Aggressive Weak-Form Remedies

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I Introduction

The rich debate on remedies for social rights violations is in some danger of ossifying. Recent work on socio-economic remedies has broken down into competing camps of those favoring strong-form versus weak-form review. Proponents of the former argue that it brings results; proponents of the latter tend to focus instead on the institutional and legitimacy limitations on courts. Still largely missing from this discussion is an analysis of exactly how and why different types of remedies work in different contexts.

Brian Ray's careful reconstruction of South African jurisprudence is a useful corrective.[1] It suggests that the South African Court's weak remedies can be usefully supplemented in various ways.[2] The Constitutional Court can, for example, maintain a weak remedy but offer a deeper and more detailed interpretation of a provision in the Constitution ('Final Constitution' or 'FC').

* Thank you to David Bilchitz, Frank Michelman, Brian Ray, Stuart Wilson, and two anonymous reviewers for comments on this essay.

1 See B Ray 'Evictions, Aspirations and Avoidance' (2013) 5 *Constitutional Court Review* 173.

2 Neither my argument nor Ray's implies that all of the Constitutional Court's socio-economic rights remedies have been weak. In some well-known cases, the Court has issued strong remedies. See, eg, *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) (Held that the government must provide broad access to a drug preventing transmission of HIV during pregnancy where the company agreed to make the drug freely available.) However, the Court has more readily relied on weaker remedies where the policy issues are relatively complex and need to be built up incrementally over time. Indeed, the Court's education jurisprudence thus far has reflected a 'wait and watch' approach in a domain (in all jurisdictions) notoriously resistant to ostensibly more effective new policies. See S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa, 1994–2008* (2009); S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 331–357, 471–474 (Woolman's monograph offers a view on rights and remedies – from the vantage point of experimentalism and development theory – consistent with views expounded in these pages.) See further M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267; M Dorf '1997 Supreme Court Term Foreword: The Limits of Socratic Deliberation' (1998) 112 *Harvard Law Review* 4. M Dorf & B Friedman 'Shared Constitutional Interpretation' (2000) *Supreme Court Review* 61; M Dorf 'Legal Indeterminism and Institutional Design' (2004) 78 *New York University Law Review* 875; M Nussbaum 'Constitutions and Capabilities: Perception against Lofty Formalism' (2007); 121 *Harvard Law Review* 4; A Sen *Development as Freedom* (1999). The Constitutional Court has shown a dramatically more principled (or aggressive) approach to rights and remedies when issues of exclusion (on the basis of race) or access (due to contractual disputes) have undermined the various entitlements learners enjoy under FC s 29(1) and FC s 29(2). *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo & Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC)(Brings to end a decade long line of cases in which language and culture had had the effect, intentional or not, of excluding learners on the basis of race); *Governing Body of the Juma Musjid Primary School & Others v Ahmed Asruff Essay NO & Others* [2011] ZACC 13, 2011 (8) BCLR 761 (CC)(Court ensures learners' rights to basic education are not undermined by contractual disputes between private parties and the state.)

Or it can attempt to give more teeth to an 'engagement' remedy by controlling the process by which the government must work with groups representing, say, potential evictees.[3] Ray conceives of remedies on a spectrum, and argues that the South African Constitutional Court can and has taken some actions that tend to increase the impact of its remedies.[4]

In this brief essay, I attempt to generalise Ray's point. Weak-form remedies are, in fact, compatible with a number of different strategies, at varying levels of aggressiveness. The essence of weak-form remedies are sometimes thought to relate to the general level of deference with which courts treat political actors. In fact, the essence of a weak-form remedy is simply that political actors, rather than courts, make substantive policy decisions. The arguments made in favor of weak-form remedies, both on democratic legitimacy and judicial competence grounds, point towards a conception of review that allows judiciaries to take aggressive action in order to incentivise political actors to act. Both capacity-based and democracy-based critiques of the judicial enforcement of social rights are skeptical that courts have the expertise or the legitimacy to establish the contours of policies (through rights-based analysis) that will have a major impact on the budget. Both critiques, however, tend to allow that courts can and should try to cajole the political branches – as well as other interested social actors – into delivering on the socio-economic imperatives spelled out and prioritised in the constitutional text.

This reconceptualisation of weak-form remedies – away from generalised deference and towards the more specific goal of allowing courts to spur politicians into action – has broad implications for the design of remedies for socio-economic rights violations. It suggests most importantly that judges can ratchet up the pressure that they place on politicians in order to induce action on socio-economic issues.[5] Given the standard pattern with socio-economic rights – where the political branches often have taken no action on issues that the constitution prioritises – this kind of pressure may be a key element in addressing the Achilles heel of weak-form remedies: their potential ineffectiveness.

I use the comparative experience of the Colombian Constitutional Court to explain how courts can use more aggressive strategies of enforcement while maintaining a division of labor that is consistent with the core of weak-form

[3] Ray (note 1 above).

[4] For the ur-text on remedies under the South African Constitution, see M Bishop 'Remedies' in S Woolman & M Bishop (eds) in *Constitutional Law of South Africa* (2nd Edition OS, 2008) Chapter 9, 1–192.

[5] Nowhere has the actual room for courts to manoeuvre in South Africa – around socio-economic rights and rights generally – been expatiated with such verve, care and elan as it has in Theunis Roux's body of work and in his recent monograph. See T Roux *The Politics of Principle: The First 10 Years of the South African Constitutional Court, 1995–2005* (2013). See also T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106 See T Roux 'Democracy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10; T Roux 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 4 *Democratization* 10.

review. In particular, I point to two strategies used by that Court in enforcing socio-economic rights: (1) setting malleable default rules that go into effect only if the state does not take effective contrary action within a set period of time, and (2) declaring policy areas structurally deficient, issuing follow-up orders with deadlines for political action on discrete issues, and using public hearings and civil society groups to monitor compliance with those deadlines. The Colombian Court's general approach, including these two strategies, is often contrasted with the more deferential South African Constitutional Court's approach.[6] But as we shall see, the Columbian Court's actions are aggressive without collapsing into strong-form remedies or judicial supremacy. It often seeks to incentivise political action while avoiding to a large extent the actual design of socio-economic policy.

The rest of this essay is organised as follows: In Part II, I seek to reorient the debate around forms of review by arguing that weak-form remedies are consistent with aggressive judicial action aimed at catalysing political activity. Aggressive action aimed at spurring political activity is important in the face of a common problem of political inaction on socio-economic issues. Part III looks at the manner in which the Colombian Constitutional Court has employed aggressive weak-form remedies to spur major alterations by the state in housing, displaced persons, and healthcare policy.[7]

Finally, Part IV concludes by considering the relevance of a comparative conversation about socio-economic remedies in light of the widely varying political constraints on courts and the local factors that partially determine the success or failure of any particular strategy. While the design of socio-economic remedies is an inherently experimental exercise, we can use comparative work to provide guidance that work across jurisdictions. To date, comparative work has helped to clarify the set of tradeoffs between different remedies, and suggests that no remedial strategy is likely to prove ideal. This widely shared view suggests that the most effective remedies may lie somewhere on a spectrum between strong-form review and weak-form review.[8] The Colombian experience offers tools that South Africa might consider when constructing more effective types of weak-form review.

[6] See K McLean *Constitutional Deference: Courts and Socio-Economic Rights in South Africa* (2009); K. Young & J Lemaitre 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa' (2013) 26 *Harvard Human Rights Journal* 179, 180 (Contrasts the more aggressive and involved Colombian enforcement of the right to health with the less interventionist South Africa approach).

[7] See C Rodriguez-Garavito 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 *Texas Law Review* 1669, 1670–71 (Describe the Court's structural interventions).

[8] See M Tushnet 'A Response to David Landau' (2012) 53 *Harvard International Law Journal Online* 155, 161 (Argues that 'structural injunctions typically begin as weak-form injunctions with little detail' and that 'the contrast … between [strong-form and weak-form review] may be overdrawn, or may reflect temporal rather than analytical differences').

II Rethinking Weak-form Remedies and Aggressive Enforcement

Weak-form remedies are sometimes read in terms of judicial deference to the political branches. That is, legislatures rather than judiciaries are best placed to take the final decision on what a Constitution means. [9] Other scholars distinguish weak-form remedies from strong-form remedies by arguing that the former is designed to promote 'dialogue' between the judiciary and the political branches.[10] Both these formulations may be too vague to be helpful to courts actually trying to decide upon appropriate remedies. For example, they do not specify along which dimensions courts should be deferential or the kinds of dialogues courts should promote.[11] Part of the problem is that the weak-form remedy (and weak-form review more broadly) is a broad phenomenon, often lumping together institutional mechanisms like the 'New Commonwealth' model of constitutionalism as well as deferential review of socio-economic rights.[12] These different exercises of review may share some common elements, but they also raise distinct challenges.

When it comes to socio-economic rights, the goals of weak-form review are generally preserved when the political branches rather than courts actually set the details of policy. *Grootboom* is consistent with this model. The South African Constitutional Court held the existing housing plan deficient in not providing for those in dire short-term need, and required that the state rectify this deficiency.[13] Beyond that, the *Grootboom* Court merely requested a reasonable plan to address the text's demand that adequate housing be progressively realisable. A number of more aggressive approaches also preserve the core concern of the weak-form

[9] See M Tushnet 'Weak-Form Judicial Review and "Core" Civil Liberties' (2006) 41 *Harvard Civil Rights-Civil Liberties Law Review* 1 ('[W]eak-form review… allows legislatures to make their own constitutional interpretations stick even when inconsistent with relatively recent judicial interpretations.'). Like Ray's piece, this reply deals only with remedies rather than the underlying rights themselves. Rights and remedies are conceptually separable, although they are related in ways that have not fully been explored within the socio-economic rights literature. See also D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* 150 (2007)(Notes that the weak remedy in *Grootboom* is tied to its substantive rejection of the minimum core approach in favour of reasonableness). The claim that effective remedial strategies for socio-economic rights are of necessity experimentalist and eclectic – a point which I take to be almost between dispute – does not imply that the same is true for interpretation of the underlying rights themselves.

[10] See C Bateup 'Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights' (2009) 32 *Hastings Comparative and International Law Review* 529 ('[D]ialogue theorists argue that weak-form bills of rights create the potential for a collaborative and continuing conversation between the branches about the optimal way to protect and enforce rights….').

[11] See Roux *The Politics of Principle* (note 5 above).

[12] See R Dixon 'Weak-Form Judicial Review and American Exceptionalism' (2012) 32 *Oxford Journal of Legal Studies* 487, 488 (Discusses the differences between American and Canadian constitutionalism as a distinction between strong-form and weak-form review, although she concludes that the practical difference may be less than is commonly supposed). The 'New Commonwealth' model includes a number of ways to soften judicial review by either allowing legislative overrides of judicial decisions, by allowing judiciaries only to interpret statutes in light of constitutional norms rather than striking those norms down, or by allowing judiciaries to declare statutes incompatible with a Constitution without also striking them down. See, generally, Stephen Gardbaum 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707.

[13] See *Government of the Republic of South Africa v Grootboom and Others*, [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)(*Grootboom*).

model. In other words, courts can take a number of paths that hold out of the promise of incentivising political action in a given area without themselves creating programs.[14] As Ray notes, closer judicial management of the process through which policy is made is one way to make weak-form review more effective.[15] A number of other possibilities are explored in more detail below. Courts can take steps to publicise political failings on an issue, and can monitor compliance regularly over time, either on their own or with the use of civil society groups.[16] Similarly, courts can set short and intermediate-term deadlines for the carrying out of discrete tasks that they assign to national or local officials.[17] Finally, courts can set default policies that will go into effect within a certain time period unless the political branches themselves take action on an issue in the interim.[18] In all of these cases, courts seek to spur political action on socio-economic rights without themselves designing complex government programmes.

Many of these techniques do involve judiciaries in setting policy to an extent. In any form of weak review, the Court prods the government to prioritise constitutional issues on forms of social welfare spending that the government might otherwise ignore.[19] Even as the Court sets even malleable default policies, or holds the bureaucracy to more specific short- or medium-term tasks, additional policymaking power will probably be shifted from the political branches to the court. But the Court can carry out fairly aggressive activities to prod the state into action without collapsing into strong-form review. Put another way, while strong-form review and weak-form review may be useful as ideal types, in reality they lie along a spectrum with a number of intermediate points that both represent more aggressive remedies while nonetheless preserving the primary goals of weak-form remedies.

The reasons why courts would want to make weak-form remedies more aggressive are now obvious from experience. The major risk with weak-form remedies is that the political branches will not respond with alacrity to a judicial order, and that the progress the order promises will not at all materialise.[20] This

[14] Both Rosalind Dixon and Katherine Young have made theoretical arguments along a similar vein. Dixon notes that if the purpose of judicial review in the socio-economic realm is to promote dialogue, then this might require harder action in certain circumstances, in order to counter legislative 'blind spots' or 'burdens of inertia'. See R Dixon 'Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391, 404. Young in turn develops a catalytic model of judicial review, where courts might use widely varying approaches in order to spur political action and empower civil society. See K Young *Constituting Economic and Social Rights* 167–191 (2012).

[15] See Ray (note 1 above) at 185.

[16] See below Part III.B.

[17] Ibid.

[18] See below Part III.A.

[19] See M Tushnet *Weak Courts, Strong Rights* 244 (Notes that the order in *Grootboom* 'does shift the government's priorities to some extent' by '[r]equiring the government to include a provision for "people in desperate need"').

[20] See Dixon (note 14 above) at 401–403 (Points out that legislatures may often face 'inertia' that makes them slow to respond to socio-economic demands, especially where the claimants have little voice in the political process and thus represent legislative 'bling spots').

is a common (although strongly contested) critique of *Grootboom*.[21] It is also one of the most important dangers of judicial review of socio-economic rights. Weak-form or dialogic review of ordinary legislation normally occurs after the political branches have already set policy; the courts review that policy decision and the question is to what extent the courts have the last word.[22] In New Commonwealth systems like the Canadian system, the very system is built in ways – such as the legislative override provision in Canada – to soften the finality of judicial review.[23]

This is not the standard pattern with judicial enforcement of socio-economic rights. Instead, judiciaries often deal with situations where legislatures have not legislated with a particular priority in mind, or where legislation exists but the bureaucracy have taken few steps to implement it. The biggest risk in such situations is that the legislature will do nothing or too little. There is thus an urgent need to develop remedies that are more effective in spurring legislative action. The rest of this section demonstrates that the major goals of weak-form review – avoiding the overreach of both judicial capacity and legitimacy – are compatible with aggressive orders aimed at prodding the legislature and/or the bureaucracy into action.

The fact that some kinds of aggressive enforcement mechanisms are compatible with the primary goals of weak-form remedies does not mean that aggressive forms of enforcement are always the optimal strategy. Rather, existing work

[21] For some examples of critiques, see Bilchitz (note 9 above) at 149–152 (Argues that the decision achieved little and was not adequately supervised by the court); DM Davis 'Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference-Lite' (2006) 22 *South African Journal on Human Rights* 301. Others have noted that the decision may have catalysed the development of legislative and judicial progress on the evictions issue over time. See Elisabeth Wickeri 'Grootboom's Legacy: Securing the Right to Access to Adequate Housing in South Africa?' Center for Human Rights and Global Justice Working Paper No. 5 (2004), available at http://www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom's%20Legacy.pdf (Takes stock of the impact of the case on South African housing policy and jurisprudence over time). Stu Woolman actually traces the policy history post-*Grootboom* and the government's significant delivery of new units of housing (2.2 million), even as it struggles with a backlog almost identical in size. K Rust and the Centre for Affordable Housing in Africa (FinMark Trust) *2012 YearBook on Housing Finance in Africa: A Review of some 42 of Africa's Housing Finance Markets* (2012) While critical of the Court's early avoidance-based techniques, he ultimately identifies a gratifying, *emerging* trend in the Court's meaningful engagement jurisprudence. This trend, consistent with his own experimentalist and developmentalist take – on shared constitutional interpretation, participatory bubbles, reflexivity and chastened deliberation – reflects a more activist court: a court willing to provide a normative framework on socio-economic rights (and other rights) at the same time as it leaves the coordinate branches, and more directly interested and knowledgeable parties, to work out the best possible solution (practically and normatively) to the dispute (and the problems) that have seized the Court. S Woolman *The Selfless Constitution* (note 2 above) 318–331, 440–480 citing, eg, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2011] ZACC 8, 2011 (7) BCLR 723 (CC). Several contributors to this volume do not share such a rosy view of the Court's jurisprudence or divine such a positive emerging trend. See S Wilson 'Curing the Poor: State Housing Policy in Johannesburg after *Blue Moonlight* (2013) 5 *Constitutional Court Review* 280; J Dugard 'Beyond *Blue Moonlight*: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing' (2013) 5 *Constitutional Court Review* 265. Indeed, they are downright scathing when it comes to what they perceive as the Court's failure to anticipate how and why their interventions would go awry.

[22] See Tushnet (note 9 above) at 4 (Contrasts strong-form and weak-form review based on whether judicial review of legislative action is final or instead subject to possible revision by political actors).

[23] See note 10 above.

has suggested that there is no perfect remedy for violations of socio-economic rights.[24] Further, the 'best' approach is likely to be partly a matter of specific political and social context, especially variables like the nature of the party system and the strength of civil society.[25] Finally, as Tushnet points out, sequence may matter a great deal when designing effective remedies in this area.[26] This draws off of a key point made by the experimentalist literature – remedies for complex problems are likely to be an iterative process.[27] Courts may for example want to begin with broader, more tentative solutions, moving towards firmer remedies as they gauge both the political reaction to their orders and as they learn more about how to respond in a complex area of policy.[28] But it is important for courts to realise that they can utilise more aggressive forms of enforcement without collapsing into judicial supremacy.

A Weak-Form Remedies and Judicial Capacity

Supporters of weak-form remedies commonly argue that courts are poorly suited to design complex social programmes. First, the problems that require redress are seen as paradigmatically polycentric. The design of an adequate system of housing, for example, forces courts to engage a multitude of different issues such as construction in different sectors and for different classes, subsidies, eviction and land-clearing, land titling and restitution, expropriation, and so on.[29] Furthermore, attempts to resolve one of these issues piecemeal with partial fixes may have an impact on other areas either within or outside of housing policy. For example, a policy that makes it harder to evict poor citizens squatting in informal settlements on public or private land may affect the incentives to build new housing. And a system of housing subsidies may impact the budget, leaving less money for other forms of social welfare.

In addition, social issues are thought to be particularly technical: they ostensibly require expertise that judges do not possess.[30] Housing or health policy may depend on statistical studies about the effects of different programmes; they may also depend on complicated economic or sociological studies. Legislatures and executive bureaucracies are presumed to have access to this kind of information, and moreover the capacity (through legislative committees and specialised civil

[24] See D Landau 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard International Law Journal* 190, 199–201 (Outlines tradeoffs between different remedial approaches).

[25] See Young (note 14 above) at 168–74 (Notes that judicial role conceptions are 'dependent on constitutional culture [and] institutions').

[26] See Tushnet (note 8 above) at 163.

[27] See C Sabel & W Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1015, 1081 (Explains the benefits of an iterative approach to public law remedies).

[28] Experimentalists refer to such learning and the revision of both descriptive accounts and normative positions – by all parties, over time, courts included – as 'reflexivity'. See Woolman (note 2 above) at 197–240.

[29] See J King *Judging Social Rights* 190–212 (2012)(Notes that socio-economic rights cases often involve polycentric dimensions, although arguing that such dimensions are in fact endemic to litigation across issue areas).

[30] Ibid at 212–249 (Explores the expertise critique and ways in which courts can review socio-economic rights claims despite its weight).

servants) to process it. Courts are usually thought to have much more difficulty accessing and utilising this sort of information.

These factors are not unique to socio-economic rights. But many commentators seem to think that they have particularly strong bite in this domain.[31] Indeed, they often lie at the heart of the case against the inclusion of justiciable socio-economic rights in constitutions.[32] Frank Cross finds it unthinkable that courts would carry out a robust judicial enforcement of social rights given the enormity of the tasks that they would face.[33] The supporters of weak-form review accept some aspects of these institutional capacity-based critiques. However, they suggest that weak-form review, properly conceived, offers a way around most of the relevant problems. Mark Tushnet argues that Cross's case against socio-economic rights is actually aimed only against strong-form review.[34] Courts may lack the tools to design social programmes from the ground up. (And they are rarely asked to do so.) They can, however, identify the absence of policy or the presence of violations. Courts can then ask the state to remedy both constitutionally infirm omissions and actions.

Institutional capacity constitutes a genuine concern that is real and significant. I have argued in other work, drawing off of the Colombian Constitutional Court, that courts do possess some techniques for mitigating these problems. For example, civil society groups can serve as monitors of state action and a source of technical expertise, helping to compensate for a court's own deficiencies in this regard.[35] Courts can also rely on other 'checking institutions', such as a Public Protector, an Auditor-General, or a Human Rights Commission, to monitor executive action and to propose new policy solutions.[36]

Aggressive review is compatible with the goals of weak-form review so long as it primarily incentivises the state to design or reorient policy. Of course, in incentivising the state to act along particular lines, the judiciary inevitably is

[31] See M Langford 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 3, 36–39 (2008)(Notes polycentricity and capacity concerns with the socio-economic rights enforcement, but believes that they can be overcome.)

[32] In South Africa, such staid and standard tropes did not carry either the academic arguments or the political debates at the time the Interim Constitution and the Final Constitution were written. See E Mureinik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464.

[33] See F Cross 'The Error of Positive Rights' (2001) 48 *UCLA Law Review* 857, 889 ('Courts … avoid involving themselves in matters fundamental to the enforcement of positive rights.')

[34] See Tushnet (note 19 above) at 231.

[35] See David Landau 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harvard International Law Journal* 319, 362.

[36] Ibid at 360. South Africa's Chapter 9 Institutions serve oversight roles, mediate disputes and can assist the Court in the enforcement of its orders. See M Bishop & S Woolman 'Public Protector' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; S Woolman & Y Schutte 'Auditor General' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; C Albertyn 'Commission for Gender Equality' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D; J Klaaren 'South African Human Rights Commission' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 24C; K Govender 'The South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 571.

'making' social policy. For example, by telling the political branches in *Grootboom* that existing housing plans were unconstitutional because they did not adequately provide for those persons with the gravest short-term needs, the Court was attempting to reorient government policy.[37] Most academic writing and judicial decisions assume that it is acceptable for the courts to undertake this kind of prioritisation. If socio-economic rights are to have any justiciable content, then it is hard to see how it could be otherwise. Courts must have the ability to tell the political branches that they need to do better in attending to particular constitutional values and provisions.

The capacity critique seems instead to go mainly to the details and design of new public policy. The target in the US has been long-term structural interdicts that required the desegregation of schools (or engagement with curriculum content) and the micromanagement of the number of beds in prison cells.[38] To some extent, these critiques misunderstand the manner in which policy was generally made in these cases. Detailed policy orders were often the product of a negotiated solution among counsel for plaintiffs, defendant and experts retained by the court.[39] Ideas arose out of a dialogue between political, judicial and civil society actors and were usually not the product of judicial fiat. When the order is understood as the end product of such participatory bubbles, the remedy might firmly incentivise the state to act on a particular issue while leaving the design of the policy details to the politicians and bureaucrats.[40]

B Weak-Form Review and Democratic Legitimacy

A second major critique of the judicial enforcement of social rights hinges on a perceived lack of democratic legitimacy. All exercises of judicial review potentially raise the 'counter-majoritarian difficulty' – the theoretical problem of justifying exercises of judicial overruling of decisions made by elected political actors.[41] But critics of the judicial enforcement of social rights argue that this problem is especially acute in the context of socio-economic rights, largely because of what Frank Michelman has called their 'raging indeterminacy'.[42] They argue that while all rights lack clarity, socio-economic rights may raise an especially large judicial zone of discretion because their content is especially contested. Courts might

[37] See Tushnet (note 19 above) at 244.

[38] See R Sandler & D Schoenbrod *Democracy by Decree: What Happens When Courts Run Government* 117–122 (2003); D Horowitz *The Courts and Social Policy* 255–261 (1977).

[39] See M Feeley & E Rubin *Judicial Policymaking and the Modern State: How the Courts Reformed America's Prisons* 351–361 (1998) (Recognises that judicial policymaking is constrained by adherence to doctrine and by the interests of various groups involved in litigation).

[40] See Bilchitz (note 9 above) at 198 (Argues for an approach in which the court sets out the 'general standard that constitutes the minimum core of the state' while the legislature and executive have 'some leeway in deciding exactly what measures are to be taken to realize the right').

[41] On how the South African Constitution's limitations clause directly addresses the putative counter-majoritarian dilemma, see S Woolman and H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2007) Chapter 34. The internal limitations clause found in FC ss 26(2), 27(2) and 29(2) were conceived with judicial overreach clearly in mind.

[42] See F Michelman 'The Constitution, Social Rights, and Liberal Political Justification' (2003) 1 *International Journal of Constitutional Law* 13, 30.

justifiably begin from a number of different starting points, to the benefit of a number of different groups involving different issues.

Similarly, these critics often argue that decisions on socio-economic rights tend to involve sensitive matters that are generally thought to be left to political actors rather than courts. Judicial decisions on socio-economic rights often have significant budgetary effects and involve the spending of considerable amounts of money.[43] Again, these problems are not unique to social rights issues. Some 'first generation' rights, like the right to counsel as a component aspect of due process, also involve the construction of costly large-scale programmes.[44] But the critics argue that the enforcement of socio-economic rights is likely to involve more substantial – or at least more visible – cost than most first-generation rights.

The democratic critique of judicial enforcement of social rights is shakier than the capacity critique. It rests on a particular vision of the separation of powers that may be too dependent on North American and European theorists. It seems to have been rejected by many actors in the new 'global south'. It may be that the configuration of political institutions in 'global south' countries, and systematic deficiencies or distortions in the representativeness or capacity of institutions like legislatures, means the critique has less bite.[45] Or it may be that the poor across the developing world are so systematically excluded from representation within their own political systems that one can construct a 'process-based' defence of robust judicial review on socio-economic issues.[46]

But even assuming *arguendo* the force of the basic critique, it again seems to aim mainly at judicial activity that itself sets social policy, rather than judicial activity aimed at incentivising politicians to set policy along the lines suggested by the Constitution. Courts possessed with powers of judicial review have the legitimacy to interpret constitutional provisions and to condemn, as constitutionally infirm, legislative action or inaction with respect to a given right. Serious problems only arise when courts themselves order the spending of substantial sums on money on particular programmes. But courts with such powers rarely wade into such choppy waters. The first 20 years of South African jurisprudence offers one example of both principled action and institutional restraint.

III Incentivising Political Action: Approaches from the Colombian Constitutional Court

The jurisprudence of the Colombian Constitutional Court can be used to explore the ways in which courts can use aggressive remedies that nonetheless preserve space for politicians to design the content of social programmes. Judiciaries, in

[43] See, eg, Cross (note 33 above) at 890 (Contends that courts should not and would not enforce socio-economic rights because they impinge on the 'power of the purse'.)

[44] See Langford (note 31 above) at 30–31.

[45] See Landau (note 35 above) at 323–332 (Argues that differences in the ways political institutions and party systems function give the counter-majoritarian difficulty less bite in many developing countries).

[46] See Dixon (note 14 above) at 405.

so doing, play what Katharine Young has called a 'catalysing role' – they seek to unblock dormant areas of socio-economic policy.[47]

The Colombian Constitutional Court is an ideal point of comparison because it has worked with a more aggressive set of remedies than the South African Court. And yet the Colombian Constitutional Court has carried out its work without necessarily collapsing into the dangers of strong-form review of socio-economic rights. Moreover, it has done so within a constitutional (although not political) context that is not so different from the context in South Africa.[48] Like the Final Constitution, the Colombian Constitution of 1991 was loaded with socio-economic rights to goods such as health and housing. These rights were viewed as a critical part of the new political order.[49] Indeed, the new constitutional order was labelled a 'social state of right' [*estado social de derecho*] in Article 1, a significant shift from the traditional understanding of the Colombian state as embodying the rule of law [*estado de derecho*].[50] The effective realisation of a broad set of rights, including socio-economic inclusion and the combatting of poverty, were seen as essential to bringing long-term peace to Colombian society.

But as in South Africa, the Colombian Court initially worked within a context where there were doubts about the extent to which social rights were judicially enforceable. The Colombian rights generally lack the built-in limitations clauses (that the state must take 'reasonable' measures, 'within its available resources, to achieve the progressive realisation' of the right) found in the South African Constitution.[51] Moreover, the president at the time the new constitution was adopted made speeches in which he argued that the new rights would be non-justiciable. In addition the Assembly left open key questions about the extent to which the new socio-economic rights could be judicially enforced.[52] Over time, the Court has tended to resolve these initial doubts in favour of aggressive judicial enforcement.

Not all of the Colombian Court's activity can be explained within a weak-form paradigm. For example, the Court has developed a vast jurisprudence of individualised enforcement in the health and pension fields – petitioners have come to the courts by the thousands to argue that they have been unjustly denied a treatment, medicine or pension, and the Court has generally granted them a

[47] See Young (note 14 above) at 172 ('The role conception of a catalytic court is one that sees itself in productive interaction with other political and legal actors.')

[48] Roux might argue that the political climate is, indeed, why the two Courts have produced different outcomes. See Roux *The Politics of Principle* (note 5 above).

[49] See Constitution of Colombia, Arts 48 (social security), 49 (health), 51 (housing) and 67 (education).

[50] Ibid at Art 1 ('Colombia is a social state of right, organised in the form of a unitary Republic, decentralised, with autonomy in its territorial entities, democratic, participatory and pluralist, founded on respect for human dignity, in work, and in the solidarity of the people integrating it and on the prevalence of the general interest.').

[51] See FC s 26.

[52] For example, the constitutional provision creating the new individual complaint mechanism, called the *tutela*, held only that the mechanism was available to enforce 'fundamental rights' without defining which rights were 'fundamental.' See Constitution of Colombia Art 86. See also Art 85 (Defines certain rights as being of 'immediate application' without defining the significance of this term, and leaving the socio-economic rights off of this list).

remedy on an individual basis.[53] These kinds of remedies are difficult to square with the goals of weak-form enforcement. I will leave the Court's approach to the substantive constitutional interpretation of these socio-economic rights for another occasion.[54]

Instead, I focus here on two different approaches used by the Court to deal with structural deficiencies in socio-economic policy. In all of these cases, the court faced the common problem of political inaction: either the legislative framework that existed was nonexistent or deficient, or the relevant bureaucracy lacked the capacity or will to implement an extant legal framework. The Court has been creative in finding ways to spur political action in these contexts. The first approach, used in a dramatic series of housing decisions during a deep economic crisis in the late 1990s, was meant to incentivise legislative action by setting an unpleasant default policy for the political branches if they failed to design a new housing programme within a set period of time. The Court coupled this approach with a strategy of aggressively publicising the issue so as to put it more squarely on the social and political radar, and to pressure the political branches into taking effective action. The second approach, which employed structural injunctions, gave substance to the rights of displaced persons (2004) and health (2008), respectively. The Court retained jurisdiction in these matters in order to monitor bureaucratic compliance and issued follow-up orders with specific deadlines for bureaucratic action. Here too, the Court has attempted aggressively to publicise issues so as to put them on the public radar, and has used civil society groups to aid in its monitoring.

A Incentivising Political Action by Using Default Rules

A major concern in the design of weak-form review is that the political branches may ignore the invitation to dialogue. The Colombian Constitutional Court faced this dilemma in the late 1990s, when a deep economic crisis threatened several hundred thousand homeowners with foreclosure.[55] The problem was that the government system to finance housing, called UPAC, indexed interest rates in a way that caused them to rise much more sharply than the rate of inflation. The economic crisis itself ensured that a significant number of families would have

[53] See P Rueda 'Legal and Social Change During Colombia's Economic Crisis' in J Couso, A Huneeus and R Sieder (eds) *Cultures of Legality: Judicialization and Political Activism in Latin America* 25, 40–48 (2010) (Tracks an explosion in the amount of cases using the concept after an economic crisis in the late 1990s).

[54] The key concept here is the 'vital minimum doctrine,' which the Court synthesised as 'a direct consequence of the principles of human dignity and the social state of law' that are explicit in the text of the Constitution. See Decision T-426 of 1992. The right to a vital minimum provides a right to a minimum level of well-being and has at times served as a kind of linchpin or prioritisation device for Colombian jurisprudence. See D Landau 'The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures' in A Nolan (ed) *Economic and Social Rights After the Global Financial Crisis* (2014).

[55] See RU Yepes 'The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates' in R Gargarella et al (eds) *Courts and Social Transformation in New Democracies* 127, 136 (2006) (Notes that the crisis aggravated the situation of 800 000 borrowers and seriously threatened 200 000 borrowers with foreclosure).

difficulties in making payments. Despite the crisis, neither the president nor the Congress took action, perhaps influenced by international financial institutions aiding the country.

The Court stepped in directly in a few cases to patch problems with the system. For example, it struck down contractual clauses disallowing prepayment, as well as agreements allowing the capitalisation of interest charges.[56] The fundamental problem was that the Court lacked the competence and legitimacy to construct a new system. The Court thus undertook a series of responses designed to maximise the likelihood of a political response.

First, in a case challenging the constitutionality of the entire UPAC system on formal grounds, the Court called a one-day, legislative-style public hearing in which it heard from economists, members of civil society groups (including groups representing the debtors), business and banking organisations, members of Congress, the leaders of checking institutions including the Ombudsman and Attorney-General, and members of the government, including Ministers of State and the head of the Central Bank.[57] The hearing aired the weaknesses of the UPAC system, offered possible solutions, and acknowledged the risks of intervention. The Court held such a hearing even though the issue before the Court was primarily technical: whether the UPAC statute had been improperly promulgated by the president using emergency powers, rather than going through the normal congressional process.[58] In conjunction with this, members of the Court spoke to the media and otherwise publicised the issue. The Court's approach helped to raise public consciousness, to put the UPAC problem on the public agenda, and to increase pressure on the administration.

Second, the Court decided the case so as to create an unacceptable default for the government. It struck down the entire UPAC regime on procedural grounds. At the same time, it deferred the effect of the decision for about nine months (from September 1999 until June 2000), and allowed the existing legislation to remain in effect during the interim period.[59] The Court made it clear that although the state had retained discretion as to how it legislated, it would remain bound by the Court's own prior jurisprudence on the issue. The judgment placed the administration in a difficult position. If it failed to take action on the issue, then it would be seen as causing a collapse of the entire UPAC system. Faced with this kind of unpleasant fallback position, the president forced a bill through the legislature that altered the formula for calculating interest rates and provided bailout money for homeowners in danger of losing their home. The Court upheld the new law, although it conditioned the constitutionality of some provisions on pro-debtor principles adopted by the Court.[60] These changes were significant. The decision for example required that the interest rates charged to UPAC debtors

[56] See Decisions C-747 of 1999 (capitalisation); C-252 of 1998 (prepayment). Further, in Decision C-383 of 1999, the Court held that tying UPAC rates to broader interest rates in the economy, rather than to rates of inflation, was unconstitutional.

[57] See Decision C-700 of 1999, § VI (Describes the public audience and the individuals who gave statements at that audience).

[58] See Decision C-700 of 1999.

[59] Ibid.

[60] See Decision C-955 of 2000.

be no higher than the lowest rates charged in the broader economy, and increased bailout funds for some classes of debtors.

The Court also attempted to use default rules in its recent same-sex marriage decision.[61] It held that the limitation of gays to common-law-like unions with property rights, rather than allowing same-sex marriage, was a 'deficit of protection'. The Court acknowledged, at the same time, that the political branches had some discretion in how they responded to that deficit.[62] It thus ordered the legislature to take action on the issue within two years.[63] If the Congress failed to act, then notaries and local judges would have the power to formalise the unions. The Court thus attempted to offer the Congress a choice that would incentivise positive action: legislate on this issue or lose regulatory control over it. In this case, the attempt failed. The Congress debated but never approved legislation giving effect to the judicial decision within the two-year window. Notaries, lower court judges and the Columbian Constitutional Court have now begun defining the shape of the new regulatory scheme.[64]

The UPAC decision is not wholly consistent with the goals of weak-form remedy. The Court did give itself the last word on the design of policy on certain questions. It bound the legislature to its own prior jurisprudence on capitalisation of interest, prepayment, and other questions, and it upheld the new law only after conditioning its constitutionality on the inclusion of certain new provisions, like the one requiring that interest rates within the system be no higher than those charged anywhere else in the Colombian economy. But the core technique of spurring legislative action by otherwise suggesting that its policy would revert to an unacceptable default did ensure that the political branches carried out most of the design of the new policy.

The UPAC decision in effect is a species of what has been called a 'penalty default' – the intent is to ensure that action is taken by providing a penalty if it is not.[65] The gay marriage case in contrast is closer to what we might call an 'honest default' – the Court is attempting to design policy as best it can, while allowing the legislature to deviate from the judicially set rules should it choose to do so. The choice between these two kinds of default rules requires a complex calculation that is beyond the scope of this brief response. The penalty default may appear to be illegitimate judicial action. The political branches might fail to comply and then blame the judiciary for imposing an unacceptable and undesirable policy

[61] Earlier decisions had given same-sex couples the same rights as heterosexual couples to form 'unions of fact' after living together for a set period of time, with social benefits and rights in respect of property. See Decision C-075 of 2007. The issue posed in this case was whether those unions were sufficient legal protection, or whether the state instead had to recognise same-sex marriages.

[62] See Decision C-577 of 2011.

[63] The case could hardly look more similar in issue and in outcome than its South African counterpart. *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* [2005] ZACC 20, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

[64] See Corte deje en firme sentencia que formaliza union gay, El Tiempo, July 24, 2013, available at http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-12946302.html.

[65] See K Krawiec & S Baker 'The Penalty Default Canon' (2004) 72 *George Washington Law Review* 663 (Proposes a rule within American administrative law that would penalise lawmakers by striking down some delegations to administrative agencies that seemed motivated by improper motives).

– unmoored from any valid interpretation of the constitutional text – on the country. If the political branches do fail to comply, the consequences could be disastrous. Had Colombia been left without an extant policy on housing finance, the consequences would have been dire for a number of different groups. The Court would have been forced either to step in on an individual basis or allow significant suffering.

An honest default policy, in contrast, can be defended as a best judicial effort to interpret constitutional provisions. However, it may also be ineffective in spurring political action, and the default may itself become the rule, even against the wishes of the Court. This outcome is particularly likely where legislative action is costly to the politicians on broadly unpopular issues. The gay marriage decision outlined above demonstrates such a result. The Court set out a policy that was largely acceptable to the political branches. Many members of Congress preferred to let the judicial rule stand rather than remaking it. The broader point is that the judicious use of default policies can be an effective way to advance socio-economic policy without requiring that a court itself have the last word on the content of policy design.[66]

B Monitoring and Cajoling Political Action in Structural Cases

A second model has been used by the Columbian Court in its two major structural cases. These two structural injunction cases, as well as other structural injunction cases from places like India, have normally been contrasted with the weak-form review found in cases like *Grootboom*. But as I show in this section, the techniques used by the Colombian Court in its structural cases are largely compatible with the capacity and legitimacy critiques at the base of weak-form review. They can be constructed so as to leave the essence of policymaking in the hands of the bureaucracy, while the courts use a combination of techniques to try and impel steady progress.

One of the Court's distinguishing features has been its willingness to use structural remedies to tackle large-scale socio-economic rights issues in an environment that entirely lacked a political response or suffered from a horribly deficient political reaction. The Court has used this device – which it calls the 'state of unconstitutional conditions' – twice in recent years: once in 2004 to deal with internally displaced persons, and the second time in 2008 to deal with structural failures in the healthcare system.[67] Both cases display a similar toolkit. The Court maintains jurisdiction over the cases, puts a particular panel of judges

[66] The 'default' approach has often been used in South Africa as well. See *Minister of Home Affairs v Fourie* [2005] ZACC 19, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) (Rewrites the marriage statutes to include gay marriage but suspending the decision for one year to allow Parliament to legislate on the issue); *President of the Republic of South Africa v Modderklip* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (Orders that the state was required to compensate a private landowner for infringements on his property rights due to impoverished squatters who lacked alternative accommodations, and thus potentially incentivising the state to develop its housing policies by making it internalise some of the costs of its deficient policy). FC s 172*(b)*(ii) gives courts exercising judicial review the power to suspend 'the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect'.

[67] See Landau (note 24 above) at 223–229.

in charge of monitoring compliance, issues a large number of follow-up orders, holds periodic public hearings, and carves out a role for civil society in monitoring compliance. Both cases are still ongoing.

The internally displaced persons (IDP) case originally involved roughly three million Colombians who had been forced from their homes because of ongoing, low-intensity civil violence, and were living somewhere else within the country.[68] The Congress had passed a law providing some support for these individuals, but the law had not been implemented by the bureaucracy. As a result IDPs were living without any network of social services – a particularly precarious state within a particularly poor country.[69] They did not receive any healthcare, food, access to housing and job training, or restitution. Some of these individuals brought individual complaints, often aided by a limited network of civil society supporters. This same network pushed the Court towards adopting a more global solution to the problem.[70] The orders focused initially on creating a realistic set of indicators to gauge progress and on developing a coherent bureaucracy with a substantial budget. More recently, the Court has tried to prod the bureaucracy to be attentive to the special needs of certain vulnerable groups (children, women, indigenous groups, the handicapped, and Afro-Colombians), as well as to make progress on more complex issues like access to land as a form of restitution.[71]

The health case was even bigger by some metrics: it encompassed the entire national healthcare system. This case was spurred by a huge number of individual complaints, as well as by concerns within the Court about the equity effects of huge numbers of individual remedies.[72] The Court held that health was in itself a fundamental right and issued structural orders requiring the bureaucracy to rework and clarify the lists of covered benefits, to change the way in which benefits are financed, and to equalise benefits between the 'contributory system,' which includes formal sector workers, and the 'subsidized system', which includes the unemployed and those in the informal sector.[73] Historically, the contributory system possessed a far larger package of benefits than the subsidised system. The goal was to force the national authorities to fix the long-standing structural problems across the system that had contributed to the avalanche of individual lawsuits.[74]

This section does not focus broadly on the results of these cases. They have been covered in much more detail elsewhere. Both cases have cost the court significant

[68] See M Espinosa 'The Constitutional Protection of IDPs in Colombia' in Rodolfo Arango Rivandeira (ed) *Judicial Protection of Internally Displaced Persons: The Colombian Experience* 1, 4 (2009)(Notes that current estimates fluctuate between 1.9 and 3.9 million people).

[69] Ibid at 6–7 (Notes the importance of Law 387 of 1997, which attempted to regulate the issue but which had not been implemented).

[70] See Landau (note 35 above) at 360 (Notes that the Court received a 'flood' of tutelas from displaced persons before issuing its decision).

[71] See Rodriguez-Garavito (note 7 above) at 1682.

[72] See text accompanying note 52 above.

[73] See Decision T-760 of 2008.

[74] See, generally, AE Yamin & O Parra-Vera 'Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates' (2010) 33 *Hastings International and Comparative Law Review* 431, 433–45.

time and resources, and progress has been painfully slow. But real progress has been achieved. In the displaced persons case, the Court did contribute to the construction of a more coherent public policy on the question, including a large increase in the size of the budget and the bureaucracy.[75] Moreover, progress has been achieved across some major indicators. The results provide at least limited support for structural remedies.

Instead, the focus here is on the techniques used by the Court. First, the Court has made use of its ability to publicise these cases in order to increase their visibility with political groups and with the public. The Court holds periodic public audiences on both structural injunctions.[76] The major recent audiences have been televised. It uses these events to give civil society groups a voice, to track compliance and cajole the bureaucracy into moving more quickly, and to crystallise public opinion around important issues. In 2011, for example, the Court brought in new personnel to move the long-stalled healthcare case forward, and held a prominent public audience in order to try and achieve progress on the difficult goals it sought to achieve.[77] The audience appeared to have some effect. Congress and the state bureaucracy finally attempted to equalise the packages of benefits enjoyed by poorer citizens with those enjoyed by the middle class.[78] In the displaced persons context, the Court was able to take an issue that was not really on the public or political radar and make it a much more central issue.[79]

Secondly, the Court has used a set of techniques across both cases that are a species of the tight procedural control recommended by Ray.[80] As Cesar Rodriguez-Garavito notes, these techniques have generally set specific deadlines for compliance with a specific task, and then requiring the state to report back upon compliance.[81] The Court then reviews the state's activity to ensure that it meets constitutional standards. The Court generally has broken each case down into a set of discrete tasks. It has then issued a series of orders focusing on each issue.[82] For example, in an order in the displaced persons case from 2008, the Court focused on special risks faced by women. It identified a series of 12 risks faced especially by women (eg, sexual violence), and ordered the construction of

[75] See C Rodriguez-Garavito & D Rodriguez-Franco *Cortes y Cambio Social: Como la Corte Constitucional Transformo el Desplazmiento Forzado en Colombia* 212 tbl.1 (Shows large increases in the budget.).

[76] One such public audience in the displaced persons case is described by Cesar Rodriguez-Garavito. C Rodriguez-Garavito (note 7 above) at 1669–1670.

[77] Video of this audience, as well as another audience in the health case held in 2012, are available on the Court's webpage at http://www.corteconstitucional.gov.co/T-760-08/audiencias.php.

[78] See Young & Lemaitre (note 6 above) at 196.

[79] See C Rodriguez-Garavito & D Cortes y Cambio Social: Como la Corte Constitucional Transformo el Desplazmiento Forzado en Colombia 97–100 (Finds that the decision increased media coverage of the problem of displaced persons in major outlets).

[80] See Ray (note 1 above) at 223.

[81] See Rodriguez-Garavito (note 7 above) at 1676 (Defines this model under the heading of 'dialogic activism').

[82] A list of the court's most important follow-up orders in the displaced persons case through 2009 can be found in Rodriguez-Garavito & Rodriguez-Franco (note 75 above) at 88–89.

13 specific programmes to confront these risks within a set timeframe.[83] These programmes were identified and worked out through extensive dialogue between the Court, the state, and civil society groups. They were not simply mandated by the Court. Moreover, the programmes adumbrated by the Court left the state in control over the details of policy.[84]

Thirdly, the Court has made use of organs of civil society to reduce its own burden. Colombian civil society (advocacy groups, labour unions, student groups, etc) has historically been quite weak. However, the period since 1991 has seen an increase in the activity of civil society groups. Many of these groups have viewed the Court as a forum for action. Abortion-rights and gay-right groups, for example, largely bypassed the political process and sought to use the Court to achieve their aims. In the social rights area, the Court has had some success integrating civil society into its enforcement strategies. In the displaced persons case, the Court established a Monitoring Commission (*Comision de Seguimiento*) composed of NGOs, groups representing IDPs, ex-magistrates of the court, and other officials.[85] The Commission was charged with monitoring state compliance and reporting back to the Court periodically. Members of the Commission, along with the state, participate in periodic, televised public hearings examining the overall condition of compliance. The Commission has played a major role in enforcement. It goes well beyond mere information-gathering. It has served as the source of many of the ideas that have been subsequently turned into orders of the court. It remains a source for statistical and policy information that the Court would not otherwise possess.[86]

The Court's efforts in these two structural cases obviously lie somewhere on an intermediate point in between weak-form and strong-form review, oscillating depending on the particular issue and the prior resistance faced by the Court. In particular, one observes a sequence across both cases where the Court begins with relatively open-ended orders, both in terms of content and timeframe for compliance. If these orders prove ineffective, the Court becomes more willing to give more detailed orders or directly to impose solutions. The course of negotiations between the Court, the state, and the Monitoring Commission on the construction of indicators for displaced persons are a case in point. The Court began by allowing the state to propose a set of statistical indicators on different issues such as healthcare, housing, family reunification, etc. [87] It initially rejected most of these indicators. In a subsequent hearing the Court accepted some of them but continued to reject others.[88] In a third hearing, it accepted some indicators

[83] See Auto 092 of 2008, available at http://www.corteconstitucional.gov.co/relatoria/autos/2008/a092-08.htm.

[84] For example, the Court ordered the creation of a 'Program for the Prevention of Sexual Violence Against Displaced Women and For Full Attention to its Victims,' but did not detail the exact size or scope of such a programme.

[85] See Decision 025 of 2004.

[86] See Rodriguez-Garavito & Rodriguez-Franco (note 75 above) at 85 (Describes the Commission and its work).

[87] See Auto 109 of 2007 (Explains the significance of a system of indicators and adopting some indicators, while deferring action in other areas).

[88] See Auto 233 of 2007.

proposed by the Monitoring Commission as an alternative to those proposed by the state and adopted its own indicators in two areas.[89]

Structural remedies in the mold of the displaced persons and healthcare decision are not without costs. They require courts to set policy to a meaningful degree: And they are expensive. The Court has employed large teams working across a range of issues both cases. Without these teams, it would prove difficult for the Court to handle many of the issues raised in these cases at the same time.[90] These kinds of cases reflect slow efforts at improving policy and bureaucratic competence. The Court has retained jurisdiction of the displaced persons case for over 10 years. The healthcare case has now entered in its sixth year.

Despite this extensive engagement, the approach taken by the Court preserves considerable space for the political branches to design policy. While the Court's more detailed orders have required the undertaking of discrete tasks within set periods of time, they have still outlined programmes in only general terms, leaving the details of design to the bureaucracy. Moreover, in practice the progress of the case has been dialogic. The politicians have often declined to fully comply with judicial orders. They have then been forced to defend these decisions at subsequent public audiences.[91] The Court has rethought or reworked its policies in light of bureaucratic responses. In this sense, the Court's orders have been iterative in the experimental vein: the Court has adjusted its orders in light of feedback received from both state actors and civil society groups, learning and thus improving responses through time.[92] In short, the Court's big structural cases have maintained some key benefits of weak-form remedies and have not simply collapsed into strong-form enforcement.

IV Conclusion: A More Guided Experimentalism

Comparative work in the socio-economic rights field, and especially on remedies, raises questions about the utility of cross-country comparisons. Courts are embedded in political contexts that restrain them, and these constraints may be especially powerful when dealing with questions like socio-economic remedies. The strong-form Colombian approach, outlined below, is at least partly a product of the fragmented and weak party system that dominated that country in the period after 1991.[93] It is probably not realistic to expect it to be exported to

[89] See Auto 116 of 2008.

[90] See Landau (note 24 above) at 225.

[91] Ibid at 226 (Notes that the Court has often faced problems of compliance with its large-scale orders).

[92] This process of shared constitutional interpretation, participatory bubbles, flattened hierarchies, and reflexivity provides hallmarks of the experimental constitutional literature mentioned in passing above. See Woolman *The Selfless Constitution* (note 2 above); M Dorf 'The Domain of Reflexive Law' (2003) 103 *Columbia Law Review* 384; M Dorf & C Sabel 'Drug Treatment Courts and Emergent Experimentalist Government' (2000) 53 *Vanderbilt Law Review* 831.

[93] See Landau (note 35 above) at 341–344 (Contends that the shape of the Constitutional Court's role in Colombia is in significant part a product of the political context in which the Court operates).

political contexts like the South African one, which is very different.[94] Moreover, the design of remedies in socio-economic rights questions seems inevitably to be experimental in nature. Effectiveness depends on a number of variables that tend to vary from country to country and even issue by issue – the likely nature of the political response and the strength and cohesiveness of civil society.

The purpose of cross-national work, then, must be more modest than developing a 'best' model for enforcement. Indeed, existing work has largely confirmed that there is no best model, and has instead clarified a set of tradeoffs between different kinds of approaches. Nor should comparative work be aimed at developing models for wholesale import into different contexts. It may be politically infeasible that the South African Constitutional Court, working in a political environment that is substantially more constraining than the Colombian Constitutional Court, adopt an equally aggressive enforcement approach. Nor is it clear that such an approach would be as effective in a very different political environment.

Comparative work is helpful in clarifying the trade-offs among types of remedies. Existing work suggests for example that some types of review, like the individualised enforcement model so common in Latin America, are unlikely to achieve widespread change. It also suggests that both pure types of strong-form review and weak-form review have serious weaknesses. Strong-form structural review, where a court effectively sets socio-economic policy across a policy area, is likely to drive the court up against real constraints on its capacity and will probably provoke a political backlash in most types of systems. Weak-form review in the *Grootboom* mold may prove ineffective at spurring real political action. This suggests that courts would be well-served by searching for intermediate points between pure strong-form and weak-form review.

In the South African context, ratcheting up weak-form review by increasing the pressure placed on the political branches seems like a necessity, and the Colombian experience suggests that it can be done without dissolving key elements of the Court's approach. Ray discusses two ways to increase the force of deferential or weak-form review: increasing control over process, and increasing the depth of substantive constitutional interpretation. On the procedural model, Ray, for example, discusses the companion cases to *Blue Moonlight*, which exercised control over the process leading up to evictions of the poor.[95] Ray identifies both of these techniques as a way to move along the spectrum between weak-form and strong-form review, albeit by two different routes. Micro-procedural control is an attempt to give weak-form review more teeth and to increase the likelihood of compliance by forcing the state to consider particular constitutional values. Thickened constitutional interpretation works differently – it may increase the ability of a judiciary to speak beyond a particular case, by infusing the political culture with constitutional principles that will inform political decision-making.

[94] See T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106 (Claims that the political context places important constraints on the actions of the South African Constitutional Court).

[95] See Ray (note 1 above) at 223–227.

The Colombian experience suggests that the South African Court could become bolder without collapsing into the strong-form model. While wholesale importation of a remedial model used elsewhere is generally unwise, specific elements of the Colombian approach might be useful for the South African courts in seeking to overcome problems of political intransigence. Various elements of weak-form remedies might well be suitable for transplant across countries.

For example, courts undertaking a more robust form of procedural review might also consider the techniques developed in the Colombian context. Courts can take action to raise the profile of their decisions by publicising the progress of major cases in a way that will garner social and media attention. The Colombian technique of using televised public audiences with broad civil society and political participation, for example, is one that could be transplanted to weaker remedies like the procedural control outlined by Ray. These may both increase the likelihood of compliance in the individual cases and amplify the broader effects of a judicial decision. Similarly, a more robust procedural control along the lines recommended by Ray may need to include tighter and more ongoing judicial supervision of a case: courts may need to set deadlines for compliance with particular issues and use resources to monitor compliance with those deadlines. A model in which the court instead depends on litigants to bring problems to the court's attention may both be too irregular to catch non-compliance and unfair in failing to aid those who are less likely to seek redress in the courts.

Similarly, courts might consider ways in which they can empower civil society and give it leverage vis-à-vis the bureaucracy. Of course, the South African Court's engagement with civil society has been important in some key cases. The *Treatment Action Campaign* litigation, for example, was driven by organised civil society groups, and the engagement remedies issued by the Court in *Joe Slovo* and in other cases, require the state to 'meaningfully engage' with groups of evictees and their supporters.[96] The Court might also consider techniques like the civil society organisations used in the Colombian structural injunction cases. Such entities can be a useful way to strengthen the court's ability to gather information, to propose solutions, and to garner compliance. The courts gain a powerful agent, and civil society in turn gains increased leverage over the state. Many of the trademark weaknesses of weak-form remedies can be mitigated through the effective use of civil society associations.

The development of effective remedies for socio-economic rights is bound to be an experimental process. Ray rightly points towards a middle ground: improved remedies are likely to resemble weak forms of enforcement with far more teeth than most current versions. Cross-national experience can help to expand the range of the possible. Indeed, as we have seen, the goals of weak-form enforcement are often compatible with a range of aggressive approaches aimed at incentivising politicians to carry out the constitutional duties they too often ignore.

[96] For a discussion of the Treatment Action Campaign litigation and the role of civil society, see W Forbath 'Cultural Transformation, Deep Institutional Reform, and ESR Practice: South Africa's Treatment Action Campaign' in L White & J Perelman (eds) *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (2011) 51.