rhodes, *Access to Justice: Connecting Principle to Practice*, 17 GEO. J. OF LEGAL ETHICS 369 (2004); Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883 (2004).

⁵¹ Martha F. Davis, *Access and Justice: The Transformative Potential of Pro Bono Work*, 73 FORDHAM L. REV. 903 (2004).

by diminishing standing requirements, expanding *locus standi*, negating the adversarial process, and crafting jurisprudence that treads precariously close to socioeconomic policy formation. Therefore, the focus of this chapter is the role played by a court – in this case the Supreme Court of India – in facilitating access to justice.

Interestingly, the discourse and the state response on improving access to justice in India has largely concentrated on reducing the pendency of cases in the court system (improving the court case docket) and alternative modes of adjudication (*gram nyayalayas* or village courts),⁵² *lok adalats*,⁵³ and family courts.⁵⁴ For instance, Pratiksha Baxi has critiqued the discourse of access to justice reforms in India, which has primarily concentrated on judicial delays and pendency of cases.⁵⁵ She argues that the existing discourse on judicial reforms in India – reforms that focus on efficiency, speed, and cost-effectiveness and then correlate this with the reduction of court arrears – does not ensure access to justice to the poor.⁵⁶ Baxi is right in that it is disingenuous for the state to locate enhanced access to justice by only focusing on reducing the backlog of cases. The state should aim not only to improve the

52 But see Menaka Guruswamy and Aditya Singh, *Accessing Injustice: The Gram Nyayalayas Act, 2008*, 45(43) ECON. & POL. WEEKLY 16 (2010); Menaka Guruswamy and Aditya Singh, *Village Courts in India: Unconstitutional Forums with Unjust Outcomes*, 3(3) J. ASIAN PUB. POL'Y 281 (2010): here, the authors argue that in the garb of ensuring access to justice, the state moves disadvantaged citizens primarily in rural India to forums that have procedural protections, including diminished rights to appeal, thereby violating the Constitution.

53 Sarah Leah Whitson, “*Neither Fish, Nor Flesh, Nor Good Red Herring*” *Lok Adalats: An Experiment in Informal Dispute Resolution in India*, 15 HASTINGS INT'L COMP. L. REV. 391 (1992); Marc Galanter and Jayanth K. Krishnan, “*Bread for the Poor*”: *Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L.J. 789 (2004).

54 See Namita Singh Jamwal, *Have Family Courts Lived up to Expectations?* 47(12) MAINSTREAM WEEKLY (Mar. 7, 2009), available at <http://www.mainstreamweekly.net/article1205.html>; Ratna Verma, *FAMILY COURTS IN INDIA: AN APPRAISAL OF STRENGTH AND LIMITATION* (Inter-India Publications 1997).

55 Pratiksha Baxi, “Access to Justice and Rule-of-[Good] Law: The Cunning of Judicial Reform in India,” p. 1. Institute of Human Development, Working Paper (2007), available at http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/12_India/12.4_Access_to_Justice.pdf.

56 *Id.*

efficiency of the court system, but also to make sure that more citizens are able to approach it to settle disputes. Elsewhere it has been argued that the present use of the court system is uneven, seeming to vary depending on level of income, poverty, and even place of residence in the country.⁵⁷

Cappelletti and Garth categorize the access to justice movement in three waves: first wave, legal aid for the poor;⁵⁸ second wave, representation of diffuse interests (other than those of poor), wherein a litigant is allowed to represent an entire class of persons in a particular lawsuit;⁵⁹ and the third wave, beyond access to legal representation.⁶⁰ The third wave involves reforming general litigation procedures⁶¹ and devising alternative methods to decide legal claims (e.g., arbitration, conciliation, encouraging economic settlement, creating specialized courts).

The text of the Constitution, through Directive Principles of State Policy and the jurisprudence evolved by the courts, has ensured that free legal aid – the first wave of the access to justice movement – was given expression. As we shall see in subsequent sections, the Supreme Court has, through its construction of public interest litigation (PIL) and formulation of ways to ensure easy access to courts in cases of constitutional and public importance, accounted for the second wave of the movement in the country.

The third wave of the access to justice movement is partly reflected in India, but not entirely so. The executive has attempted to devise alternate ways to decide legal claims. For example, the Arbitration and Conciliation Act of 1996 governs arbitration and conciliation,⁶² the Gram Nyayalayas Act of 2008 (village courts) was enacted to address small claims,⁶³ and special courts such as the Central Administrative

57 Guruswamy and Singh, *Village Courts in India*, *supra* note 28.

58 Cappelletti and Garth, *supra* note 47, at 197, 209, 222.

59 *Id.* at 209.

60 *Id.* at 222.

61 *Id.* at 228.

62 The Arbitration and Conciliation Act, No. 26 of 1996.

63 The Gram Nyayalayas Act, 2008, No. 4 of 2009.

Tribunal,⁶⁴ the Electricity Tribunal,⁶⁵ the National Green Tribunal,⁶⁶ and Consumer Courts⁶⁷ have been set up to deal with distinct areas of law. The study of this “third wave of reforms” is beyond the scope of this chapter. However, the state has done little to reform the general litigation procedure and the culture of the litigation system in the country. High pendency, a system inaccessible due to language barriers (English, which many Indians do not speak, is the language of the appellate courts), obscure legal processes, and the colonial origins of the Indian legal system render it inefficient and disconnected from the lives of ordinary citizens.

In the course of this chapter, we shall argue that the Indian Supreme Court, although opening up standing in public interest matters, has ensured access in the context of matters that impact society as a whole. But it is a lot less radical in ensuring access in the case of the individual complainant who may not have a matter that affects society at large but that certainly has consequences for the individual parties involved. Admittedly, the task of ensuring the individual’s access to the courts is the responsibility of the executive and the legislature. And the Court has more than met its burden in public interest matters, and it has allowed for the Constitution to be used as a lens to greatly increase the nature, extent, and sheer number of justiciable constitutional rights, and therefore entitlements from the state that citizens can expect. Yet, as we shall see in the section on ordinary cases, there are few cases in which the court has introduced the language of access to justice.

3 Public Interest Litigation and Expanded Standing

Through its invention of public interest litigation (PIL), the Supreme Court of India has attempted to make the legal system more amenable to addressing the large challenges that Indian society faces. Access to

64 The Administrative Tribunals Act, No. 13 of 1985.

65 The Electricity Act, No. 36 of 2003.

66 The National Green Tribunal Act, No. 19 of 2010.

67 The Consumer Protection Act, No. 68 of 1986.

justice is primarily represented in the context of PIL or social justice litigation, and the Court has crafted its jurisprudence in these matters of grave public concern. The Court has facilitated enhanced access by the dilution of the requirement of *locus standi* in PIL. This, the Court felt, would ensure access to justice for “marginalized” people.⁶⁸ Public interest litigation was meant to address the needs of a person or a class of persons who, for reasons of poverty, disability, or social or economic disadvantage, were unable to approach the courts.⁶⁹

The growth of PIL can be seen partly as a push-back by the judiciary to the state’s actions during the period of the Emergency imposed by Prime Minister Indira Gandhi, which led to a virtual suspension of most

68 People’s Union for Democratic Rights v. Union of India 3 S.C.C. 235 (India) (1982).

For a strict application of *locus standi* by the court, see Charanjit Lal Chowdhury v. Union of India, A.I.R. 1951 S.C. 41 (India). In this case, an individual shareholder of a company (holding one share) challenged the constitutional *vires* of a law taking over a weaving company. The Court held that the rights of the individual shareholder were not affected by this takeover and hence the action could not be maintained. See also Governing Body GC College Silchar v. Gauhati University 1 S.C.C. 192 (India) (1973), in which a resolution passed by the governing body of a university prescribed English as a medium of instruction. This resolution was challenged by the governing body of a local college, and the Court dismissed this challenge on the grounds that the petitioners were not affected by this resolution.

69 People’s Union for Democratic Rights v. Union of India 3 S.C.C. 235 (1982). An organization working for the rights of laborers, in a letter addressed to one of the Judges of the Supreme Court, highlighted the plight of the laborers engaged in construction during the Asian Games hosted by India. It was alleged that the contractors exploited these laborers, violating the existing laws protecting their labor rights (for example, the laws relating to minimum wages [The Minimum Wages Act of 1948], equal remuneration to men and women workers [The Equal Remuneration Act of 1976], and prohibiting employment of children [The Child Labour (Prohibition and Regulation) Act of 1986]). This letter was treated as a writ petition by the Court. The Court directed the government to ensure strict compliance with the relevant labor laws by the contractors so as to protect the rights of the workers. The Court in its judgment also responded to the criticism against “public interest litigation.” The Court held that the violation of these labor laws resulted in violation of fundamental rights guaranteed by the Constitution. The government contended that the case was brought before the Court by a party that did not have the standing to approach the Court (i.e., it was not the aggrieved party). The Court, rejecting this contention, held that considering the socioeconomic conditions existing in India, riddled with poverty and illiteracy, it was necessary to evolve a new strategy by relaxing the traditional rule of standing in order to make justice accessible.

constitutional rights, and partly a move to reclaim the judiciary's moral authority, which had been tested by its own conduct during this period.⁷⁰ Other causative factors might well be what has been termed a response to "untidy discourse of the Indian state," essentially the failure of Indian socialism to deliver on its promises, and also "load shedding," or simply quickly reducing the burden of pending cases.⁷¹ However, one scholar suggests that, for all these reasons, the Court was apparently "reorienting its relationship with the people" as part of this protest.⁷²

What was the conduct of the Court during the Emergency? The period of the Emergency, which was imposed by Prime Minister Indira Gandhi in 1975 for two years, witnessed large-scale violations of rights, including those of freedom of expression; rights to life, liberty, and dignity; and even the rights of the press, all in the name of maintenance of security of the state.⁷³ In spite of resistance offered by various high courts, the Supreme Court granted virtual immunity to any executive action affecting the life and liberty of the citizen.⁷⁴ The Court declared that fundamental rights were suspended, that detainees during this period were not entitled to *habeas corpus*, and that the courts could not examine the basis of detention and pronounce on its legality.⁷⁵ The Emergency period also witnessed excessive interference by the executive in the functioning of judicial appointments. Judges who took a stand

70 See A. G. Noorani, *Liquidation of Personal Liberty*, 12(18) ECON. POL. WEEKLY 730 (1977); Norman D. Palmer, *India in 1975: Democracy in Eclipse*, 16(2) ASIAN SURV. 95 (1976). Palmer maps out the Emergency regime in India in the context of political opposition, arrests without trial, press censorship, foreign policy, etc.

71 Rajeev Dhavan, *Law as Struggle: Public Interest Law in India*, 36 J. INDIAN L. INST. 302, 306 (1994).

72 *Id.*

73 See, e.g., The Maintenance of Internal Security Act, No. 26 of 1971.

74 S. Muralidhar and Ashok H. Desai, *Public Interest Litigation: Potential and Problems*, in *SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA* 159, 160 (B. N. Kirpal ed., Oxford University Press 2000).

75 R. Sudarshan, *Courts and Social Transformation in India*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR* 153, 155 (Roberto Gargarella and Pilar Domingo eds., Ashgate 2006).

against the state were superseded by compliant judges, and Justice A. N. Ray was appointed as the Chief Justice of the Supreme Court.⁷⁶

Apart from reclaiming the moral high ground, which most institutions strive to do in democracies, what else led to the initiation of this most radical of Court-engineered tools? The connection between poverty and the need for legal aid and access to the courts had been previously made in two legal aid reform reports. The first in 1971 (authored by Justice Krishna Iyer, the only politician to be appointed a judge) and the second in 1973 (authored by Justice Bhagwati) indicated a larger role for the courts to ensure access to justice by the poor. These two judges were at the time two of the most vociferous supporters of PIL and expanded standing for all to access the courts, and, more importantly, they enabled the courts to address issues that contributed to poverty and disadvantage.

The 1977 Report on National Juridicare (prepared together by Justice Krishna Iyer and Justice Bhagwati) highlights the background of PIL jurisdiction in the courts:

In our expensive court system, it is impossible for the lower income groups and the poor to enforce rights. The poor people of a village may be prevented from walking along a public pathway by a feudal chief, immigrant workers may be denied fair wages, women workers as a class may be refused equal wages. Collective wrongs call for class action. The rule of *locus standi* requires to be broad-based and any organisation or individual must be able to start such legal action.⁷⁷

This was the justification for relaxing rules on standing. No longer was it necessary for the petitioner of a case to be the party injured or wronged. A citizen could bring a case on behalf of a class of injured people, irrespective of whether he or she was part of that class, since it was felt

76 Muralidhar and Desai, *supra* note 74, at 161.

77 *Report on National Juridicare*, THE MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS (Ministry of Law and Justice, and Company Affairs, Government of India 1977); cf. Dr. Jeremy Cooper, *Poverty and Constitutional Justice: The Indian Experience*, 44 MERCER L. REV. 611, 612 (1993).

that one of that class might well be far too disadvantaged to be able to access the court system. And so unfolded the story of the appellate courts of India striving to address the structural causes for poverty, a role restricted to the executive and legislature in most other countries. Upendra Baxi, for instance, terms PIL a “post-Emergency phenomenon” aimed at reviving the image of the court, tarnished by a few Emergency-era decisions, and also as an attempt to seek new grounds to legitimize judicial power.⁷⁸

The Court explains the character and rationale of PIL in *People's Union for Democratic Rights v. Union of India* (henceforth PUDR).⁷⁹ Justice Bhagwati (who coauthored the National Juridicare Report of 1977 with Justice Krishna Iyer) explains the inspiration for PIL by saying:

[T]hat public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief.⁸⁰

Justice Bhagwati goes on to say:

Public interest litigation, as we conceive it, is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them.⁸¹

78 Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation before the Supreme Court of India*, in *LAW AND POVERTY: CRITICAL ESSAYS* 291, 294 (N. M. Tripathi 1989).

79 3 S.C.C. 235 (India) (1982).

80 *Id.* at para. 2.

81 *Id.*

In *P.U.D.R.*,⁸² the Supreme Court of India conceives of PIL as a cooperative or collaborative effort by the petitioner, the state or public authority, and the judiciary to secure the observance of constitutional or basic human rights, benefits, and privileges upon the poor, down-trodden, and vulnerable sections of the society. The Court made three observations that capture the spirit of this nature of litigation, at least from the perspective of the judiciary: One, it viewed PIL as a “strategic arm of the legal aid movement”;⁸³ two, this was intended “to bring justice within the reach of the poor masses”; and, finally, this kind of litigation was not like “ordinary traditional litigation,” which was adversarial.⁸⁴

This case was indicative of the philosophical underpinnings or the motivation of the court in committing itself to PIL. Here was the instrument that the Court would use to bring justice to the masses. The state, against whom a PIL is usually filed, was expected not to treat this as an adversarial process, but as a matter of finding the best possible way to address systemic concerns. Here was the courtroom that would play mediator between the people and the executive, and the testing stone for that mediation would be the Constitution. Litigation was becoming the arena where the policies of the state were to be measured against the promises of the Constitution. With PIL, the Indian Supreme Court unsheathed its most powerful saber against injustice and also against the executive and the legislature.

However, political scientist Pratap Bhanu Mehta takes a different perspective. He says that that the Supreme Court has “managed to legitimize itself not only as forum of last resort for questions of governmental accountability, but also as an institution of governance.”⁸⁵ Mehta says

82 People's Union for Democratic Rights v. Union of India 3 S.C.C. 235 (India) (1982).

83 *Id.*

84 *Id.* at para. 2.

85 Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18(2) J. DEMOCRACY 70, 73 (2007).

this in the context of the Supreme Court's most radical innovation – social action or public interest litigation.⁸⁶ Here, as Mehta rightly notes, the Court watered down “standing” by allowing for anyone (not merely a directly affected party) to approach the court to correct “an alleged evil or injustice.”⁸⁷ The Court, Mehta says, has abandoned “adversarial fact-finding in favour of court-appointed investigative and monitoring commissions.”⁸⁸ Mehta suggests that PIL initiatives allow the Court to make policy and ask the executive to carry it out. The examples he lists for this include closing businesses on environmental grounds, building new housing for slum dwellers, and maintaining college courses.⁸⁹

Mehta’s critique is a powerful one. By diluting standing requirements, does the jurisprudence of enhanced access to the Court also enable it to circumvent the separation of powers stated in the Constitution and make policy? To make an extreme argument, in most PILs, the affected, the marginalized, and the dispossessed are represented by the unaffected and the rarely marginalized. The affected are rarely the parties of such mammoth constitutional cases, and the Court, by doing away with the adversarial character of litigation, can prod the parties to come around to constitutional values as laid down by itself.

4 Epistolary Jurisdiction of the Court

The Supreme Court moved one step beyond, even doing away with the formal requirements that usually permit approaching the court – the filing of a petition to make a case that needs resolution. The Court did so when, in a series of cases, it treated postcards and letters as legitimate petitions. And it is this “epistolary jurisdiction” for which the Court is most famous. That a postcard was enough to gain access to the Court was unprecedented. The Court was making its stand very clear: “If you

⁸⁶ *Id.*

⁸⁷ *Id.* at 71.

⁸⁸ *Id.*

⁸⁹ *Id.* at 73.

have a compelling story of violation, we will ensure the simplest possible way to reach us. Drop us a postcard.”

So began the catena of cases that came to set the Indian Supreme Court apart from all other apex courts, specifically in the way it ensured access. In *Sheela Barse v. State of Maharashtra*,⁹⁰ a journalist (Sheela Barse), in a letter addressed to the Chief Justice, stated that some women prisoners had been assaulted and tortured by the police while in custody. The Chief Justice treated this letter as a writ petition and directed the Legal Aid Committee of the State of Maharashtra to provide legal aid to the women prisoners on trial and to have separate lockups for women, with only female guards, among the many other orders it passed in this case.

In *Sunil Batra v. Delhi Administration*,⁹¹ a death row convict, Sunil Batra, was subjected to solitary confinement by the prison authorities. Batra brought this to the notice of the Chief Justice in a letter petition. A bench of five judges of the Supreme Court held that the statute governing the prisons did not empower the prison authority to impose solitary confinement upon a prisoner under death sentence and that solitary confinement is a substantive punishment that can only be imposed by the court of law.

In the second *Sunil Batra* case (*Sunil Batra II v. Delhi Administration*),⁹² Batra wrote a letter to the Chief Justice alleging that another prisoner was being tortured by the jail warden to extract money from his relatives. The Court appointed an *amicus curiae* to investigate this allegation. This investigation revealed that the prisoner was brutally tortured by the jail warden. Taking note of these facts, the Court passed detailed orders directing that the Superintendent of the Police prevent any further corporal punishment to the prisoner. It also ordered that lawyers nominated by the subordinate courts, high courts, and the Supreme

⁹⁰ 2 S.C.C. 96 (India) (1983).

⁹¹ 4 S.C.C. 494 (India) (1978).

⁹² 3 S.C.C. 488 (1980).

Court be given all facilities for interviews, visits, and confidential communication with prisoners concerning discipline and security considerations. Finally, the Court also provided that the state prepare a prisoner's handbook and comply with the United Nations Standard Minimum Rules for Treatment of Prisoners.⁹³

The Court extended this avenue of luxurious access to issues relating to the environment as well. The Supreme Court responded to a letter written by an organization working on environmental protection, which alleged unauthorized and illegal mining in the northern part of India.⁹⁴ The Court appointed a committee for inspection of these mines, and the Court directed closure of certain mines based on the recommendation of this committee and, when faced with the rapid deforestation that had resulted from rampant mining, ordered the large-scale planting of trees. The Court also directed establishment of a monitoring committee to oversee a reforestation program in those areas where these illegal mines operated and directed the State of Uttar Pradesh to deposit 500,000 rupees to create an initial fund for the monitoring committee.⁹⁵

In this case, the use of the instrument of an *amicus* (a traditional appointment in common law courts) by the courts from the second *Batra* case had now expanded to a committee that would have a more sustained engagement with the cause at hand. This committee was charged with inspecting the facilities in question and recommending relief – either as continuation of the facilities (in this case, mines) or to suggest their closure. More importantly, the Supreme Court also directed this committee to monitor the implementation of the reforestation measures. This is the next major step in the PIL frame of cases: the expansion of the role of the court to that of a monitor of implementation, a role traditionally associated with government.

93 United Nations, “Standard Minimum Rules for the Treatment of Prisoners” (Aug. 30, 1955), available at <http://www.unhcr.org/refworld/docid/3ae6b36e8.html>.

94 *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, Supp. (1) S.C.C. 504 (India) (1989).

95 *Id.* at para. 60.

Soon, the Supreme Court devised a method of appointing socio-legal commissions of inquiry to visit the alleged sites of injustice to collect all the necessary evidence, and the case was adjudicated on the basis of such evidence. The Court appointed social activists, teachers, researchers, journalists, and government and judicial officers as members of such inquiry commissions.⁹⁶ Further, to ensure enforceability, the Court set up monitoring committees.⁹⁷ Thus, the Supreme Court has certainly gone beyond the second wave of access to justice reform as discussed Cappelletti and Garth, by ensuring access to the Court even for the poor, marginalized, and unrepresented sectors of society.

It is the Supreme Court that best summarizes its own history of PIL. Recently, in *State of Uttaranchal v. Balwant Singh Chauhan*,⁹⁸ it categorized the PIL jurisprudence in India in three phases: (1) phase 1: the Supreme Court passed orders to protect the fundamental rights of the marginalized groups and sections of society who could not approach

96 Baxi, *supra* note 78, at 575.

97 See, e.g., *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, 2 S.C.C. 431 (India) (1985); Supp. (1) S.C.C. 504 (India) (1989). Exercising its epistolary jurisdiction, the Supreme Court registered a letter from an environmental protection group as a writ petition. This letter alleged that illegal mining the northern part of India adversely affected the ecology of the area. The Supreme Court constituted a committee to examine whether the safety standards laid down in the law governing mining activity were being followed and also whether there was any danger of landslide because of the quarrying activities. The Court also constituted an expert committee to investigate the issue of ecological disturbance, and air, water, and environmental pollution caused by the quarrying operations. Addressing the displacement caused by the mining activities, the Court directed establishment of a “Rehabilitation Committee,” and a monitoring committee for overseeing the reforestation program. See also *D. K. Joshi v. Chief Secretary, State of Uttar Pradesh* 9 S.C.C. 578 (India) (1999), in which the Supreme Court, responding to a petition alleging the polluted nature of drinking water in a town in India, constituted a monitoring committee to look into effective functioning of the various public authorities in charge of the drinking water supply, providing sewerage, and disposal of solid waste; *M. C. Mehta v. Union of India*, 6 S.C.C. 588 (India) (2004), in which the Supreme Court appointed a monitoring committee to ensure compliance with its orders prohibiting illegal industrial activities in residential areas.

98 3 S.C.C. 402, 427 (India) (2010).

the Court because of extreme poverty, illiteracy, and ignorance;⁹⁹ (2) phase 2: Supreme Court cases dealt with the protection and preservation of ecology, environment, forests, marine life, and so on;¹⁰⁰ (3) phase 3: Supreme Court cases dealt with issues of governance and the maintenance of probity, transparency, and integrity in governance.¹⁰¹ As has been argued, it may be impossible for PIL to “redress such grievous and ugly imbalances in social and political society, but it can expose such imbalances.”¹⁰² The *State of Uttarakhand v. Balwant Singh Chauhan* was a PIL challenging the appointment of the Advocate General of Uttarkhand (formerly Uttarakhand), alleging that he was ineligible for this appointment as he was beyond the age limit prescribed by the Constitution for such appointments. The High Court directed the state government to make a decision on this issue and apprise the Court. The state appealed this order to the Supreme Court of India. The Court held that this PIL was an abuse of the process of law and was filed for extraneous considerations, as the issue of the appointment of the Advocate General was well-settled law. The Supreme Court quashed the high court proceedings, imposed a penalty of 100,000 rupees on the petitioners, and also laid down guidelines for courts to assess the bona fide nature of the PILs filed.

4.1 Public Interest Litigation Cell at the Supreme Court

Even though this epistolary jurisdiction is now less frequently used by the Court, this avenue was given institutional space and form. A special PIL cell of the Supreme Court was established to deal with letter petitions. This epistolary jurisdiction of the Supreme Court is now

99 See, e.g., *Jasbhai Motibhai Desai v. Roshan Kumar*, 1 S.C.C. 671 (India) (1976); *Hussainara Khatoon (IV) v. State of Bihar* 1 S.C.C. 98 (India) (1980).

100 See, e.g., *M. C. Mehta v. Union of India*, 1 S.C.C. 395 (India) (1987); *Subhash Kumar v. State of Bihar*, 1 S.C.C. 598 (India) (1991).

101 See, e.g., *Vineet Narain v. Union of India*, 1 S.C.C. 226 (India) (1998); *Centre for Public Interest v. Union of India*, 7 S.C.C. 532 (India) (2003).

102 Dhavan, *supra* note 71, at 323.

regulated per the guidelines laid down by the Supreme Court in entertaining letter petitions. The categories of cases that are accepted as letter petitions are now restricted to (1) bonded labor; (2) neglected children; (3) nonpayment of wages and violation of labor laws; (4) petitions from jails complaining of harassment, speedy trial as a fundamental right, and so on; (5) harassment by police or death in police custody; (6) petitions against atrocities on women, in particular harassment of brides, bride burning, rape, murder, kidnapping, and so on; (7) petitions complaining of harassment of persons belonging to Scheduled Caste and Scheduled Tribes and economically “backward” classes; (8) petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wildlife, and other matters of public importance; and (9) petitions from riot victims and the like.¹⁰³

This staggering array of areas for which the Court is willing to accept letter petitions illustrates both the willingness of the Court to greatly improve access and also its commitment to be a “change maker.” A concerned citizen or a victim can petition the Court on actions from bonded labor or indentured servitude to environmental pollution. Why has the Court expressed such an unprecedented commitment to ensuring access? After all, aren’t constitutional courts or the highest courts of a country normally notoriously reticent in enabling access? The American Supreme Court typically hears about seventy-five to eighty cases a year.¹⁰⁴ The South African Constitutional Court decided about thirty cases between April 1, 2010, and March 31, 2011, and 115 new cases were filed during this period.¹⁰⁵ And the House of Lords hears around eighty

103 The Supreme Court of India, “Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received,” available at <http://supremecourtofindia.nic.in/circular/guidelines/pilguidelines.pdf>.

104 The Supreme Court of United States, available at <http://www.supremecourt.gov/faq.aspx>.

105 The Constitutional Court of South Africa, “Annual Performance Report: 2010/2011,” available at <http://www.constitutionalcourt.org.za/site/Admin/constitutional-court-annual-report-2010-11>.

to ninety appeals a year.¹⁰⁶ In contrast, the Supreme Court of India disposed of 79,621 cases between May 2010 and April 2011.¹⁰⁷

Part of the Court's motivations to enable such access and make change might well be due to the Court's conception of the role of the law in enabling social justice. As far back as 1964, Justice Gajendragadkar saw the role of social justice in adjudication to assist in the removal of socioeconomic disparities and inequalities.¹⁰⁸ In *Randhir Singh v. Union of India*,¹⁰⁹ Justice Chinappa Reddy, in directing that a driver in the Delhi police force should be paid wages equivalent to drivers in other departments, observed that "the Judges of the Court have a duty to redeem their constitutional oath and do justice no less to the pavement dweller than to the guest of the five-star hotel."¹¹⁰ And in the *Consumer Education and Research Centre* case, Justice Ramaswamy saw rule of law as a "catalyst, rubicon to the poor to reach the ladder of social justice."¹¹¹ Further, the judge, reiterating the constitutional promise of social, economic, and political justice, saw the interpretative role of the Court as aiming at the empowerment of the poor, to establish an egalitarian social order.¹¹²

Therefore, it is evident that the Court perceives the law as a tool to be used to enable those who are disadvantaged to access social justice and that the role of the Court was to participate in nation building by

106 The House of Lords, "House of Lords Briefing: Judicial Work," available at <http://www.parliament.uk/documents/lords-information-office/hoflbpjudicial.pdf>.

107 Supreme Court of India, "Monthly Pending Cases," available at <http://www.supremecourtofindia.nic.in/pendingstat.htm>.

108 J. K. Cotton Spinning and Weaving Mills Co. Ltd. v. Labour Appellate Tribunal of India, 3 S.C.R. 724, para. 19 (India) (1964). Although this case pertained to an industrial dispute between the workers and the management, Justice Gajendragadkar observed, "The concept of social justice is not narrow, or one-sided, or pedantic, and is not confined to industrial adjudication alone."

109 1 S.C.C. 618 (India) (1982).

110 *Id.* at para. 5.

111 *Consumer Education and Research Centre v. Union of India*, 3 S.C.C. 42, para. 19 (India) (1995); See also *Air India Statutory Corporation v. United Labour Union*, 9 S.C.C. 377, para. 43 (India) (1997).

112 *Air India Statutory Corporation*, 9 S.C.C. at para. 15 (1997).

empowering the poor and establishing a more egalitarian dispensation than the one that existed. This was the guiding philosophy of many of the judges of the court, and it explains the Court's commitment to PIL and enhanced access.

5 Enabling Access for the Ordinary

Has the Court enabled access and focused on the Constitution's brand of social justice merely in the large cases of great public interest? Has the apex court related these rarefied constitutional principles to the ordinary, everyday cases? By ordinary cases we mean, for instance, vehicular accidents or civil suits by indigent persons – essentially, those matters that actually define litigation and fill the hierarchy of courts that permeate India. Here, the statutory framework aids efforts at ensuring access to the court system. For instance, the Code of Civil Procedure via Order 33 provides for the institution of suits even by an indigent person.¹¹³ An indigent person includes a person who is not possessed of sufficient means to enable him to pay the fee prescribed by law to file such a claim.¹¹⁴

113 INDIA CODE CIV. PROC. ORDER 33, R.1.: "Suits may be instituted by indigent person – Subject to the following provisions, any suit may be instituted by an indigent person. Explanation I – A person is an indigent person, –

- (a) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or
- (b) where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit.

Explanation II – Any property which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the application, shall be taken into account in considering the question whether or not the applicant is an indigent person.

Explanation II – Where the plaintiff sued in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity."

114 INDIA CODE CIV. PROC. ORDER 33, R.1.

The Supreme Court negotiated the question of whether this provision for the indigent to approach the Court applies to the Motor Accidents Tribunal under a special statute dealing with motor accident claims.¹¹⁵ In *State of Haryana v. Darshana Devi*,¹¹⁶ the widow and the daughter of a person killed by a bus operated by the state transport service claimed compensation before the motor accidents tribunal but could not pay the court fees of this tribunal. The High Court of Punjab and Haryana held that the Civil Procedure Code provision exempting indigent persons from paying court fees also extended to the tribunal adjudicating motor accidents claims. The state of Haryana appealed to the Supreme Court against this order.

The Supreme Court, through Justice Krishna Iyer, one of the original architects of the PIL movement and author of the initial reports on legal aid discussed earlier, dismissed this appeal. In his opinion, the judge wrote, “access to court is an aspect of social justice and the State has no rational litigation policy if it forgets this fundamental.”¹¹⁷ Justice Krishna Iyer observed that the court must expand the jurisprudence of access to justice as an integral part of social justice and give the benefit of doubt “against levy of a price to enter the temple of justice.”¹¹⁸

In this case, Justice Krishna Iyer cites Cappelletti when discussing access to justice. He says, “[O]ur perspective is best projected by Cappelletti, quoted by the Australian Law Reform Commission.”¹¹⁹ He adds:

[T]he right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can

¹¹⁵ The Motor Vehicles Act, No. 59 of 1988, provides for the establishment of the Motor Accidents Claim Tribunal.

¹¹⁶ 2 S.C.C. 236 (India) (1997).

¹¹⁷ *Id.* at para. 5.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 237.

thus be seen as the most basic requirement – the most “basic human right” – of a system which purports to guarantee legal right.¹²⁰

Subsequently, in *A. A. Haja Muniuddin v. Indian Railways*,¹²¹ the Supreme Court reaffirmed that access to justice cannot be denied to an individual merely because he or she does not have the means to pay the prescribed fee. In this case, a special statute governing the disputes arising out of damage, deterioration, or nondelivery of goods entrusted to the railways for delivery required a claimant to pay certain fees to proceed before the claims tribunal. The claimant had suffered monetary losses when the wagon carrying his goods met with an accident. The claimant filed an application before the tribunal to allow him to proceed as an indigent person; this claim was rejected by the tribunal on the grounds that the Code of Civil Procedure did not apply to the claims under this special statute (the Railway Claims Tribunal Act, 1987). The Supreme Court again found that the provisions of an enactment must be broadly interpreted to ensure access to justice.¹²²

There are not many “ordinary” cases in which the Supreme Court has applied its access to justice jurisprudence. This could be for many reasons – perhaps, in ordinary cases, rules of standing are more strictly enforced, statutes more sternly construed, and appeals more rarely made to the highest court of the country. It also may be that such cases are decided on the facts, applying the statute in question; thus, these cases rarely (at least in the perception of the court) necessitate dwelling on constitutional values.

6 Conclusion

The Supreme Court’s access to justice jurisprudence is largely located in dilution of *locus standi* in public interest cases that implicate fundamental rights. These are the extraordinary cases that the Supreme Court

120 *Id.* at para. 5.

121 4 S.C.C. 736 (1992).

122 *Id.* at para. 5.

entertains. In the “ordinary” cases, the Court has been less creative. The language of judgments in the “ordinary” cases rarely dwells on access to justice. The dilution of *locus standi* and other innovative remedies have certainly ensured that the Supreme Court has dealt with the issues of those disadvantaged people who ordinarily would not have had access to the court system, including prisoners, tribal members, women, and children in juvenile homes.

The Court has certainly attempted to reach out to classes of persons hitherto unrepresented. And the Court’s radical creation – the PIL – along with its conception of access to justice, has ensured that large classes of socially and historically disadvantaged citizens are able to have their constitutional rights respected through access to the court system. Perhaps the desire to reclaim a moral authority post-Emergency may well have been one of the motivating factors for the Court to embrace this unusual role. But, equally so, the Court has been inspired by its firm belief that the law is an instrument that must facilitate social justice and that the Constitution must speak on behalf of those who have rarely been heard.

However, the true measure of the Supreme Court’s impact via PIL cases is in terms of the compliance with Court orders. As Sudarshan argues, the “decisions of the higher judiciary in public interest litigation have been more *symbolic* and less *instrumental* and for full realisation of their socio-economic rights, the poor and other disadvantaged groups need a lot more than favourable verdicts handed down by the Supreme Court and the High Court.”¹²³ Cooper appears to agree with this characterization, saying that the “political and the symbolic function of the court’s decision have exercised a far greater influence on Indian society than the formal decision between the parties.”¹²⁴

The efforts of the Supreme Court have borne fruit. Its expansion of *locus standi*, institution of innovative remedies, appointment of inquiry

123 Sudarshan, *supra* note 75, at 163.

124 Dr. Jeremy Cooper, *Poverty and Constitutional Justice: The Indian Experience*, 44 MERCER L. REV. 611 (1993).

commissions, and exercise of supervisory jurisdiction gives the Supreme Court of India an unparalleled role, and one that has ensured enhanced access to the Court. But access to justice then requires the implementation of the orders of the Court; this is the real test of a deliberative and representative democracy, one in which the executive is responsive and accountable, the Supreme Court has less of a role to play, and citizens and civil society have a greater burden.

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9 Access to Constitutional Justice in Colombia

Opportunities and Challenges for Social and Political Change

Manuel Iturralde

IN THIS CHAPTER, I DISCUSS THE ACCESS TO CONSTITUTIONAL justice in Colombia after the enactment of the 1991 Constitution, which created the Constitutional Court. I assess how the new constitutional framework and the decisions of the Constitutional Court have enhanced citizens' opportunities to access the constitutional jurisdiction, as well as the social and political transformations that such access has generated.

I also consider how social movements and organizations have taken advantage of access to constitutional justice to protect their constitutional rights and their social standing through legal strategies. Finally, I discuss the challenges that such strategies must face in order to achieve social and political transformations through the use of law.

To consider these topics, the chapter is based on a sociolegal perspective that understands the constitutional jurisdiction as part of the legal field, which is, in turn, a social field wherein different actors (judges, social movements, state agents, academics) interact and struggle to dominate the field and impose their worldview.

The Constitutional Jurisdiction and the Transformation of the Colombian Legal Field

After a difficult period marked by armed conflict and, particularly, by the war that the state waged against drug cartels in the 1980s, Colombian society welcomed the 1990s in high spirits – hopes for political change, peace, and social welfare were high. And it had good reasons for being hopeful: The Colombian government reached a truce with the Medellín Cartel (the most violent of the drug cartels, led by Pablo Escobar); César Gaviria, a young and modernizing politician from the Liberal Party was elected president; and a Constitutional Assembly was in session, entrusted with the enactment of a new Constitution. The National Constitutional Assembly, popularly elected on December 9, 1991, included new political movements¹ and traditionally excluded sectors of the Colombian population,² as well as the traditional parties (the Liberal and Conservative parties). The result of this democratic exercise is the 1991 Constitution, which declares that Colombia is an *Estado social de derecho* – a state governed by the social rule of law, a social state (something akin to the traditional definition of the welfare state)³ that

1 The government offered seats in the Assembly to members of some demobilized guerrilla groups. The M-19 movement, one of the most important guerrilla groups in Colombia, took part in the elections as a result of peace negotiations with the Barco government, in which the demobilization of the group and its transformation into a political party was agreed. The M-19 obtained the third-highest number of votes, securing more votes than the Conservative Party and the Liberal Party, the most traditional political parties in Colombia.

2 For example, members of women's rights and black movements obtained seats in the Assembly. The government guaranteed also a number of seats to representatives of the indigenous people of Colombia.

3 The translation of the term *Estado social de derecho* is a complex matter. Even though it presents features that are similar to those of the welfare state (a democratic form of government subjected to the rule of law, in which the state is in charge not only of the protection of political and civil rights, but also of the material well-being of all citizens through the enactment and protection of their economic and social rights), the term “welfare state” is usually translated into Spanish as *Estado de bienestar*. In Spanish-speaking countries the *Estado de bienestar* is usually associated with the system of government that developed in Europe, and later in the United States, at the end of the nineteenth century, but particularly after the Second World War in countries such as the United Kingdom. In this particular context, the welfare state is closely linked to a

promotes human dignity, freedom, equality, and democratic political participation through an ambitious bill of rights.

To consolidate the rule of law – a political and legal project that was taking place simultaneously in different parts of Latin America – the Constitutional Assembly emphasized the strengthening of the judiciary

Keynesian economy, which requires a state that actively intervenes in the economy to guarantee economic growth and the fair distribution of social and economic resources. The term *Estado de bienestar* is also a target of the critiques that the welfare state was subjected to in the 1970s and 1980s, particularly by liberal economists who defend freedom of markets, without state intervention, as a requirement for economic growth and as a safeguard of democracy. Consequently, the term *Estado social de derecho* works to differentiate itself from the welfare state and the critiques it has been subjected to, and is broadly used in many contemporary Latin American Constitutions, following the model of the Spanish and German Constitutions (which define their political regimes as democratic and social states). One of the main differences between the welfare state and the *Estado social de derecho*, especially in Latin America, is that the former is associated to the Keynesian economic model and to strong state intervention in the economy and social relations, while the latter presents a more flexible economic model with less state intervention, one that may accommodate very different political economies. For instance, neoliberalism has become a predominant pattern of political economy in the region; it has been accommodated, not without conflict, into the legal framework of the *Estado social de derecho*. To avoid confusion between these terms, in this chapter, I use the Spanish term *Estado social de derecho*. On this topic, see Asa Briggs, *The Welfare State in Historical Perspective*, 2 EUR. J. SOCIOl. 16–29 (1961); Harold Wilensky, *THE WELFARE STATE AND EQUALITY* (University of California Press 1975); Theda Skocpol and John Ikenberry, *The Political Formation of the American Welfare State in Historical And Comparative Perspective*, 6 ANN. REV. SOCIOl. 87–148 (1983); Claus Offe, *CONTRADICTIONS OF THE WELFARE STATE* (MIT Press 1984); Hannu Uusitalo, *Comparative Research on the Determinants of the Welfare State: The State of Art*, 12(4) EUR. J. POL. RES. 430–22 (1984); Douglas Ashford, *THE EMERGENCE OF THE WELFARE STATE* (Blackwell Publishers 1986); Gosta Esping-Andersen, *THE THREE WORLDS OF WELFARE CAPITALISM* (Princeton University Press 1990); Thomas Boje, *Welfare State Models in Comparative Research: Do the Models Describe the Reality?*, in *COMPARATIVE WELFARE SYSTEMS: THE SCANDINAVIAN MODEL IN A PERIOD OF CHANGE* (Bent Greve ed., Macmillan 1996); Giuliano Boloni, *Classifying Welfare States: A Two-Dimension Approach*, 26(3) J. SOC. POL'y 351–72 (1997); Ramón Eduardo Madriñan Rivera, *EL ESTADO SOCIAL DE DERECHO* (Ediciones Jurídicas Gustavo Ibañez 1997); Howard Glennerster and John Hills, *THE STATE OF WELFARE* (Oxford University Press 1998); Diego Valadés, *PROBLEMAS CONSTITUCIONALES DEL ESTADO DE DERECHO* (Universidad Nacional Autónoma de México 2002); Julio Alberto Tarazona Navas, *EL ESTADO SOCIAL DE DERECHO Y LA RAMA JUDICIAL* (Ediciones Doctrina y Ley 2002); Mauricio García Villegas, *Democracia y estado social de derecho: Aspiraciones y derechos en el constitucionalismo latinoamericano*, in *LA REFORMA POLÍTICA*

by creating new judicial institutions and guaranteeing their autonomy and independence, especially from the executive branch. The most significant of these institutions are the Attorney General's Office (*Fiscalía General de la Nación*), entrusted with the investigation and prosecution of crimes within the framework of a new semi-accusatory system (inspired by the U.S. model, but with remnants of Continental Europe's inquisitive system); the Superior Council of the Judicature (*Consejo Superior de la Judicatura*) in charge of the organization and management of the judicial branch; and the Constitutional Court (*Corte Constitucional*), whose main function is to guarantee the supremacy and integrity of the Constitution, as well as the effective protection of citizens' fundamental rights. The Constitution also included new judicial mechanisms to protect citizens' rights, such as the *acciones populares y de grupo*⁴

DEL ESTADO EN COLOMBIA: UNA SALIDA INTEGRAL A LA CRISIS (Miguel E. Cárdenas ed., Fescol 2004); Anthony Giddens, *Positive Welfare*, in THE WELFARE STATE READER (Christopher Pierson and Francis G. Castles eds., Polity Press 2006); Carole Pateman, *The Patriarchal Welfare State*, in THE WELFARE STATE READER (Christopher Pierson and Francis G. Castles eds., Polity Press 2006); Friedrich Von Hayek, *The Meaning of the Welfare State*, in THE WELFARE STATE READER (Christopher Pierson and Francis G. Castles eds., Polity Press 2006); Giuliano Bonoli, *The Politics of the New Social Policies: Providing Coverage against New Social Risks in Mature Welfare States*, in THE WELFARE STATE READER (Christopher Pierson and Francis G. Castles eds., Polity Press 2006); Luca Mannsori y Bernardo Sordi, *El estado social de derecho en la constitución*, in EL DERECHO FUNDAMENTAL DE IGUALDAD (Susana Mosquera coord., Monelos Palestra Editores 2006); Paul Pierson, *The New Politics of the Welfare State*, in THE WELFARE STATE READER (Christopher Pierson and Francis G. Castles eds., Polity Press 2006); Thomas Paine, *The First Welfare State?*, in THE WELFARE STATE READER (Christopher Pierson and Francis G. Castles eds., Polity Press 2006); Wil Arts and John Gelissen, *Three Worlds of Welfare Capitalism or More? A State-of-the-Art Report*, in THE WELFARE STATE READER (Christopher Pierson and Francis G. Castles eds., Polity Press 2006), María Del Rosario Huerta Lara, *Los conceptos de Estado social de derecho, bienestar social e interés colectivo*, REVISTA LETRAS JURÍDICAS 18 (2008).

4 Article 88 of the Constitution defines popular and class actions as follows: "The law will regulate popular actions for the protection of collective rights and interests related to the homeland, space, public safety and health, administrative morality, the environment, free economic competition, and others of a similar nature. It will also regulate the [class] actions arising out of harm caused to a large number of individuals, without barring appropriate individual action.

(popular and class actions), and especially the *acción de tutela*⁵ (a writ for the protection of constitutional rights), whose highest judicial instance is the Constitutional Court.

In this sense, the 1991 Constitution improved access to constitutional justice in order to effectively protect constitutional rights, the rule of law, and democratic participation.⁶ Not only this, it also entrusted the Constitutional Court, the highest judicial authority of the constitutional jurisdiction, with broad powers and autonomy to review laws enacted by Congress and, exceptionally, the executive. The Constitution establishes an automatic judicial review of statutes and norms that have the force of law; thus, the Constitutional Court checks that they respect both formal and material constitutional standards. The Constitution also grants to any citizen the right to file an *acción pública de inconstitucionalidad* (a writ for constitutional judicial review) against any statute enacted by Congress (or any norms enacted by the executive that have the force of law), which, according to the citizen's claim, violate the Constitution. Since the *acción pública de inconstitucionalidad* is such an open and accessible mechanism,⁷ it works not only as a democratic and participatory way of exerting control on political power, but also as an effective tool to protect fundamental rights by allowing the possibility of challenging laws that violate such rights.

The Constitutional Court also plays a fundamental role in protecting citizens' rights by acting as a last judicial instance to the *acción de tutela*. Through the review mechanism (*revisión*), the Court has

“In the same way, it will define cases of civil liability for damage caused to collective rights and interests.”

5 According to article 86, “Every person has the right to file a writ of protection before a judge, at any time or place, through a preferential and summary proceeding, for herself or by whomever acts in her name for the immediate protection of her fundamental constitutional rights when that person fears the latter may be violated by the action or omission of any public authority.”

6 Manuel José Cepeda, *POLÉMICAS CONSTITUCIONALES*, 110 (Legis 2007).

7 It does not require a lawyer, or that a particular case affects the plaintiff's rights. It is thus an abstract form of constitutional control. As a result, the Constitutional Court's rulings are *erga omnes*, and if the Court declares that a norm violates the Constitution, it means that it is invalid and is no longer part of the legal system.

discretionary power to select and review *tutelas*⁸ in order to make rulings that not only may review the case and quash previous judgments, but also may set constitutional precedents vis-à-vis the interpretation and judicial protection of fundamental rights.

The constitutional judicial review powers that the Constitution granted to the Constitutional Court, together with the Court's progressive activism during the past two decades, have kick-started a political, legal, and social process that has constitutionalized ordinary law and the everyday life of citizens.⁹ Such a process has pitted two legal discourses against each other: new constitutionalism¹⁰ or new law (*Nuevo Derecho*), as some academics call it,¹¹ on the one hand, and traditional legal formalism, which has prevailed in the Colombian legal field, on the other hand.

The former defends a progressive understanding of the 1991 Constitution and the *Estado social de derecho*, claiming that, under the new constitutional and political framework, the Constitution is to be enforced and takes precedence over legislation in order to effectively protect the fundamental rights of all citizens and to guarantee their economic and social well-being. Meanwhile, legal formalism holds a more conservative view of the Constitution and the role of the judiciary. Even though the Constitution is the fundamental norm of a legal system and has a binding character, the legislative branch has democratic legitimacy and the ability

8 All *tutela* decisions, once they are definitive, are sent to the Constitutional Court.

9 Rodrigo Uprimny, *Las transformaciones de la administración de justicia en Colombia*, in 1 EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA 301–02 (Mauricio García and Boaventura de Sousa Santos eds., Colciencias, Ediciones Uniandes, Universidad de Coimbra, Instituto Colombiano de Antropología, Universidad Nacional de Colombia, Siglo del Hombre 2001).

10 Cepeda, *supra* note 6; César Rodríguez, LA GLOBALIZACIÓN DEL ESTADO DE DERECHO 54–61 (Ediciones Uniandes 2009); Luis Prieto Sanchís, JUSTICIA CONSTITUCIONAL Y DERECHOS FUNDAMENTALES (Trotta 2003); NEOCONSTITUCIONALISMO(S) (Miguel Carbonell ed., Trotta 2003); TEORÍA DEL NEOCONSTITUCIONALISMO (Miguel Carbonell ed., Trotta 2007).

11 Diego Eduardo López Medina, EL DERECHO DE LOS JUECES 322–26 (Legis; Universidad de los Andes 2002; 2nd ed. 2006); Diego Eduardo López Medina, TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINOAMERICANA 435–41 (Legis; Universidad de los Andes 2004).

to develop and enforce its principles and bill of rights through legislation. Following the democratic principle of separation of powers, the judiciary must display self-restraint and limit itself to interpreting and applying the law, following the legal standards set by the legislative branch. Thus, legal formalism sees judicial activism as a negative feature, as an abuse of judicial power that undermines representative democracy.¹²

New constitutionalism's interpretation of the legal meaning and binding force, as well as the social and political function, of the Constitution entails important consequences: It means that judges, and particularly constitutional judges heading the Constitutional Court, have the constitutional duty to protect fundamental rights and the principles of the *Estado social de derecho*; to do so, if necessary, the judges, in exercise of their constitutional powers, may even nullify statutes enacted by Congress, either in particular cases,¹³ or, in the case of the Constitutional Court, permanently. It also means that economic and social rights are as important as civil and political rights, for they are essential to making the state responsible for the guarantee of the economic and social well-being of all citizens. Thus, economic and social rights are justiciable; it is the duty of judges to enforce them, wherever possible. Consequently, under this view, the Colombian constitutional order is based on social justice, and it is the state's duty to attain it through public policies, but also through judicial action, which may help in shaping and implementing these policies.

Such a view of the Colombian constitutional order and the role that the judiciary plays is key to progressive judicial activism, understood as judicial power to effect social change through policy making¹⁴ – in this case, to make constitutional rights and principles a reality. This kind of

12 Christopher G. Buck, *Judicial Activism*, in 2 ENCYCLOPEDIA OF ACTIVISM AND SOCIAL JUSTICE 786 (Gary L. Anderson and Kathryn Herr eds., Sage 2007).

13 This is called a constitutionality exception (*excepción de constitucionalidad*), which derives from article 4 of the Constitution: “The Constitution is the supreme law. In all cases of incompatibility between the Constitution and the law or any other legislation or regulation, the constitutional provisions will apply.”

14 Buck, *supra* note 12.

progressive judicial activism, which is very controversial, needs a legal and theoretical justification. In Colombia, new constitutionalism and new law discourses have provided such justification. These discourses, defended by justices and judicial clerks of the Constitutional Court, other members of the judiciary, academics, and, increasingly, law students, rely on the idea that law, even though traditionally a tool of social control, is also capable of contributing to the achievement of social change, following the guidelines of the Constitution and the tenets of social justice, democracy, and freedom set forth in the *Estado social de derecho*.

This implies that the legal system is not only made of legislated rules that the judiciary must apply, but also of constitutional rules and principles that take precedence over legislation. Since constitutional rights and principles, even though they are enforceable, tend to be open textured and to conflict with each other when applied to particular cases or situations, the constitutional judge has the important task to balancing carefully such rights and principles, as well as adapting them to social change, in order to achieve social justice and protect the dignity of citizens through his or her decisions. Such task requires the judiciary to be bold and creative, to display an active role in the interpretation and enforcement of constitutional rights and principles.

The leading role that the judiciary, particularly the constitutional jurisdiction, plays in the *Estado social de derecho*, as well as in new constitutionalism and new law discourses in Colombia, also entails a different notion of the judicial precedent. Judicial precedent has become a source of law, identical to legislation, and, in the case of the Constitutional Court's rulings, it takes precedence over statutes enacted by Congress.

New constitutionalism and new law discourses confront the basic assertions of legal formalism, which is the legal discourse that has predominated in Latin America for centuries.¹⁵ Legal formalism claims that law is a complete, coherent, and autonomous system, mainly composed

15 Mauricio García and César Rodríguez, *Law and Society in Latin America: Toward the Consolidation of Critical Sociolegal Studies* 9(26) BEYOND LAW 11–57 (2003).

of rules enacted by the legislative body. Accordingly, the legal system contains all the answers to legal problems or conflicts that may arise, and the role of the judiciary is to apply the system's rules to solve such problems. Legal formalism is also attached to a classical conception of liberal democracy, which features a radical separation of powers, in which rules enacted by the legislative branch are the main legal source and judges are in charge of their application, through a logic-deductive process, to particular cases. Thus, for legal formalism, judicial precedent is only an auxiliary criterion in the application of law.¹⁶

The 1991 Constitution has a generous bill of rights, which includes not only civil and political rights, but also social and economic rights – a main feature of the *Estado social de derecho* – as well as a powerful and independent constitutional jurisdiction equipped with broad and effective judicial mechanisms to protect constitutional rights. This has brought justice closer to citizens' needs and expectations vis-à-vis different kinds of problems and conflicts that affect their lives and well-being. In a society that traditionally has regarded the judicial system – and especially access to justice – as expensive, ineffective, and unequal, one that usually benefits the economic and political elites, this is a major change of perception toward state institutions.

In Colombia, the academic and legal debate between new constitutionalism and legal formalism is therefore an ongoing struggle for the predominance of certain actors (mostly legal academics and members of the judiciary – particularly high-ranking judges, politicians, and public officers), hierarchically situated, over the legal field.¹⁷ For instance, one object of debate concerns who has the last word on the interpretation and enforcement of constitutional rules and principles, since this question delineates who holds the greatest power to define the

16 Daniel Bonilla, Legal Formalism, Legal Education and the Professional Practice of Law in Latin America (2011) (unpublished manuscript, on file with author); López Medina, *supra* note 11, at 266–69 (2006); López Medina, *supra* note 11, at 129–30 (2004).

17 López Medina, *supra* note 11, at 319–26 (2006).

law and how it is to be enforced, and therefore also delineates who holds the keys to a legal system that defines and constrains political power.

Taking this background into account, in this chapter, I will discuss how the new constitutional framework and the progressive activism of the Constitutional Court have enhanced citizens' opportunities to access the constitutional jurisdiction to protect their rights and strategically use law as a tool to achieve political and social change. Social movements and organizations, particularly those that represent the interests of groups traditionally excluded and discriminated against (such as women, Afro-Colombians, indigenous populations, members of the LGBT community, and trade unions), have taken advantage of this broad access to constitutional justice to protect their constitutional rights and their social standing through legal strategies. Nevertheless, as it has been shown, such judicial and social activism has met with stern resistance. The keepers of the traditional legal order and the *doxa* that sustains and legitimizes it – and which legal formalism embodies – have opposed new constitutionalism, not simply as a matter of principle, but as a way of securing their influential hierarchical positions in the legal field and its matching worldview.

Through a sociolegal perspective, and following Bourdieu's views on the legal field as a social field (in which different actors interact and struggle to dominate the field and impose their worldview),¹⁸ I will develop the hypothesis that access to constitutional justice in Colombia has become a powerful and promising mechanism of redistribution of political and social power, one that has benefited especially those groups excluded from the public debate and who have been marginalized by an unfair and unequal social and economic order. Nevertheless, such progress is endangered by the opposition of actors and ideologies that tend to defend the status quo, and who pose a great challenge to new constitutionalism and its strategy to achieve social and political

18 Pierre Bourdieu, *Elementos para una sociología del campo jurídico*, in LA FUERZA DEL DERECHO (Ediciones Uniandes, Instituto Pensar–Pontificia Universidad Javeriana, Siglo del Hombre 2000).

transformations through the direct application of the Constitution and the justiciability of economic and social rights.

To demonstrate this hypothesis, my argument will be divided into four sections. In the first section, taking into account the chief problems of access to justice in Colombia, which the constitutional jurisdiction seeks to address – mainly courts' work overload, slowness, and inefficacy in solving social conflicts – I will describe the Constitutional Court's performance to improve access to justice, control political power, and protect citizens' rights, mainly through the Court's rulings regarding *acciones públicas de inconstitucionalidad* and *tutelas*, which are the citizens' main mechanisms to access the constitutional jurisdiction. The Constitutional's Court intense activity, particularly regarding *acciones de tutela*, shows the wide accessibility of the constitutional jurisdiction, especially for disadvantaged persons and groups who do not have access to or face serious difficulties with accessing ordinary justice or public policy debates that affect their rights and interests. The Court's performance also indicates the reach of its role in the protection of fundamental rights and the new constitutional order, as well as the transformation of legal discourse. In this sense, the Court's rulings are not only abundant, but many of them have also an instrumental and symbolic impact on vital public debates and the political struggle for social change. Thus, different social movements have resorted to the constitutional jurisdiction as part of a broader strategy to achieve their political goals and social emancipation.

In Section 2, I discuss how some particular global and local conditions – among them the spread of new constitutionalism and progressive judicial activism in different countries (especially from the Global South), a new constitutional framework, and the rise of a new and progressive view of law in Colombia – have favored the Constitutional Court's progressive judicial activism and the constitutionalization of law and citizens' everyday lives. This, in turn, has transformed the legal field and affected the struggle between two opposing worldviews on law and its social and political role – legal formalism set against new constitutionalism.

In Section 3, I assess the impact of the Constitutional Court's activism and its limits in the pursuit of social change and the emancipation of social groups traditionally ignored by the legal system and excluded from the political debate that takes place in the legislative branch. I claim that, despite its limits and setbacks, the Court's activism has changed over time into a more principled and cautious form of activism that seeks to enforce the Constitution, achieve social justice, and strengthen deliberative democracy, rather than threatening it, by stimulating the political debate and helping to overcome institutional blockages that hinder the design and implementation of public policies that address social injustice.

In the fourth and conclusive section, I consider the opportunities and challenges that the Constitution, the constitutional jurisdiction, and new constitutionalism face in consolidating themselves as real tools of social change.

1 Access to Constitutional Justice: The Constitutional Jurisdiction Performance

1.1 The Main Problems of Access to Justice in Colombia

The main problems of access to justice in Colombia have been broadly diagnosed by different studies and academic research. They include a significant work overload in all jurisdictions, which results in high rates of inefficacy, slowness, and impunity. According to Uprimny, Rodríguez, and García – who re-create Galanter's dispute pyramid in the Colombian context – by 1997, around 52.2 percent of judicable conflicts were taken before courts in urban areas. Of those cases, more than 50 percent of users experienced difficulties in accessing justice or could not access justice at all; 10.5 percent accessed justice with difficulties (e.g., they struggled to understand the complexities, legal aspects, and economic costs of judicial processes; they found it hard to select and afford a suitable lawyer); 4.3 percent did not access justice because their claims

were not heard; and 37.5 percent did not proceed with the judicial process because of the perceived difficulties in succeeding.¹⁹

Although there is a significant gap between the social demand for justice and the state's actual response through the judicial system, this is not the only setback in the access to justice: The reduced supply of state's justice makes it a scarce good, which becomes expensive, selective, and exclusive. For instance, civil justice serves private interests, not the public good, because repeat players²⁰ – usually big corporations – make the most of it through their economic, cultural, and social capital. They have the money to pay for the best law firms, which routinely take their cases before courts. An occasional defeat of a repeat player does not affect him or her as much as it affects a person who only occasionally resorts to courts (Galanter's one-shooter), who has much more at stake.²¹ Thus, the executive judicial process (*proceso ejecutivo*) overloads civil courts as corporations seek judicial recovery of small debts from thousands of debtors.²²

A stark example of the inequality of access to ordinary justice, to the benefit of powerful social actors, and the Constitutional Court's activism to redress such inequality, is the Colombian financial crisis of the late 1990s. The financial crisis seriously affected mortgage debtors (approximately 200,000 families²³) who could no longer afford the rising interests

19 Rodrigo Uprimny, César Rodríguez, and Mauricio García, *Las cifras de la justicia*, in *JUSTICIA PARA TODOS? SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLOMBIA* 351 (Rodrigo Uprimny, César Rodríguez, and Mauricio García eds., Norma 2006).

20 Marc Galanter, *Litigation in America*, 31(1) UCLA L. REV. 4–72 (1983).

21 *Id.*

22 Uprimny, Rodríguez, and García, *supra* note 19, at 343, 345–47, 351–52 (2006); Uprimny, *supra* note 9, at 273–74; César Rodríguez, *La justicia civil y de familia*, in 1 *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA* (Mauricio García and Boaventura de Sousa Santos eds., Colciencias, Ediciones Uniandes, Universidad de Coimbra, Instituto Colombiano de Antropología, Universidad Nacional de Colombia, Siglo del Hombre 2001).

23 Rodrigo Uprimny and Mauricio García, *Corte Constitucional y emancipación social en Colombia*, in *EMANCIPACIÓN SOCIAL Y VIOLENCIA EN COLOMBIA*, 488 (Mauricio García and Boaventura de Sousa Santos eds., Norma 2004).

on their mortgages and started losing their homes through executive processes. This was one of the most remarkable examples of the Constitutional Court's activism vis-à-vis social rights. Since the Colombian government and Congress were not very receptive to the mortgage debtors claims, many of them created social organizations that, with the support of lawyers, filed *tutelas* against banks and financial corporations, and challenged statutes that regulated the mortgage market, claiming the protection of their fundamental right to decent housing. Between 1998 and 1999, through the review of hundreds of *tutelas* filed by mortgage debtors, in most cases the Court ruled against the banks and financial corporations and protected the social right to housing of homeowners in a time of financial crisis and high unemployment rates. Accordingly, the Court ordered banks to reassess the interests and debts of mortgage debtors.²⁴ In addition, the Court also displayed a bold and much criticized²⁵ activism because it reviewed the constitutionality of the statutes regulating the housing finance system, ruled that they violated the Constitution, and ordered Congress to enact a new statute, one that followed the standards set by the Court, within seven months.²⁶

1.2 *The Constitutional Jurisdiction Performance*

Under a context of restrained and unequal access to justice, the strengthening of the constitutional jurisdiction brought about by the 1991

24 See, among others, decisions T-1188 of 2005, T-1255 of 2005, T-258 of 2006, T-363 of 2006.

25 Financial corporations, business groups, the Colombian government, members of Congress, and economists accused the Court of overstepping its jurisdiction, thus violating the separation of powers, and of lacking the technical knowledge to make informed economic decisions. See Uprimny and García, *supra* note 23, at 489; César Rodríguez G. and Diana Rodríguez F., *CORTES Y CAMBIO SOCIAL: CÓMO LA CORTE CONSTITUCIONAL TRANSFORMÓ EL DESPLAZAMIENTO FORZADO EN COLOMBIA* 28 (Dejusticia 2010); Sergio Clavijo, *Fallos y fallas de la Corte Constitucional*, in *EL CASO DE COLOMBIA 1991–2000* (Alfaomega 2001); Salomón Kalmanovitz, *LAS INSTITUCIONES Y EL DESARROLLO ECONÓMICO EN COLOMBIA* (Norma 2001).

26 See decision C-700 of 1999; Uprimny and García, *supra* note 23, at 489; Rodríguez and Rodríguez, *supra* note 25, at 11.

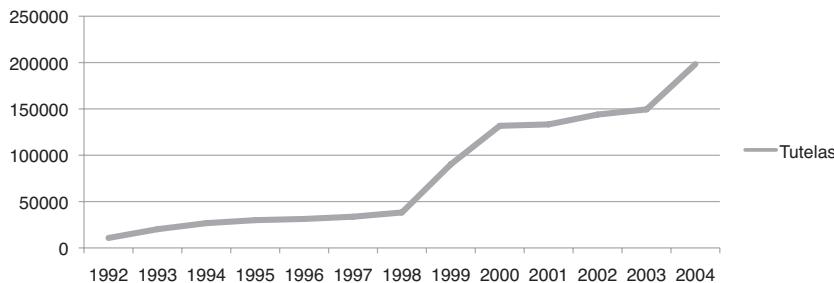


Figure 9.1. Number of *tutelas* filed (1992–2004). Source: Manuel José Cepeda, *POLÉMICAS CONSTITUCIONALES* (2007).

Constitution, and particularly the creation of the Constitutional Court as a specialized and independent body in charge of the protection of the Constitution and citizens' rights, produced an incredible increase of social demand for constitutional justice. Such demand was facilitated by the fact that all citizens now had at their hands effective, cheap, and simple judicial mechanisms – mainly *tutela*, but also the *acción pública de inconstitucionalidad*, as well as popular and class actions – to protect their rights and demand their participation in public decisions that affected them.

According to available figures, which unfortunately do not cover the twenty years of the Court's existence, citizens increasingly have accessed the constitutional jurisdiction to protect their rights and interests. This is especially the case of the *tutela*, whose social demand has increased steadily throughout the years. Between 1993 and 2004, the number of *tutelas* filed increased from 20,000 to 198,000 – a tenfold increase²⁷ (see Figure 9.1).

The increasing percentage of *tutelas* filed between 1994 and 2004 is significant when compared to the entries of ordinary justice²⁸ and administrative justice.²⁹ Compared to ordinary justice, in 1994, the number of

27 Uprimny, Rodríguez, and García, *supra* note 19, at 354; Cepeda, *supra* note 6.

28 Ordinary justice in Colombia comprises civil justice, family justice, criminal justice, and labor justice.

29 Contentious administrative justice solves conflicts arising between citizens and the state.

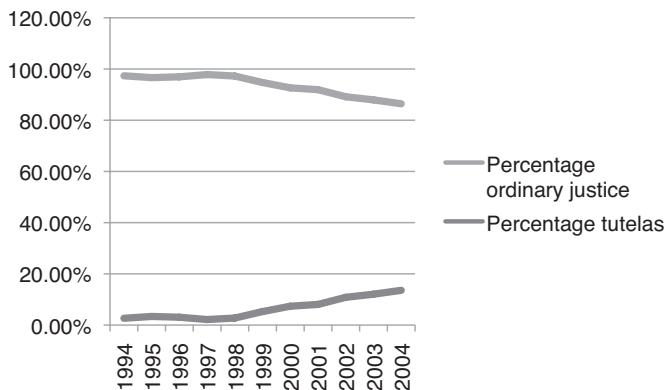


Figure 9.2. Proportion of *tutelas* to ordinary justice entries. *Source:* Manuel José Cepeda, *POLÉMICAS CONSTITUCIONALES* (2007); Consejo Superior de la Judicatura, *ESTADÍSTICAS JUDICIALES* (2007).

tutelas filed represented 2.65 percent of the total, whereas entries of ordinary justice equaled 97.35 percent. By 2004, *tutelas* represented 13.57 percent and entries of ordinary justice, 86.43 percent (see Figure 9.2).

As for administrative justice, the proportion of *tutelas* filed is even higher. In 1994, *tutela* entries corresponded to 52.57 percent of the total, whereas administrative justice entries corresponded to 47.43 percent. By 2004, *tutelas* represented 74.69 percent and administrative justice equalled 25.31 percent³⁰ (see Figure 9.3).

The workload of the Constitutional Court has increased as well during the past two decades, as shown by the number of constitutional judicial reviews and *tutelas* that it has decided. The number of *tutelas* that the Court has reviewed broadly exceeds the number of constitutional judicial reviews. The number of judicial reviews increased steadily until reaching a peak in 2000 (with 396 rulings) and then gradually decreasing, reaching 182 decisions in 2010 (see Figure 9.4).

The total number of Constitutional Court rulings was 234 in 1992, but 999 in 2010. The number gradually increased from 1997 until reaching a

³⁰ Cepeda, *supra* note 6; Consejo Superior de la Judicatura, *ESTADÍSTICAS JUDICIALES* (2007).

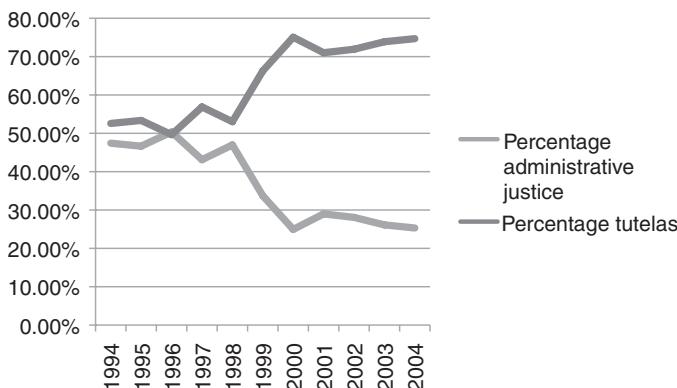


Figure 9.3. Proportion of *tutelas* to administrative justice entries. *Source:* Manuel José Cepeda, POLEMICAS CONSTITUCIONALES (2007); Consejo Superior de la Judicatura, ESTADÍSTICAS JUDICIALES (2007).

peak in 2000, after which it decreased and stabilized at between 1,000 and 1,200 decisions per year³¹ (see Figure 9.5).

1.3 The Performance of the Constitutional Court Regarding the *Tutela*

As shown by the previous figures, the social demand for constitutional justice, particularly *tutelas*, notably increased between 1998 and 2000. This was a period of deep economic and financial crisis in Colombia, following a global trend triggered by the crises of the Russian, South-east Asian, and Argentine financial markets.³² Thus, Colombian citizens resorted to *tutelas* to claim the protection of their social and economic rights, which were badly impacted by high unemployment rates and the retreat of social security services. Even though the Constitution establishes that *tutela* only proceeds for the protection of fundamental

31 Corte Constitucional, “Estadísticas” (Oct. 12, 2011), available at <http://www.corteconstitucional.gov.co/relatoria/CONSOLIDADO%20ESTADISTAS%201992-2011.htm>.

32 Joseph Stiglitz, GLOBALIZATION AND ITS DISCONTENTS (W. W. Norton 2002).

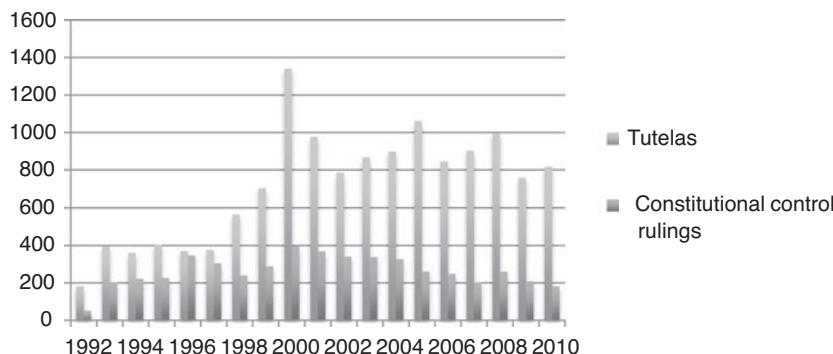


Figure 9.4. *Tutelas* and constitutional control rulings decided by the Constitutional Court (1992–2010). *Source:* Corte Constitucional, ESTADÍSTICAS (Oct. 12, 2011), http://www.corteconstitucional.gov.co/relatoria/CONSOLIDADO_percent20ESTADISTAS_percent201992–2011.htm.

rights – which are mainly civil and political rights – the Constitutional Court's jurisprudence has recognized since 1992 the justiciability of social and economic rights whenever they are connected to a fundamental right (such as life or human dignity) in a particular case, and therefore

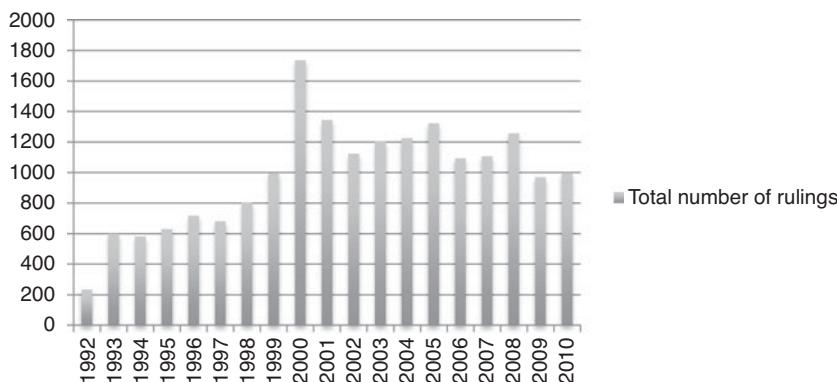


Figure 9.5. Total number of the Constitutional Court's rulings (1992–2010). *Source:* Corte Constitucional, ESTADÍSTICAS (Oct. 12, 2011), http://www.corteconstitucional.gov.co/relatoria/CONSOLIDADO_percent20ESTADISTAS_percent201992–2011.htm.

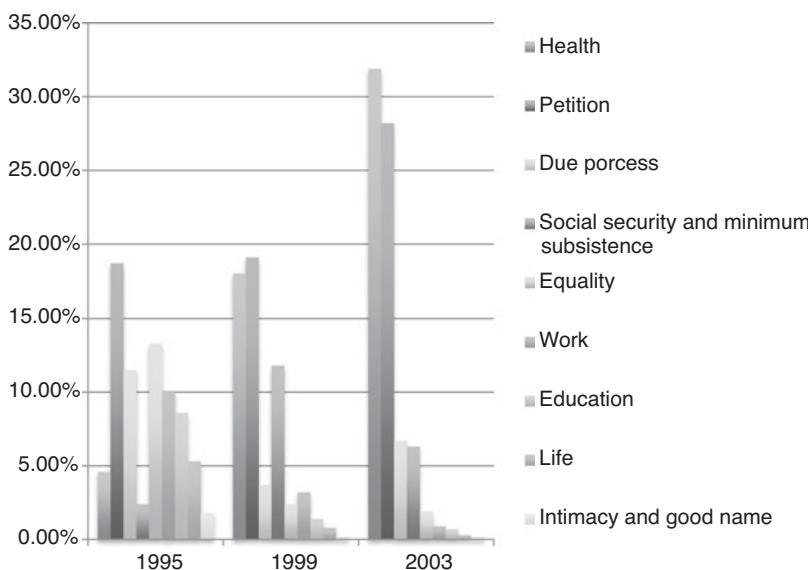


Figure 9.6. Proportion of rights claimed through *tutelas* (1995–2003). *Source:* Manuel José Cepeda, *POLÉMICAS CONSTITUCIONALES* (2007).

may also be protected through a *tutela*.³³ This situation is reflected in the proportion of social and economic rights whose protection was claimed by citizens through *tutela* actions. The available data, which are limited, show that between 1995 and 2003 social and economic rights claims increased; by 2003, they were the first group of rights claimed through *tutelas*, representing 39.8 percent of the total; in 1995, they corresponded to 26.2 percent and, in 1999, to 34.5 percent³⁴ (see Figure 9.6).

The widespread use of the *tutela*, and the kind of rights that citizens claim through this mechanism, illustrates how, given the limited access

33 See the Constitutional Court's decisions T-02 of 1992 and T-42 of 1992.

34 Cepeda, *supra* note 6. See also Uprimny, Rodríguez, and García, *supra* note 19, at 359; Mauricio García and César Rodríguez, *La acción de tutela*, in 1 *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA*, 424–25 (Mauricio García and Boaventura de Sousa Santos eds., Colciencias, Ediciones Uniandes, Universidad de Coimbra, Instituto Colombiano de Antropología, Universidad Nacional de Colombia, Siglo del Hombre 2001).

to ordinary justice arising particularly in times of economic and social crisis, access to the constitutional jurisdiction in Colombia has become a strategy to replace (at least partially) everyday ordinary justice. A high percentage of *tutelas* filed between 1992 and 1996 referred to small causes that should have been solved by ordinary judicial mechanisms that proved to be ineffective, expensive, or difficult to access.³⁵ In addition, the *tutela* has proved an effective way of securing the basic living standards that define the *Estado social de derecho*. Thus, the Constitutional Court jurisprudence, following the tenets of new constitutionalism, recognized the justiciability of social and economic rights, because the Constitution is conceived as a norm to be enforced, not simply a political manifesto.

Despite the Constitutional Court's progressive activism regarding the *tutela* and its protection of fundamental rights, the available information shows that the Court has been cautious in conceding *tutelas*, especially for procedural reasons. During the first years, the Court denied most of the *tutelas* it reviewed. This is not surprising, since *tutela* was a judicial mechanism new to all citizens who used it; therefore, the Court selected several cases not so much to grant fundamental rights but to set constitutional precedents regarding the adequate use of the *tutela*.³⁶ In the following years, as *tutelas* became known to citizens due to the Constitutional Court's jurisprudence, the Court granted more *tutelas* – on average, half of those selected. This may show that an important criterion for the Court to select cases became the effective protection of rights, in order to illuminate their reach and content (see [Figure 9.7](#)).

Available figures also show that the Constitutional Court is able to review only a small fraction of the *tutelas* it receives; the average between 1992 and 2004 was 2.2 percent³⁷ (see [Figures 9.8](#) and [9.9](#)).

35 García and Rodríguez, *supra* note 34, at 448–50.

36 *Tutela* is an exceptional mechanism that, according to the Constitution, may be used only when there are no other judicial remedies available to protect the rights of the claimant. It also may be used as an interim measure to avoid irreversible harm.

37 Cepeda, *supra* note 6.

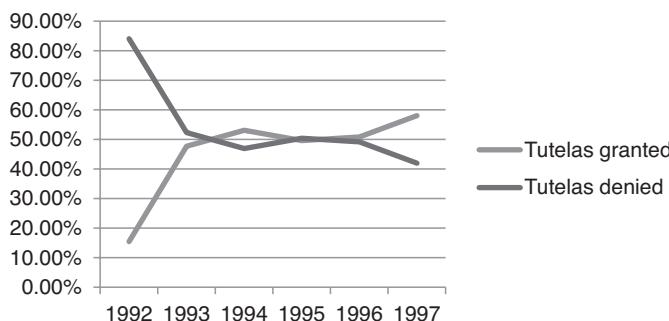


Figure 9.7. *Tutelas* granted and denied by the Constitutional Court (1992–97).
 Source: Manuel José Cepeda, *La Corte Constitucional: Un balance estadístico positivo*, in *LA CORTE CONSTITUCIONAL: EL AÑO DE LA CONSOLIDACIÓN 9* (Observatorio de Justicia Constitucional, Balance jurisprudencial de 1996); Libardo Ariza, *La Corte en números: Un balance estadístico*, in *DERECHO CONSTITUCIONAL: PERSPECTIVAS CRÍTICAS 440* (Manuel José Cepeda ed., 1999).

Nevertheless, there is a telling contrast between the percentage of *tutelas* that the Constitutional Court grants and the amount of *tutelas* that the highest courts of ordinary and contentious administrative jurisdictions (the Supreme Court of Justice and the Council of State, respectively) concede. Although not many data are available, between 1992 and 1995, the Council of State only granted 8.31 percent of the *tutelas* it studied, whereas the Supreme Court only granted 6.34 percent

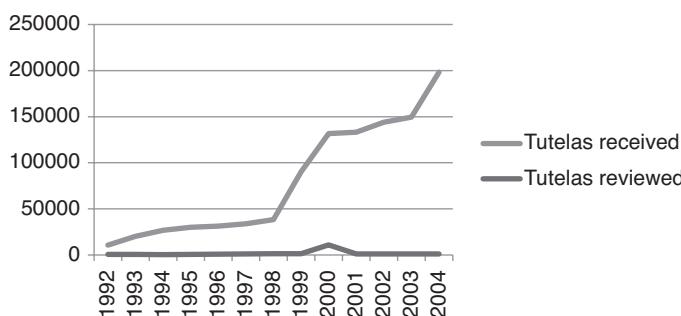


Figure 9.8. *Tutelas* received and reviewed by the Constitutional Court (1992–2004). Source: Manuel José Cepeda, *POLÉMICAS CONSTITUCIONALES* (2007).

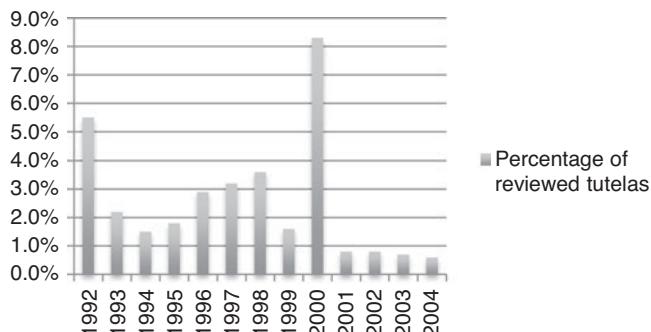


Figure 9.9. Percentage of *tutelas* reviewed by the Constitutional Court (1992–2004). *Source:* Manuel José Cepeda, *POLÉMICAS CONSTITUCIONALES* (2007).

of them.³⁸ As will be seen in the next section, this stark difference reveals a clear divide between the Supreme Court and the Council of State, on the one hand, and the Constitutional Court, on the other hand. Although the former seem to distrust the broad use of *tutela*, which in their view may endanger the rule of law, legal certainty, and the separation of powers, the Constitutional Court is a staunch defender of this mechanism because it guarantees the effective protection of fundamental rights and material justice. Thus, the Supreme Court and the Council of State magistrates seem to be closer to legal formalism and more attached to the norms enacted by Congress, whereas Constitutional Court magistrates appear to privilege a more progressive – and constitutionalized – view of law, which entails the direct enforcement of the Constitution and the justiciability of social and economic rights.

1.4 The Performance of the Constitutional Court regarding the Constitutional Review of Legal Norms

Before closing this section, it is worth noting that the constitutional review of legal norms is also an important part of the Constitutional Court’s

³⁸ Libardo Ariza, *La Corte en números: Un balance estadístico*, in *DERECHO CONSTITUCIONAL: PERSPECTIVAS CRÍTICAS* 440 (Manuel José Cepeda ed., Universidad de los Andes; Siglo del Hombre 1999).

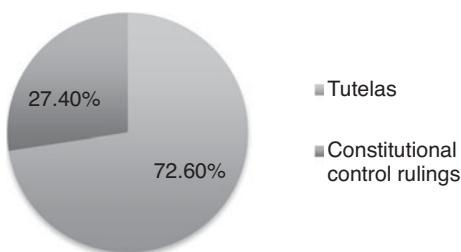


Figure 9.10. Constitutional Court's *tutelas* and constitutional control rulings (1992–July 31, 2011). *Source:* Corte Constitucional, ESTADÍSTICAS (Oct. 12, 2011), http://www.corteconstitucional.gov.co/relatoria/CONSOLIDADO_percent20ESTADISTAS_percent201992–2011.htm.

activity. Even though they represent a considerably small percentage of the Court's decisions compared to *tutelas* (see Figure 9.10), constitutional review rulings represent an important form of constitutional control over the legal norms enacted by Congress – and exceptionally by the executive, and are also an effective mechanism to protect the rights of social groups excluded from the democratic debate that ought to take place in Congress.

Between 1992 and 2011, the Constitutional Court ruled over 5,151 constitutional control cases. In 62 percent of these cases, the Court ruled that the legal norms it reviewed were constitutional, whereas in 24 percent of such cases they violated the Constitution. In 6 percent of the cases, the Court ruled that the norms may still be part of the legal order, as long as they are applied in accordance with the Court's binding interpretation (conditional constitutionality)³⁹ (see Figure 9.11). The decisions that the Constitutional Court has made during the past two decades regarding constitutional control also show that, despite criticisms claiming that the Court's activism continually endangers the autonomy of the legislative branch, the Court is also very cautious when it comes to controlling the legislative activity of the other two branches of power, thus preserving the rule of law and legal certainty – two concepts so cherished by legal formalism.

39 Corte Constitucional, *supra* note 31.

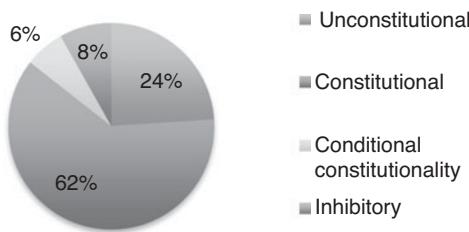


Figure 9.11. Constitutional control of legal norms (1992–2004). *Source:* Manuel José Cepeda, *POLÉMICAS CONSTITUCIONALES* (2007).

It is also important to stress that most of the Court's constitutional control rulings are triggered by *acciones públicas de inconstitucionalidad* filed by citizens. The percentage of this kind of decisions (82.8 percent) is much higher than those originating in automatic constitutional control⁴⁰ (14.7 percent) or presidential objections (2.5 percent)⁴¹ (see Figure 9.12).

These figures illustrate how citizens have taken advantage of the accessibility of the *acción pública de inconstitucionalidad* to protect their rights and interests, which were not taken into account during legislative debates and that violate the Constitution. This kind of constitutional control over legal norms that the Constitutional Court exerts becomes a valuable tool to promote a deliberative and more inclusive democracy, since traditionally excluded and marginal groups, as well as the social movements and nongovernmental organizations that advocate for their rights, also resort to the Court, not simply to challenge a statute, but to be heard and acknowledged.⁴²

Even though there is no information available that indicates what kind of individuals, social actors, or social movements have challenged

40 The Constitution grants automatic constitutional review powers to the Constitutional Court vis-à-vis these norms: laws approving international treaties, plebiscites, and referendums; statutory law bills; and legislative decrees enacted by the executive.

41 The Constitutional Court has to rule on objections that the president of the Republic may have toward bills awaiting for his or her approval to become laws on the grounds that they violate the Constitution.

42 Rodríguez and Rodríguez, *supra* note 25; Julieta Lemaitre, *EL DERECHO COMO CONJURO: FETICHE MÉDICO, VIOLENCIA Y MOVIMIENTOS SOCIALES* (Universidad de los Andes; Siglo del Hombre 2009).

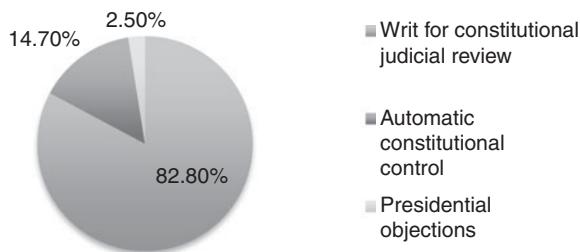


Figure 9.12. Constitutional Court's constitutional control rulings (1992–2004).
Source: Manuel José Cepeda, *POLÉMICAS CONSTITUCIONALES* (2007).

statutes (and have filed *tutelas*) during the past two decades, it is evident that the Court's rulings have been instrumental in advancing political struggles and the social emancipation of significant groups of the Colombian population, those traditionally excluded from the political debate, marginalized, and discriminated against. These groups and organizations have brought before the Court *structural cases*, claiming protection of their fundamental rights, which have been ignored by the executive and legislative branches. These cases affect a considerable number of persons whose rights are being violated; involve several state institutions as being responsible for such violations (mainly through defective or a complete lack of public policy); and demand complex rulings, which involve court orders to several state institutions to protect the rights of all the population involved, not just the plaintiffs.⁴³

Therefore, even if this type of case does not represent the majority of the Constitutional Court's rulings, these are not mere anecdotic cases. Their social impact is undeniable, for it reveals the struggles for social emancipation and political power of important groups of Colombian society, many of which represent thousands, and even millions of people, who have been subjected to violent forms of exclusion.

Several examples illustrate this point. The most dramatic one refers to the victims of forced displacement due to armed conflict,⁴⁴ which

43 Rodríguez and Rodríguez, *supra* note 25, at 16.

44 For more than four decades Colombia has faced an armed conflict between leftist guerrillas who hope to take power, the state, and, from the 1980s, right-wing paramilitary groups supported by drug traffickers, landowners, local elites, and members of the

numbered around 3 million people in 2009⁴⁵ – approximately 7 percent of the Colombian population. Despite the fact that Colombia was second only to Sudan in the greatest number of forcibly displaced people, the Colombian state did not have in place a proper public policy to protect the rights of this extremely vulnerable population, which was left to its own devices. Through decision T-025 of 2004, which reviewed several *tutelas*, the Constitutional Court declared an “unconstitutional state of affairs” (*estado de cosas inconstitucional*)⁴⁶ regarding the living conditions of the forcibly displaced population, due to the massive and systematic violation of its fundamental rights. To a large extent, such a massive violation of constitutional rights is the result of the failure to design and implement an adequate public policy that effectively addresses this problem, which reflects an institutional and political blockage that must be overcome.

Departing from previous rulings on unconstitutional states of affairs that were not very successful⁴⁷ (because the detailed orders given by the

armed forces, who fight the guerrillas. To defeat their respective enemy and deprive it of social support, these illegal armed groups have resorted to strategies that terrorize the population, such as selective killings, massacres, forced disappearances, and forced displacement, which violate international humanitarian law and have unleashed a humanitarian crisis.

45 Rodríguez and Rodríguez, *supra* note 25, at 13.

46 The Court has declared an unconstitutional state of affairs in different cases, including the prison and public health systems (decisions T-153 of 1998 and T-760 of 2008, respectively). According to the Court’s jurisprudence, an unconstitutional state of affairs is a set of facts, actions, or omissions that result in the massive and systematic violation of fundamental rights of a group of persons. The actions or omissions of a public authority, or of several public authorities, may be the cause of such violation of constitutional rights. This reveals a structural failure or a complete lack of public policy to protect the rights that are being violated. See Libardo Ariza, *La realidad contra el texto: Una aproximación al estado de cosas inconstitucional*, 4(1) REVISTA TUTELA, ACCIONES POPULARES Y DE CUMPLIMIENTO 20–40, 2000; Rodríguez and Rodríguez, *supra* note 25, at 40.

47 The Court’s ruling on the prison system is a case in point: Prison overcrowding and the massive violation of the fundamental rights of inmates in Colombian prisons continue unabated, despite the Court’s ruling. The Colombian government complied with the Court’s decision by creating new prisons at a high economic cost (around US\$500 million), but without improving inmates’ living standards or changing criminal

Court could not or would not be followed by public authorities),⁴⁸ the Court issued several orders of procedure to state agencies, which also involve civil society, to design and implement public policies to confront this humanitarian crisis. In addition to issuing these orders, the Constitutional Court has retained jurisdiction over the case to oversee the implementation of its orders. Accordingly, the Court has issued eighty-four follow-up rulings and has held fourteen public audiences to discuss with state agencies and civil society the progress of public policy on forced displacement and the fulfilment of the Court's orders.⁴⁹

Other illustrative examples of structural cases involve struggles for social emancipation, which confront the political and institutional blockage of state institutions that fail or are unwilling to protect the fundamental rights of significant groups of the Colombian population. A political system that is largely influenced by a conservative and authoritarian worldview, a view held by a considerable part of Colombian society (or at least by some of its most influential groups), has been reluctant to protect the rights of minorities (such as the LGBT community and objectors of conscience), of groups traditionally discriminated against (such as women, indigenous groups, and the black population), of stigmatized groups (such as the prison population), or of those whose life choices go against the moral values of the alleged majority (e.g., drug abusers, those advocating assisted suicides, and abortion rights groups).

In all these cases, individuals and social organizations have challenged before the Constitutional Court those statutes and government

policy that abuses the use of prison. Consequently, since a great number of prisoners are still entering the penitentiary system, it is still overcrowded (by about 30 percent). See Libardo Ariza and Manuel Iturralde, *LOS MUROS DE LA INFAMIA: PRISIONES EN COLOMBIA Y AMÉRICA LATINA* (Ediciones Uniandes, CIJUS 2011).

48 The concerned public authorities often found that they did not have the institutional capacity or the financial resources to comply with the Court's specific and ambitious orders. Furthermore, quite often, these authorities did not have the political will to obey the Court's ruling, regarding the Court's actions as an unacceptable form of judicial activism that interfered with their legal functions. This topic will be discussed in the following section.

49 Rodríguez and Rodríguez, *supra* note 25, at 14–15.

decisions – and their omissions – that violate or fail to protect their rights. In response to these social demands, presented most often by social and academic organizations (that often work together) through structural cases and strategic litigation, the Constitutional Court has ruled (1) that abortion is legal under certain circumstances, considering that the criminalization of a woman's choice to interrupt pregnancy violates her autonomy and dignity;⁵⁰ (2) that euthanasia is legal under certain circumstances, to protect the freedom and dignity of persons who have decided to end their lives;⁵¹ (3) that homosexuals have the same rights and obligations as heterosexuals – including the right to form a family and to get married;⁵² (4) that indigenous populations and black communities have the right to be consulted before the state makes a legislative or administrative decision that may affect their interests and their way of life;⁵³ (5) that people may not be punished for consuming illegal drugs because they are making a free and personal choice that is not affecting others;⁵⁴ and (6) that the prison population has the right to live in decent conditions.⁵⁵

All these examples show how access to constitutional justice has become a powerful mechanism of effective democratic participation in the face of a deficient public debate in Congress.⁵⁶ In this scenario, access to constitutional justice is an effective way of protecting constitutional rights – particularly when its minimum standards are not effectively protected by law – and to promote a democratic debate through the direct intervention of the Constitutional Court to mobilize the government and

50 Decision C-355 of 2006.

51 Decision C-239 of 1997.

52 Decision C-577 of 2011.

53 Decision C-030 of 2008, among others.

54 Decision C-221 of 1994.

55 Decision T-153 of 1998.

56 Helena Alviar, *Uso y límites de la acción pública de inconstitucionalidad en Colombia*, in TEORÍA CONSTITUCIONAL Y POLÍTICAS PÚBLICAS: BASES CRÍTICAS PARA UNA DISCUSIÓN 480–81 (Manuel José Cepeda and Eduardo Montealegre eds., Universidad Externado de Colombia 2007); Mauricio García and Rodrigo Uprimny, *La reforma a la tutela: ¿Ajuste o desmonte?*, 15 REVISTA DE DERECHO PÚBLICO 280 (2002).

Congress toward the materialization of social policies that ensure material equality.⁵⁷ Among others, the Court's rulings on abortion, euthanasia, and same-sex marriage, in addition to protecting fundamental rights, exhorted Congress to enact statutes that regulate such rights, following the constitutional standards set up by the Court's decisions.

Nevertheless, the Court's progressive activism has not been exempt from controversy. As discussed in the following section, the Colombian government, Congress, members of the judiciary elite (mainly justices from the Supreme Court of Justice and the Council of State), a part of the legal academy, lawyers, economists, and public opinion sectors have criticized the Court's activism, labeling it populist and naïve.⁵⁸ Furthermore, they have called for a constitutional reform to curtail the Court's powers. So far, these reform attempts have not been successful, but they reveal a political and legal struggle between legal formalism, which defends the status quo of the Colombian legal field, and new constitutionalism, which seeks to become predominant within the field.

2 The Constitutional Court's Activism and the Struggle between New Constitutionalism and Legal Formalism

The Constitutional Court's activism regarding the protection of fundamental rights and the control of political power to uphold the rule of law, as well as the principles of the *Estado social de derecho*, have revolutionized the role of judges in Colombian society and legal discourses. But such a significant transformation has not been peaceful. Actors within the legal field (lawyers, high- and low-ranking judges, academics, politicians, judicial clerks) have taken part in this debate. Their arguments have not only revolved around legal topics, but also, and fundamentally, around ideological and political issues regarding the role of judges in the *Estado social de derecho*, the conception and reach of fundamental rights, and the adequate control of political power and the rule of law.

57 García and Uprimny, *supra* note 56, at 281.

58 Uprimny and García, *supra* note 23, at 476.

These are not only ideological struggles, but also conflicts over the predominance of actors hierarchically situated in the legal field, who use their economic, social, and cultural capital to improve their standing in the field and to impose their interests and worldviews.⁵⁹ Therefore, discussions over the role of the constitutional jurisdiction, the activism of its judges, the justiciability of social and economic rights, and the protection of social (and not just political) citizenship are ideological as well as political battlefields that define the configuration of the legal field and its *habitus*.⁶⁰

From this perspective, it is hardly surprising that, despite the popularity of the Constitutional Court, the *tutela*, and the *acción pública de inconstitucionalidad* among citizens and social movements,⁶¹ powerful actors in the legal field (particularly the magistrates of the Supreme Court and the Council of State, congressmen, and members of government) have tried on several occasions to reform such institutions and curtail the powers of the constitutional jurisdiction. Four out of the five governments in power after the enactment of the 1991 Constitution have tried, not very successfully, to change the justice system via constitutional reforms; all these projects have avowed to limit the reach of *tutela* and the Constitutional Court's powers. Between 1992 and 2009, Congress discussed twenty-three bills (most of them constitutional reforms) that attempted, also with no success, to restrain the *tutela* (nineteen bills) and the Court's jurisdiction (four bills). For instance, under the Uribe government, Congress debated seven bills regarding the *tutela* and the Constitutional Court.

There are two recurring themes in reform projects concerning the *tutela*. The first is the banning of *tutelas* against judicial decisions. The Constitutional Court has ruled that whenever a judicial decision – no matter the hierarchy of the court – constitutes a *de facto* proceeding

59 Bourdieu, *supra* note 18, at 196–99.

60 *Id.*, at 167–71.

61 Lemaitre, *supra* note 42; Cepeda, *supra* note 6, at 108; Rodrigo Uprimny, *supra* note 9, at 302.

(*vía de hecho*), such a decision constitutes a violation of the right to due process and of the minimum standards of material justice; that is, it is an openly unfair and arbitrary decision. The Court's jurisprudence on this matter has created strong tensions and even open conflicts between the Constitutional Court and the heads of the ordinary and contentious administrative jurisdictions –the Supreme Court and the Council of State, who have witnessed how the former has quashed rulings, via *tutelas*, that they have made as the highest courts of their respective jurisdictions.⁶²

In response and in an open act of disobedience, the Supreme Court and the Council of State have not followed the Constitutional Court's *tutela* rulings. Their argument is that the Constitutional Court is endangering the rule of law, the separation of powers, and the principle of legal certainty by making activist decisions that clearly exceed its constitutional powers.⁶³ Thus, the Constitutional Court is being accused of promoting the government of judges, which is illegitimate and antidemocratic because it is a countermajoritarian power. Consequently, the Supreme Court and the Council of State have lobbied the government and Congress to reform the Constitution and ban the *tutela* against judicial decisions. Even though this is a frequent reform proposal, so far it has not succeeded, in great measure because of the *tutela*'s popularity, which is seen as a last-resort remedy against the problems of access to ordinary justice in Colombia.

The second recurring theme seeks to exclude the *tutela* as the appropriate judicial mechanism to protect social and economic rights. The effective protection of these rights implies political decisions on distributive justice and public expenditure.⁶⁴ According to the Court's critics, these are decisions that a judge cannot make for at least two reasons: First, he or she does not have the proper information or technical knowledge to make sound decisions that have macroeconomic effects; and

62 García and Uprimny, *supra* note 56, at 245.

63 *Id.*, at 256–58.

64 *Id.*, at 267–69.

second, these decisions have fiscal impact and require public expenditure. Therefore, Congress and the government, who, as elected bodies, represent the public interest, must make these decisions. Thus, the Constitutional Court does not have the appropriate tools or the democratic legitimacy to enforce social and economic rights.⁶⁵ Accordingly, Congress has studied different bills presented or supported by different governments, congressmen, the Supreme Court, and the Council of State, that seek to limit *tutela* to the protection of rights that do not involve public expenditure.

Once again, such proposals have not been successful due to *tutela*'s popularity as an effective way of protecting social and economic rights; as it has been seen, these are precisely the rights that are claimed most commonly via *tutelas* in Colombia.⁶⁶

These two examples are very representative of the kinds of debates and struggles that two opposing worldviews and sets of interests bring about in the Colombian legal field. As has been shown, there is an intense legal debate between actors in the field regarding the justiciability of economic and social rights, the enforceable character of the Constitution, the duties of an *Estado social de derecho* toward its citizens, and the Constitutional Court's powers to exert constitutional control over the other two branches of power and to protect fundamental rights, among others. But, as also discussed, these are not simply technical debates on legal matters that only concern lawyers. These are also struggles for power

65 Clavijo, *supra* note 25.

66 Nevertheless, the current government, headed by president Juan Manuel Santos, recently made progress on the restriction of the protection of social and economic rights via *tutela* – Congress approved the Legislative Act 003 of 2011 – a constitutional reform that establishes the fiscal sustainability principle. According to this, fiscal sustainability must guide all state's actions in order to progressively achieve the aims of the *Estado social de derecho*. The judiciary is also bound by this principle, and its decisions must take into account their economic impact. If this is not the case, the Attorney General of the Nation (in charge of the protection of public interest) or any of the cabinet ministers may initiate a fiscal impact incident (*incidente de impacto fiscal*), as a result of which rulings of the highest courts of all jurisdictions may be modified to guarantee fiscal sustainability.

within the legal field; diverse actors, who occupy different hierarchical positions within the field, are using their available capital to reach strategic positions that will allow them to impose their interests and worldview on Colombia's legal system. This debate is taken very seriously by actors in the field. And because the positions taken by these various actors also reveal their beliefs and political standing, they also act to legitimize and naturalize their vested interests – Bourdieu's neutralization effect.⁶⁷

For instance, the clash between the Constitutional Court, on the one hand, and the Supreme Court and the Council of State, on the other hand, is not only about legal certainty, the rule of law, and the separation of powers. It is a confrontation between these courts to establish who is the supreme authority of the judiciary and who has the last word within the legal order to say what is the law and how it ought to be interpreted and applied. This naming power transcends the legal field and has important repercussions in other social fields – such as the bureaucratic, political, and economic fields, since the law is the rationalized and legitimized form of exerting violence to sustain the social order and decide who holds political power.

The struggle just described and the upheaval that the Colombian legal field is experiencing also have important consequences for the way in which actors within the field perceive their reality and make sense of it. The understanding and definition of law is changing in Colombia; a new legal culture – new constitutionalism – is confronting the traditional values and beliefs predominant in the legal field almost since colonial times.⁶⁸ The legal culture that best represents these values is legal formalism.

The rise and increasing influence of new constitutionalism and progressive judicial activism within the Colombian legal field during the past two decades, particularly in the constitutional jurisdiction, have been favored by a series of factors. First, despite legal formalism, Colombian

67 Bourdieu, *supra* note 18, at 183.

68 García and Rodríguez, *supra* note 15, at 11–57.

legal culture has accepted the constitutional review of laws. Since the constitutional reform of 1910, the constitutional jurisdiction (until 1991 headed by the Supreme Court) has exerted the constitutional review of statutes through the *acción pública de inconstitucionalidad*. Thus, when the Constitutional Court began its work in 1992, Colombian legal culture was familiar with constitutional judicial review.⁶⁹

Second, the procedural design of the *acción pública de inconstitucionalidad* facilitates citizens' access to constitutional justice and to judicial review, since it is a simple procedure that any citizen may initiate.⁷⁰ Third, the institutional settings of judicial review in Colombia, under both the 1886 and the 1991 Constitutions, have granted great power to the constitutional jurisdiction, since it may declare the unconstitutionality of a legal norm – which means that it is invalid and is no longer part of the legal system. Such great review powers granted by the Constitution may encourage judicial activism.⁷¹ Fourth, the 1991 Constitution enhanced these features of the constitutional jurisdiction by granting it more powers and autonomy through the creation of the *tutela* action and independent and authoritative Constitutional Court.⁷²

Fifth, two related political factors have favored the Constitutional Court's activism. On the one hand, the political and institutional blockage regarding the effective protection of constitutional rights, which is reflected in either deficient public policies or their failure to protect such rights (particularly of marginalized or discriminated groups) has delegitimized the representative political system. Thus, under the new constitutional setting and inspired by the global expansion of new constitutionalism, social movements have resorted to the constitutional

69 Uprimny and García, *supra* note 23, at 470.

70 *Id.*, at 472.

71 Nevertheless, in line with the canons of legal formalism, the Supreme Court exercised a restrained judicial review, granting wide discretionary powers to the legislative and executive branches in the design, enactment, and implementation of public policies through legal norms. López Medina, *supra* note 11, at 204–05 (2004).

72 López Medina, *supra* note 11, at xix (2006).

jurisdiction as a key component of their political strategy to achieve social emancipation.⁷³

Sixth, the passing of the 1991 Constitution, which enacted the *Estado social de derecho*, a generous bill of rights, and a powerful constitutional jurisdiction, gave institutional and political support to the discourse of new constitutionalism. New constitutionalism was introduced in Colombia through the work of a new generation of legal scholars and lawyers, educated in the United States and Europe, and influenced by new (at least in the Latin American context) tendencies in legal theory and constitutionalism, particularly those of Anglo-Saxon origin.⁷⁴ Some of these scholars and lawyers became influential through teaching in prestigious law schools, and they took up posts in the Constitutional Court as judicial clerks and even as justices.⁷⁵ This significant change in the Colombian

73 Uprimny and García, *supra* note 23, at 473; Rodríguez and Rodríguez, *supra* note 25, at 17; Lemaitre, *supra* note 42.

74 López Medina, *supra* note 11, at 3–6 (2004).

75 This is the case of Eduardo Cifuentes and Manuel José Cepeda, who also were deans of the Law School of Universidad de los Andes, one of the most prestigious Colombian universities; Manuel José Cepeda was also advisor to the government during the drafting of the 1991 Constitution and supported the creation of the *tutela* and the Constitutional Court. Other representative cases are Carlos Gaviria, a professor at Universidad de Antioquia and a human rights activist, who, after his judicial post, became leader and presidential candidate for the Polo Democrático Party (a leftist political party); Ciro Angarita, who was professor at Universidad de los Andes; and Alejandro Martínez, who, after his judicial post, was elected member of Bogotá's Local Council, representing the Polo Democrático Party. All these justices proved to be influential in the development of the Court's progressive activism and jurisprudence. See López Medina, *supra* note 11, at 435–37 (2004). One possible explanation of the different profiles and legal views of the Constitutional Court justices, on the one hand, and of the Supreme Court and Council of State justices, on the other, may be the way they are elected. According to the Constitution, the former are elected by the Senate from lists of three sent by the president of the Republic, the Supreme Court of Justice, and the Council of State. The latter are elected through a co-optation system (*sistema de cooptación*), which means that justices of each high court elect new justices as vacancies become available. Even though the Supreme Court and the Council of State influence the election of the Constitutional Court justices, they do not control it, which, as facts have shown, opens up the possibility of the arrival of lawyers who are not connected to the judicial elite. Instead, members of the Supreme Court and the Council of State tend

legal culture was simultaneously taking place in other Latin American countries and in other regions of the world, particularly in the Global South, where political and institutional transformations and a progressive legal discourse put forth a renewed judicial activism, particularly in constitutional courts,⁷⁶ as a valuable tool for attaining social change.⁷⁷

Meanwhile, legal formalism, clearly favored for over a century by the 1886 Constitution – which conceived a classic, but conservative, view of the rule of law and of liberal democracy⁷⁸ – lost much of this support, or at least found a strong competitor that enjoys popular support because it has brought justice closer to common citizens.

From the beginning, the majority of Constitutional Court justices have taken seriously their duty of protecting the supremacy and integrity of the Constitution. They also have been well aware of the great powers the new constitutional setting grants the Court – and have used them. To give legal and political grounds to its progressive activism, the Court has found a key support in new constitutionalism, for it has interpreted and enforced the Constitution according to its tenets, which fall in line with new constitutionalism's view of the active role of judges and of law itself regarding social change.⁷⁹ Thus, studying the Constitutional Court's activism and the critiques it has been subjected to brings out an important dimension of the confrontation between new constitutionalism and legal formalism.

to elect lawyers who have connections with these high courts (where legal formalism prevails) and who hold similar views.

76 During this period, many countries have undergone democratization processes through the enactment or reform of their constitutions, which have strengthened the constitutional jurisdiction and promoted a progressive judicial activism. In addition to Colombia, the Constitutional Courts or Supreme Courts of Hungary, South Africa, India, Russia, and South Korea are telling examples. Uprimny and García, *supra* note 23, at 465–66; Rodríguez and Rodríguez, *supra* note 25, at 33.

77 López Medina, *supra* note 11, at 436–37 (2004); Uprimny and García, *supra* note 23; Rodríguez, *supra* note 10; Rodríguez and Rodríguez, *supra* note 25.

78 López Medina, *supra* note 11, at 205 (2004).

79 *Id.*, at 435–36.

New constitutionalism embodies a new mentality that is antiformalist and sees the Constitution, especially constitutional rights and principles, as a powerful tool for achieving profound social changes. This worldview collides with that of legal formalism, which tends to see the Constitution and its bill of rights, particularly social and economic rights, as a political program that sets a course toward the type of polity we seek to achieve, but one that has to be accomplished mainly through statutes enacted by Congress and enforced by the executive. Here, the role of the judiciary is one of self-restraint, for its task is to uphold the rule of law and protect citizens' rights, following the lead of the other two branches of power. These branches have the representative and democratic legitimacy that judges lack; under this system, judges cannot directly apply the tenets of the Constitution and thus bypass elected public powers.

Those who support a legal culture of new constitutionalism not only find that it agrees with their worldviews, beliefs, and legal education, but also that it favors their interests and strategic positions with the Colombian legal field.

Conversely, defenders of legal formalism pledge their alliance to the rule of law and oppose what they call a government of judges, led by the Constitutional Court. But they are also defending the *status quo* that protects their vested interests. This is the case with the Supreme Court and the Council of State, which for more than a century agreed on how to share power within the legal field, being that they were the highest courts in their respective jurisdictions and were accountable to no one regarding the definition and application of law. All this changed with the strengthening of the constitutional jurisdiction and the creation of the Constitutional Court. The Constitutional Court seriously contests the power and influence of the Supreme Court and the Council of State within the field. Even more, thanks to the Constitutional Court's jurisprudence on *tutelas* against judicial decisions, any judge of the Republic has the power to quash decisions that the Supreme Court and the Council of State make in their own jurisdictions, whenever they violate fundamental rights under

de facto proceedings. This means that, in practice, constitutional jurisdiction takes precedence over other jurisdictions, for it is entrusted with the protection of the supremacy and integrity of the Constitution and of fundamental rights, which in their turn take precedence over the legal norms to which legal formalism is so attached.

Thus, the struggle between judicial hierarchies over the normative force of the Constitution is also a confrontation to decide who has the power to define the content, reach, and enforceability of fundamental rights and to control political power.⁸⁰

3 The Social Impact of the Constitutional Court Rulings: From Expansive to Principled Judicial Activism

As discussed, a series of institutional, political, historical, and cultural factors have strengthened the political and legal standing of the Colombian constitutional jurisdiction, as well as citizens' and social movements' access to it. These conditions, in turn, have stimulated the Constitutional Court's progressive activism. But, as I have shown, such activism has been opposed and criticized as populist and naïve, especially by actors in the legal field who are faithful to legal formalism. Such criticisms synthesize the two main objections to progressive judicial activism: First, that it violates basic democratic principles and hinders public debate and social mobilization, which are the legitimate channels to solve political and social controversies and to make democratic decisions. Second, that even if judicial activism had democratic legitimacy, it is not effective in achieving social change because courts have neither the tools nor the capacity to design and implement public policies, and no real power to enforce their decisions. They depend on the political institutions, which they are undermining, to do this.⁸¹

The Constitutional Court's first attempts at solving structural cases, especially through the "unconstitutional state of affairs" jurisprudence,

80 García and Uprimny, *supra* note 56, at 263.

81 Rodríguez and Rodríguez, *supra* note 25, at 35–36.

show that these criticisms are not off target. The ambitious and detailed orders given by the Court to other state agencies proved to be too bold, since they overstepped executive and legislative jurisdictions⁸² and resulted in counterproductive effects: They generated resistance from the executive and legislative and were not able to protect the rights of the groups involved in the Court's rulings.⁸³

Nevertheless, the Constitutional Court has learned from these experiences; although it has not renounced progressive activism, it has tempered it. As Rodríguez and Rodríguez show, the Court's ruling that declared an unconstitutional state of affairs vis-à-vis the protection of the constitutional rights of forcibly displaced populations was a qualitative leap from the Court's previous rulings on similar structural cases.⁸⁴ In this case, the Court opted to give a significantly different set of orders that emphasized procedures, rather than concrete results, to protect the fundamental rights of this population. The Court ordered the Colombian government and Congress to take the necessary steps to design and implement a public policy that effectively protects the fundamental rights of the displaced population. In this way, the Court gave the other two branches of power plenty of room to maneuver and showed itself respectful of the democratic principle and the separation of powers. This legitimized its decision and eased cooperation with Congress and the executive.

But the Court also indicated that it would be vigilant on compliance with its orders, retaining competence over the case until it was satisfied that the other two branches of power had delivered. To achieve this, the Court used two control mechanisms: public audiences and follow-up orders. Through public audiences, the Court assessed the progress made by the incumbent state institutions and, based on this assessment,

82 The ruling on the house financing system is a case in point.

83 The decision on the unconstitutional state of affairs in Colombian prisons is a good example.

84 The decision on the unconstitutional state of affairs in the public health system is another significant example. Rodríguez and Rodríguez, *supra* note 25.

issued further orders. As Rodríguez and Rodríguez note, even though the fundamental rights of most of the displaced population are still being violated, the Colombian state has at least made significant progress by putting in place a real public policy that addresses this humanitarian crisis.⁸⁵ This would be unthinkable without the Court's ruling.

This case illustrates the complex relationship between judicial activism and emancipatory social practices. Judicial activism alone is not capable of achieving social change, but it is not irrelevant. It produces direct instrumental effects, such as the unblocking of institutional stalemates that prevent the state from protecting the constitutional rights of vulnerable or marginalized populations and thus enabling the design and implementation of new public policy.⁸⁶ But it also generates symbolic effects, which are not negligible. For one thing, the Constitutional Court's structural rulings have stimulated the political conscience of social movements, whose rights and claims have finally been acknowledged by the state, and it has convinced them that litigation is an important strategy (albeit not the only or the main one) to use to accomplish their political aims.⁸⁷ For another, the Court's rulings on structural cases have played a significant part in raising awareness or changing the perspective on important social and political problems, as well as providing alternative solutions.⁸⁸

The Constitutional Court's progressive activism has undergone an important transformation: It has gone from an expansive activism to a principled one, which still aims at attaining social change through the enforcement of constitutional rights and principles, but without undermining the democratic functions of elected bodies and the separation of powers. To the contrary, this tactical change (made up of strong decisions combined with weak remedies), far from threatening democracy, has reinforced it by opening up deliberative and democratic spaces in

85 Rodríguez and Rodríguez, *supra* note 25.

86 *Id.*, at 50.

87 Uprimny and García, *supra* note 23, at 495; Lemaitre, *supra* note 42.

88 Rodríguez and Rodríguez, *supra* note 25, at 23.

which to discuss social problems and solve them. Public audiences⁸⁹ have made possible a public debate between the state and civil society, which quite often is not possible in Congress – which remains the democratic forum *par excellence*, especially when it comes to the protection of the rights of marginalized and discriminated against social groups.⁹⁰

4 The Constitution as a Tool of Social Change: Challenges Ahead

In these pages, I have developed the argument that access to constitutional justice in Colombia has become a powerful and promising mechanism for the redistribution of political and social power, one that has benefited especially those groups excluded from public debate and marginalized by an unfair and unequal social order. I also tried to show that such progress is endangered by the opposition of those actors who tend to defend the status quo and that pose a great challenge to new constitutionalism and its strategy to achieve social and political transformations through the direct application of the Constitution and the justifiability of economic and social rights.

This is an ongoing struggle, which neither new constitutionalism nor legal formalism has won. The legal field is a complex social structure, which continually reshapes itself through the transformation of its sets of dispositions, practices, rules, and discourses, as well as through the strategic actions of its social actors. Thus, it is not a matter of if or when new constitutionalism is going to overcome legal formalism. Rather, these opposing worldviews and interests continuously confront, but also influence, each other, concede ground, and reach partial agreements.

Even though is not possible to talk of a pure, uncontested legal culture that prevails within a legal field, the Colombian legal field is experiencing interesting times, for it is undergoing profound transformations. Thus, what is at stake here is the exercise and control of political power,

⁸⁹ So far, the Constitutional Court has held public audiences on eighteen different topics, including both constitutional reviews of laws and *tutela* cases.

⁹⁰ Rodríguez and Rodríguez, *supra* note 25, at 55–58.

not only in the legal field, but also in other social fields. The debates discussed here on access to justice, the justiciability of social and economic rights, the meaning and reach of the welfare state and citizenship, and the Constitutional Court's power, cast a long shadow over other social and political struggles over inclusion, recognition, and distributive justice.

These struggles and conflicts will define what kind of polity we are and want to be. Despite the shortcomings of the Constitutional Court and new constitutionalism, they have changed for the better Colombian society and its political regime. Under extreme conditions of violence and inequality, they have protected and enhanced democracy. This is so because, given the restrictions of a traditionally exclusive political regime, the constitutional jurisdiction has become a democratic forum, accessible to all citizens, where plural and inclusive debates over different public interest matters take place. The access to constitutional justice has improved the protection of the rights of all citizens, as well as enhanced the effective control and exercise of political power for the greater good, not only of those already included in the social contract, but also of the forgotten minorities and excluded majorities.

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