Remedies and Institutional Support in Social Rights Litigation

By *Edward Béchard-Torres*[*]

Abstract: In some jurisdictions of the Global South, courts seized with social rights claims have occasionally issued orders that help build state capacity. These remedies can take various forms. Some are managerial, others are dialogic. Some are specific and individualized, while others attempt to confront structural problems. Generally, these orders neglect the work of developing substantive rights doctrine. Instead, they work to build a more effective, coordinated, and attentive government. In short, these orders see courts offer *institutional support* to other state actors. This Article surfaces institutional support as a potential approach in social rights litigation. Drawing on landmark social rights proceedings in India, South Africa, and Colombia, the Article argues that this varied remedial approach has already been successfully deployed and may constitute one of the contributions of courts in the Global South to comparative law. Institutional support can also be understood as a trade-off between the competing dimensions of transformative constitutionalism. On one hand, the approach presents paths for achieving meaningful judicial impact, while curbing some of the risks associated with enforcing social rights. On the other, it neglects the work of elaborating social rights' critical political vision, as well as substantive rights doctrine. Institutional support also implies an uncoupling of constitutional rights and judicial remedies, but this particular feature is welcome. The uncoupling of right and remedy can help manage the public's expectations of what courts can accomplish, and it can help foster a rights discourse that is less court centric.

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A. Introduction

In some jurisdictions of the Global South, courts seized with social rights claims have issued orders that help build state capacity. These remedies can take various forms. "Strong-

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form" or "managerial" orders might be deployed to promote the implementation of social programs. "Weak" or "dialogic" orders might be issued to encourage information-gathering.[1] Such interventions can sometimes take the form of simple and specific commands, but they can also be nested in sprawling responses to structural problems.[2] Across the board, these remedies represent a turn away from substantive rights doctrine. They instead press courts in the service of building a certain kind of government. Put simply, these orders see courts offer other public actors *institutional support*.

This Article considers institutional support as a remedial posture for courts engaged in social rights litigation. The approach centers weak state capacity as a critical obstacle to fulfilling rights. Part A revisits some of the landmark social rights proceedings in India, South Africa and Colombia, and argues that many of those orders have an underlying logic of institutional support. This broad judicial ethic may thus constitute one of the rich contributions of comparative law from the Global South[3]—and one of relevance to jurisdictions in the Global North, which are hardly unfamiliar with deficiencies in state capacity.

Part B offers a few observations on why "institutional support" might be attractive for judges, and what it means for the judicial role. Institutional support offers several paths for increasing judicial impact, while curbing some of the risks associated with social rights enforcement. For better or worse, institutional support also implies an uncoupling of constitutional rights and judicial remedies. Court orders may offer specific forms of relief that address shortcomings in state capacity, but this leaves the content of social rights to the realm of political contestation and social movements. Part B argues that this dynamic is indeed welcome. The uncoupling of right and remedy might help manage the public's expectations of what courts can accomplish, and it can help foster a rights discourse that is less court-centric.

1 For more on distinction between strong- and weak-form remedies, see e.g., *Mark Tushnet*, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law, Princeton 2008; *Rosalind Dixon*, Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited, International Journal of Constitutional Law 5 (2007); *Katharine G Young*, Constituting Economic and Social Rights, Oxford 2012.

2 For more on distinction between individualized relief and structural remedies, see *Kent Roach*, Remedies for Human Rights Violations: A Two-Track Approach to Supranational and National Law, Cambridge 2021; *Kent Roach*, Polycentricity and Queue-Jumping in Public Law Remedies: A Two-Track Response, University of Toronto Law Journal 66 (2016).

3 See generally *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Southern Turn in Comparative Constitutional Law, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020.

B. Institutional Support and the Rights-Fulfilling State

I. The Turn Towards State Capacity as a Structural Rights Problem

Scholars have long recognized a relationship between weak state capacity and the judicial role. In some jurisdictions, weak institutions have prompted a modest redrawing of the separation of powers, with courts assuming responsibilities that they have been reluctant to elsewhere.[4] Problems of "mis-governance"—ranging from incompetence, inattentiveness, intransigence or mere inertia—have occasionally provoked courts into becoming assertive managers of other state actors.[5] Some judicial interventions have also indirectly encouraged governments to invest in their rights-respecting capacities.[6] Judicial dialogue is said to help state actors overcome bureaucratic blockages, for instance.[7] Some of this activity prompted Madhav Khosla and Mark Tushnet to publish their "preliminary inquiry" of judicial interventions that buttress weak state capacity.[8]

Institutional support—understood as a general remedial orientation—further cements this relationship between judicial role and state capacity. The term is used to refer to a variety of court orders that can bolster other state actors' performance and effectiveness—or, at least, that compensate for their absence. In doing so, it positions weak state institutions as a central rights problem capable of animating judicial activity. And it suggests that what may be underlying facially varied approaches to enforcing social rights is an implicit theory of "effective public administration".[9]

4 *Armin von Bogdandy et al.*, Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism, in: Armin von Bogdandy et al. (eds.), Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune, Oxford 2017, p. 6; for an account of the judicial role in Southern constitutionalism that revolves around failed institutions, see *David Landau*, Institutional Failure and Intertemporal Theories of Judicial Role in the Global South, in: David Bilchitz / David Landau (eds.), The Evolution of the Separation of Powers: Between the Global North and the Global South, Cheltenham 2018.

5 *Katharine Young*, The New Managerialism, in: Vicki Jackson / Yasmin Dawood (eds.), Constitutionalism and a Right to Effective Government, Cambridge 2022, p. 136; *Gaurav Mukherjee / Juha Tuovinen*, Designing Remedies for a Recalcitrant Administration, South African Journal of Hum Rights 36 (2020), p. 389.

6 *César Rodríguez-Garavito / Diana Rodríguez-Franco*, Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South, Cambridge 2015, pp. 16–17; *Brian Ray*, Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave, Cambridge 2016.

7 *Dixon*, note 1, pp. 394–406.

8 *Madhav Khosla / Mark Tushnet*, Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry, American Journal of Comparative Law 70 (2022); *Vicki Jackson / Yasmin Dawood* (eds.), Constitutionalism and a Right to Effective Government, Cambridge 2022.

9 For the suggestion that a "theory of effective public administration" might underlie varied enforcement approaches in social rights litigation, see *Young*, note 5, pp. 136–137.

Some scholars have charted the judicial move from "substance" to "process".[10] However, the approach imagined here is more ambitious than mere process. Institutional support presses courts in the service of building an effective, rights-conscious government: one where social programs are effectively coordinated, financed, and implemented; where public policy is evolving, responsive and data-informed; and where public officials treat the vital needs of the most vulnerable with care and concern. This account of rights-affirming governance is rooted in a "thicker" understanding of state capacity—one which includes, but goes well beyond, a government's mere "ability to accomplish its intended policy goals".[11]

Many different kinds of orders can fall within its scope. These orders can occasionally be "weak-form" or "dialogic", and leave the details of a broad response to other state actors.[12] They can also assume a "strong-form" of specific, managerial commands. Occasionally, they might be experimentalist and engage stakeholders and other state actors in elaborating a response to an identified issue.[13] Similarly, institutional support can be offered through "complex" orders that address systemic rights deprivations, or through simple forms of individualized relief that address the needs of specific litigants.[14]

The "support" that is imagined here can still involve coercion and accountability of state actors and officials. For instance, some of the proceedings considered below feature ongoing supervision of state officials—with the occasional hanging threat of contempt proceedings. They also include judge-led confrontations with "lackadaisical public administrations".[15] But this accountability is to a performance ideal, and not to some substantive account of what social rights guarantee. Framing the judicial role as "support" positions other state actors in a sympathetic light. It assumes that these actors share the desire to embody the effective, coordinated, rights-conscious state—even if they may depend on a curial intervention to attain it.

Of course, different problems, institutional contexts, or political moments will call on courts to make sensitive judgment calls over which kind of "institutional support" ought to be put into practice. The constraints that shape this work are similar to those which

10 See e.g., *Ray*, note 6.

11 *Mark Dincecco*, State Capacity and Economic Development: Present and Past, Cambridge 2017, section 1.1.

12 For more on "dialogic", "weak" or "open" remedies, see *Young*, note 1, p. 147; *Aruna Sathanapally*, Beyond Disagreement: Open Remedies in Human Rights Adjudication, Oxford 2012, pp. 14–15, 105; *Tushnet*, note 1, pp. 247–248; for "dialogic judicial activism", a more aggressive enforcement posture that still relies to some degree on dialogue, see *Rodríguez-Garavito / Rodríguez-Franco*, note 6, p. 16.

13 On the differences between "managerial", "conversational", or "experimentalist" approaches to social rights enforcement, see *Young*, note 1.

14 On the distinction between individual and structural responses in human rights litigation, see notably *Roach*, note 2; *Edward Bechard-Torres*, Giving the Individual Remedy in Social Rights Litigation Its Due, Comparative Constitutional Studies 2 (2024), p. 81.

15 *Mukherjee / Tuovinen*, note 5, p. 18.

shape the activity of other "responsive" courts.[16] Judges have to navigate public sentiment, political dynamics, procedural rules, judicial ideology, legal culture, as well as courts' limited capacity to invest resources in long-running, complex cases.[17] All this said, the interventions that fall within this family of institutional support are often assertive and muscular. That is because the softest of enforcement approaches—for instance, the kind of bare declaratory relief fashioned in *Grootboom*[18]—often assumes that the state has the capacity to mount a compelling response. Institutional support proceeds on the premise that the state lacks such capacity, and that some degree of judicial involvement may be required for governments to succeed. Thus, these kinds of interventions might regularly include "strong" or "moderate" remedies, as well as ongoing supervision.[19] As the South African Constitutional Court suggested more recently in *Mwelase*, if "temporary, supervised oversight of administration" is required "where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done".[20]

It might then be asked why it is valuable to surface "institutional support" as a body of enforcement approaches, when it simply draws on existing categories taken up in the literature—whether that be "strong" or "weak" orders, conversational, experimentalist, or managerial, to name but a few.[21] Part B attempts to situate institutional support among these other approaches, and identifies key similarities and differences. For now, it should suffice to say this. First, "institutional support" reveals how facially different remedies—some of which may be strong-form and "managerial", others may be "weaker" and dialogic—may indeed be animated by a common, underlying conception of the judicial role. Second, recognizing institutional support can reveal how strong-form, managerial orders actually flow from a fairly deferential posture. If an existing social program has been left unimplemented because of a breakdown in coordination between different state agencies, a court practicing institutional support might issue specific, "managerial" commands. In such a case, judicial strong-arming is actually *compatible* with deference, since judges are preserving—and indeed enforcing—the legislature and executive branches' desires on matters of policy. Third, surfacing institutional support helps mark an important conceptual shift away

16 *Malcolm Langford*, Judicial Politics and Social Rights, in: Katharine Young (ed.), The Future of Economic and Social Rights, Cambridge 2019, p. 80.

17 *Rosalind Dixon*, In Defence of Responsive Judicial Review, National Law School of India Review 34 (2023), p. 106.

18 South Africa and Others v Grootboom and Others, [2000] ZACC 19, [2001] (1) SA 46 (CC) [Grootboom].

19 For more on a classification of judicial activity according to "weak", "moderate", or "strong" rights, remedies, and supervision, see *Rodríguez-Garavito / Rodríguez-Franco*, note 6; *Malcolm Langford / César Rodríguez-Garavito / Julieta Rossi*, Introduction: From Jurisprudence to Compliance, in: Malcolm Langford / César Rodríguez-Garavito / Julieta Rossi (eds.), Social Rights Judgments and the Politics of Compliance: Making it Stick, Cambridge 2017.

20 Mwelase and Others v Director-General for the Department of Rural Development and Land Reform, 2019 ZACC 30, para 49.

21 For a summary of established enforcement approaches in social rights litigation, see *Young*, note 1.

from conversations around what social rights guarantee—a question of substantive rights doctrine—and towards conversations around whether and how courts can contribute to buttressing state capacity.

The following sections provide a selection of examples of institutional support being mobilized in social rights cases. These examples are organized around a few recurring sites: improving social program implementation, and encouraging the state to be more attentive and informed about the needs of the most vulnerable. There are certainly other forms of support and capacity building that are conceivable.

The turn towards these examples is meant to be illustrative. They show that some courts are—at least occasionally—comfortable in engaging in this kind of work, and that it can produce rights-affirming results. Moreover, drawing on well-known social rights cases means that we have the benefit of a modest body of empirical evidence measuring the courts' efficacy. The examples are drawn from social rights cases in Colombia, South Africa, and India. These middle-income countries are widely recognized as leading jurisdictions.[22] They have varied experience enforcing social rights, and their work has been nourished by rich scholarly communities.[23] These apex courts are also rooted in different legal cultures and political environments. The approaches they have mobilized are therefore not confined to their own borders—or necessarily to middle-income jurisdictions more generally. Indeed, as suggested above, problems related to a lack of state capacity can also occasionally arise in jurisdictions in the "Global North".[24]

II. Ensuring That Social Programs Are Effectively Implemented

Inadequate implementation of social programs can lead to widespread rights deprivations.[25] Experience suggests that judicial remedies can help shore up this basic failing in state

22 See e.g., *Daniel Bonilla Maldonado*, Introduction, in: Daniel Bonilla Maldonado (ed.), Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Colombia, Cambridge 2013; and *Rodríguez-Garavito / Rodríguez-Franco*, note 6.

23 On the varied enforcement approaches adopted by these jurisdictions' apex courts, see e.g., *Manoj Mate*, Public Interest Litigation and the Transformation of the Supreme Court of India, in: Diana Kapiszewski / Gordon Silverstein / Robert A. Kagan (eds.), Consequential Courts, Cambridge 2013; *Magdalena Sepúlveda*, Colombia: The Constitutional Court's Role in Addressing Social Injustice, in: Malcolm Langford (ed.), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge 2009; *Dennis Davis*, Adjudicating the Socio-Economic Rights in the South African Constitution: Towards Deference Lite?, South African Journal of Human Rights 22 (2006).

24 *Michaela Hailbronner*, Transformative Constitutionalism: Not Only in the Global South, American Journal of Comparative Law 65 (2017); on the suggestion that governance issues in the Global South make these same jurisdictions ripe sources of inspiration for jurisdictions in the "North", see *Mariana Pargendler*, Corporate Law in the Global South: Heterodox Stakeholderism, European Corporate Governance Institute - Law Working Paper 718 (2023).

25 On the issue of coordination breakdowns between different levels of government, see *Mukherjee / Tuovinen*, note 5, p. 11.

capacity.[26] Court orders might attempt to repair breakdowns in coordination between state actors, overcome gaps in implementation, or ensure that existing programs are being financed at a level sufficient to meet their anticipated costs. These orders do not necessarily challenge government policy. Quite the opposite: they can make government more effective at achieving its own objectives.

Many of the orders issued throughout the Indian Supreme Court's celebrated "right to food" proceeding share this basic orientation.[27] At the time the original writ petition was filed, India's public distribution system possessed close to 50 million tons of surplus grain in stock, but had failed to distribute it.[28] The Supreme Court's earliest order voiced a particular role-conception: while policy is "best left to the Government", the Court may have to ensure "that the food grains which are overflowing in storage receptacles […] should not be wasted". The decision adds—in a phrase that the Court would repeat throughout the proceedings—that "mere schemes without any implementation are of no use".[29]

A drumbeat of subsequent court orders further encouraged implementation by converting different social programs into legal entitlements.[30] Such orders encouraged the implementation of India's public food distribution system,[31] as well as programs related to child development,[32] and mid-day meal programs,[33] to take but a few examples.[34] In a similar vein, some of the Court's orders sought to repair coordination breakdowns between government actors at the central, state, and local levels.[35] State governments had failed to discharge their existing obligations to identify families below the poverty line,[36] dispense

26 For a narrow understanding of state capacity as a lack of proper coordination and effective implementation, see *Dincecco*, note 11, section 1.1.

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

28 For more on the proceedings, see *Lauren Birchfield / Jessica Corsi*, Between Starvation and Globalization: Realizing the Right to Food in India, Michigan Journal of International Law 31 (2010), p. 692; *Poorvi Chitalkar / Varun Gauri*, India: Compliance with Orders on the Right to Food, in: Malcolm Langford / César Rodríguez-Garavito / Julieta Rossi (eds.), Social Rights Judgments and the Politics of Compliance: Making It Stick, Cambridge 2017, p. 294; *S. Muralidhar*, India: The Expectations and Challenges of Judicial Enforcement of Social Rights, in: Malcolm Langford (ed.), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge 2009, p. 116.

29 PUCL Interim Order (20 August 2001); see also PUCL Interim Orders (2 May 2003) and (29 October 2010).

30 Chitalkar / Gauri, note 28, p. 298.

31 PUCL Interim Orders 23 July 2001, 28 November 2001, 8 May 2002, and 29 April 2004.

32 PUCL Interim Orders 8 May 2002, 29 April 2004, 7 October 2004, and 13 December 2006.

33 PUCL Interim Orders 28 November 2001, 20 April 2004, and 17 October 2004.

34 Chitalkar / Gauri, note 28, p. 299.

35 Ibid, p. 298.

36 PUCL Interim Order 3 September 2001.

ration cards,[37] or distribute grain allocated by the central government,[38] for instance. Last, the Court's "institutional support" also meant establishing a Central Vigilance Committee to reduce corruption in the public food distribution system.[39]

State actors may not have consistently complied, but the mid-day meal plan saw its coverage increase by nearly 61 million children from 2001 to 2006, increasing recipients' caloric intake considerably.[40] The mid-day meal plan is also credited with meaningfully increasing girls' school enrolment.[41] Although a supportive political environment helped buttress this change, the available evidence suggests that the Court's intervention played a valuable causal role.[42]

This strand of institutional support is also evident in some of the landmark orders issued by the Constitutional Court of Colombia. Consider the "included benefits" line of cases. Courts once routinely needed to issue orders to deliver benefits that had already been promised by the country's national healthcare plan.[43] Colombia maintains a list of benefits that must be funded by private health insurance companies to individuals within Colombia's contributory and subsidized regimes.[44] Exploiting weak regulatory oversight, insurance companies had commonly refused to pay for these "included" treatments.[45] The *tutela*

37 PUCL Interim Order 28 November 2001.

38 See e.g., Ibid. and PUCL Interim Orders 17 September 2001 and 12 August 2010.

39 PUCL Interim Orders 12 July 2006 (noting widespread corruption in Public Distribution System and establishing the Central Vigilance Committee), 12 August 2012 (recommending computerization of the Public Distribution System) and 17 September 2012 (cataloguing the 22 reports of the Central Vigilance Committee).

40 *Daniel Brinks / Varun Gauri*, The Law's Majestic Equality: The Distributive Impact of Judicializing Social and Economic Rights, Perspectives on Politics 12 (2014), pp. 375–393.

41 *Jayna Kothari*, Social Rights Litigation in India: Developments of the Last Decade, in: Daphne Barak-Erez / Aeyal Gross (eds.), Exploring Social Rights, Oxford 2007, p. 181; an earlier study found that the provision of a mid-day meal decreased the proportion of girls out of school by as much as 50% *Jean Drèze / Geeta Kingdon*, School Participation in Rural India, Review of Development Economics 5 (2001).

42 See e.g., *Rosalind Dixon / Rishad Chowdhury*, A Case for Qualified Hope? The Supreme Court of India and the Midday Meal Decision, in: Gerald Rosenberg / Sudhir Krishnaswamy / Shishir Bail (eds.), A Qualified Hope: The Indian Supreme Court and Progressive Social Change, Cambridge 2019.

43 *Alicia Ely Yamin / Andrés Pichon-Riviere / Paola Bergallo*, Unique Challenges for Health Equity in Latin America: Situating the Roles of Priority-Setting and Judicial Enforcement, International Journal for Equity in Health 18 (2019), p. 107; *Alicia Ely Yamin*, The Right to Health in Latin America: The Challenges of Constructing Fair Limits, University of Pennsylvania Journal of International Law 40 (2019), pp. 719–720.

44 *Katharine Young / Julieta Lemaitre*, The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa, Harvard Human Rights Journal 26 (2013), pp. 187–188.

45 *Alicia Ely Yamin / Oscar Parra-Vera*, Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates Hastings, International Journal of Comparative Law 33 (2010), pp. 435–436; *Everaldo Lamprea / Johnattan García*, Closing the

– an accelerated legal proceeding tailored to protect fundamental constitutional rights[46] Rev Dev Econ ultimately provided some relief. A meaningful portion of *tutela* healthcare cases saw courts simply order payment for "included" medicines and treatments.[47] Indeed, the number of such "included benefits" cases likely numbered in the hundreds of thousands over the last two decades.[48]

To be sure, much of Colombian *tutela* jurisprudence would *not* fall within this tradition of institutional support. Many cases adopt a more traditional and substantive approach of enforcing social rights' "vital minimum".[49] However, these "included benefits" cases stand as a class apart, and should be thought of as species of institutional support. These orders helped compensate for the insurance industry's refusal to obey its legal duties to pay for certain medications and treatments, and for the government's failure to exercise vigilant oversight.[50] That is, court orders worked to enforce—rather than subvert—existing government policy.[51] Later, the Court's more ambitious foray into the systemic failings of Colombia's healthcare regime similarly targeted pervasive mismanagement and a lack of implementation.[52]

There are aspects of the Constitutional Court's landmark proceeding concerning internal migrants displaced by violence—Decision T-25/04—which similarly put into motion this ethic of institutional support.[53] The Court's response, which unfolded over a decade in more than 250 orders, is too sprawling to thoroughly examine here. However, it is clear that the Court's response was animated—at least in part—by a concern of weak institutional performance. The Court voiced the concern that a lack of "implementation, follow-up and evaluation of policy" had "contributed in a constitutionally significant man-

Gap Between Formal and Material Health Care Coverage in Colombia, Health & Human Rights Journal 18 (2016), pp. 50–51; Procuraduría General de la Nacíon / DeJuSticia, El Derecho a la Salud en perspectiva de derechos humanos y el Sistema de Inspección, Vigilancia y Control del Estado Colombiano en Materia de Quejas en Salud, Bogotá 2008, pp. 81–104; Defensoría del Pueblo, La tutela y el derecho a la salud (2006-2008), Bogotá 2009.

46 Constitution of Colombia, 1991 see Title VIII, Ch 4 (Constitutional Court) and article 86 (acción de tutela).

47 *Yamin / Pichon-Riviere / Bergallo*, note 43, p. 107; *Yamin,* note 43, pp. 719–720.

48 Defensoría del Pueblo, note 46, p. 30; *Yamin / Parra-Vera*, note 45, p. 443; Defensoría del Pueblo, note 45, pp. 64–77.

49 See e.g., Decision T-426/92, (CC); Decision T-458/97, (CC) at section 23; Decision C-776/03, (CC) at section 4.5.3.3.2.

50 On this particular failing of the Colombian healthcare system, see *Yamin / Parra-Vera*, note 45, pp. 435–436; *Yamin / Pichon-Riviere / Bergallo*, note 43, pp. 106–107; *Young / Lemaitre*, note 44, pp. 187–189.

51 *Bechard-Torres*, note 15; *Yamin / Pichon-Riviere / Bergallo*, note 43, pp. 107–108; *Yamin / Parra-Vera*, note 46, p. 443; for a defense on health rights litigation on this basis, see *Benedict Rumbold et al.,* Universal Health Coverage, Priority Setting, and the Human Right to Health, Lancet 390 (2017), p. 713.

52 Decision T-760/08, (CC) at section 3.3.15; *Young / Lemaitre*, note 45, pp. 191–192.

53 Decision T-025/04, (CC).

ner to the disregard of fundamental rights".[54] A later decision articulated a "principle of coherence in policy", which requires that social programs be financed such that they can be fully implemented.[55] Accordingly, some of the Court's orders directed state agencies to follow-through on existing programs, while others commanded state officials to calculate and make available the financial resources required to implement existing policies.[56]

III. Promoting Data-Informed Policy, Encouraging Special Attention for the Most Vulnerable

Court orders can also promote responsive, data-informed policymaking. They can similarly encourage state actors to be more caring and attentive towards the needs of the most vulnerable. As before, these orders are not concerned with social rights' substance, but are instead concerned with building a certain kind of state. Realizing such a state is not without challenge. Courts have to confront a lack of political will, as well as, potentially, deep prejudice felt towards certain vulnerable communities. They may also have to shore up the state's rights-respecting capacities, since state agencies will require material investment before their decision-making towards vulnerable populations can be well-informed, caring, attentive, and responsive.

The judges of the Constitutional Court of Colombia presiding over the internal migrant proceedings understood that reliable data is essential to fulfilling basic rights. The Court thus directed state officials to gather data on the internally-displaced, so as to discern their number, their location, and their needs.[57] It also oversaw a participatory process to construct "rights-based indicators" to measure the efficacy of the state's measures and response.[58] Meanwhile, the Constitutional Court of South Africa has signaled a willingness to review government policy based on inadequate information,[59] an approach which is thought to contribute to a "deepening of democracy"—or, to put the point in slightly different terms, to building a certain kind of state.[60]

Engaging the kind of fruitful destabilization described by Charles Sabel and William Simon, court orders can also promote more deliberative and dynamic policymaking processes.[61] In India's right to food proceeding, for instance, the Supreme Court's regular hearings would occasionally serve as a forum to raise and disseminate novel policy ideas.

54 See Ibid. at section 6; translated in *Rodríguez-Garavito / Rodríguez-Franco*, note 6, pp. 77–78.

55 See Decision T-25/04 at sections 8.1 and 6.3.1.1.

56 Decision T-025/04, supra note 53 at sections 8.1 and 6.3.1.1.

57 *Rodríguez-Garavito / Rodríguez-Franco*, note 6, pp. 3–4.

58 Ibid., p. 22.

59 Mazibuko and Others v City of Johannesburg and Others, [2009] ZACC 28, [2010] (4) SA 1 (CC) at paras. 66-67 [Mazibuko].

60 Ibid. at para 71.

61 *Charles Sabel / William Simon*, Destabilization Rights: How Public Law Litigation Succeeds, Harvard Law Review 117 (2004).

Judges repeatedly issued non-binding policy suggestions (sometimes sourced from recommendations from some state actors or civil society organizations) and paired them with requests for state officials to respond.[62] Officials at the state level were thus encouraged to be more dynamic and responsive.

For its part, South African evictions jurisprudence demonstrates how courts can prod state actors to invest in their capacity to be more caring, and more attentive, towards communities experiencing real vulnerability. In a series of well-known cases, the Constitutional Court of South Africa required municipalities to engage in "respectful face-to-face engagement or mediation" prior to evicting individuals experiencing homelessness.[63] State officials had to listen respectfully to members of the affected population, and demonstrate sensitivity, flexibility, and reasonableness in their engagement.[64] Officials were instructed to keep records so that their conduct could be scrutinized during judicial review.[65]

This process of engagement is not intended to guarantee a particular result. However, experience suggests this remedy regularly yields practical solutions for individuals experiencing distress, and encourages state officials to expand what they were previously willing to do to fulfill social rights. In *Olivia Road*, to take an early example, 400 residents contested a planned mass expulsion in Johannesburg.[66] The Constitutional Court ordered the parties to engage with one another meaningfully "to resolve the differences and difficulties aired in this application in light of the values of the Constitution", the duties of the municipality, and the rights of community members.[67] The resulting agreement saw the city promise changes to its housing policy and to desist from the mass eviction.[68] It instead promised to invest in building safety and to facilitate access to essential services at reasonable cost.[69]

Engagement has since emerged as a general requirement that must be met before an eviction can be authorized.[70] This requirement has been resisted by some state officials

62 See e.g., PUCL Interim Orders 2 May 2003, 9 May 2005, 10 February 2010, 12 August 2010, 31 August 2010, and 6 September 2010.

63 Port Elizabeth Municipality v Various Occupiers, [2004] ZACC 7, [2005] (1) SA 217 (CC) ; Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others, [2008] ZACC 1, [2008] (3) SA 208 (CC) [Olivia Road]; Residents of Joe Slovo Community, Western Cape v Thubelish Homes and Others, [2009] ZACC 16, [2010] (3) SA 454 (CC) [Joe Slovo].

64 Olivia Road, note 63, paras. 14-15 and 19-21.

65 For a closer examination of this model and its promise, see *Sandra Liebenberg*, Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law, Nordic Journal of Humam Rights 32 (2014), pp. 324–325.

66 Olivia Road, note 63.

67 See text of the Court's interim order, reproduced in *Ray*, note 6, pp. 115–116.

68 *Stuart Wilson*, Litigating Housing Rights in Johannesburg's Inner City: 2004-2008, South African Journal of Human Rights 27 (2011), pp. 147–148.

69 *Ray*, note 6, pp. 115–116.

70 *Liebenberg*, note 65.

who insist that they lack the capacity to engage in this process in every instance eviction is sought. The Constitutional Court has been indifferent to these arguments.[71] From the perspective of institutional support, this indifference is sensible: catalyzing broader investment in state capacity is an important part of the point. These decisions signal to state actors that they must invest in their rights-respecting administrative capacities for the future.[72]

C. Understanding Institutional Support and its Vision for the Judicial Role

Institutional support calls for a few shifts in thinking about the role of courts. Perhaps most obviously, it suggests that accounts of judicial review centered around the need to discipline the exercise of public power and to thwart a "tyranny of the majority" are overly simplistic.[73] The interventions considered above are not concerned with abuses of power. They are more commonly a response to the problem of weak state capacity. This Part provides an explanatory and justificatory account of institutional support as a judicial orientation. It situates and compares this approach to others. It also considers the upsides of uncoupling judicial remedies from the substance of constitutionalized social rights.

I. Situating Institutional Support Amongst Other Enforcement Approaches

Institutional support cuts across different enforcement approaches that scholars rely on to organize the field. In an effort to shore up state capacity and build rights-affirming government, courts might engage in approaches which are managerial, dialogic, experimentalist or responsive in nature.[74] In this way, "institutional support" echoes Katherine Young's call to dislodge established typologies in favour of a vision of the judicial role that is focused on "catalyzing" more effective, rights-affirming government.[75] But institutional support also bears important differences from how some of these approaches are conventionally imagined. Surfacing its distinctiveness is therefore valuable.

For instance, some of the orders considered above are "strong-form" or "managerial". However, "managerialism" is traditionally associated with judicial commands that enforce the content of constitutional rights.[76] Projecting that assumption onto these kinds of orders would be both mistaken and harmful. It would be mistaken because these orders do not represent an effort to enforce a detailed, substantive account of social rights—in a "minimum core" variety or otherwise. Instead, under an ethic of institutional support, judicial

71 Olivia Road, note 63, paras 14-15, 19 and 21; *Ray*, note 6, p. 117.

72 See e.g., *Ray*, note 6, pp. 107 and 117.

73 *Khosla / Tushnet*, note 8.

74 For general descriptions of these categories, see *Young*, note 1.

75 See e.g., Ibid; *Young*, note 5; *Kent Roach*, Dialogic Remedies, International Journal of Constitutional Law 17 (2019), pp. 862-863 (on the principle of effective redress animating the work of "neo-Diceyan critics").

76 *Young*, note 1, p. 155.

commands might be deployed to compel the implementation of social programs, or to improve coordination between different levels of government or state actors. Put simply, these orders represent a form of practical assistance that courts can offer to make government work more effectively.

The view is also harmful because it results in unduly narrow interpretations of what social rights guarantee. If court orders are understood to be enforcing rights, they might be turned to as a window revealing rights' "true" meaning.[77] Some social rights scholarship indeed adopts this methodological posture. In their important review of India's right to food case, Lauren Birchfield and Jessica Corsi write that the Indian Supreme Court's interim orders "gradually defined the right to food in terms of what policies are required of the state and central governments in order for them to adequately fulfill their constitutional obligations".[78] This article has advanced a different reading. It has suggested that many of the Indian Supreme Court's brief orders were more concerned with buttressing state capacity, and improving program implementation. It would unduly constrain the right to food to read these orders as the definitive statement on what this right encompasses, a point this article will return to below.

Some of the other orders that fall within the umbrella of institutional support are dialogic or conversational, since they invite a response from—and ultimately defer to—the political branches.[79] However, here too there is an important difference. "Dialogue" is often presented as a collaboration between courts and the political branches as they jointly elaborate on rights' meaning.[80] By contrast, institutional support is not guided by a desire to clarify rights' full meaning, nor will it necessarily guarantee the fulfillment of social rights. Instead, these orders prod state actors towards certain performance ideals. The rights themselves must be pursued more broadly in political processes.

Institutional support instead possesses elements of "experimentalist" and "responsive" approaches.[81] Experimentalists imagine a process of consulting, generating information, and deliberating with stakeholders over vital rights matters.[82] Courts supervise the process to ensure its integrity, and perhaps to set rough boundaries, but without articulating social rights' content. Such experimentalist approaches can be particularly effective when de-

77 *Daryl Levinson*, Rights Essentialism and Remedial Equilibration, Columbia Law Review 99 (1999), p. 880.

78 *Birchfield / Corsi*, note 29, p. 700.

79 *Dixon*, note 1; *Tushnet*, note 1; *Jeff King*, Judging Social Rights, Cambridge 2012; *Young*, note 1, p. 147 (labelling the approach "conversational"); see also *Rodríguez-Garavito / Rodríguez-Franco*, note 6 (championing "dialogic judicial activism").

80 See e.g., *Barry Friedman*, Dialogic and Judicial Review, Michigan Law Review 91 (1993), p. 653 (writing that, under dialogic review, "[c]onstitutional interpretation is an elaborate discussion between judges and the body politic").

81 See notably *Sabel / Simon*, note 62; *Alana Klein*, Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights, Columbia Human Rights Law Review 39 (2008); *Ray*, note 6.

82 *Klein*, note 82, p. 397.

ployed against public institutions that have persistently failed to meet their own objectives and that are insulated from accountability.[83] Institutional support may differ only to the degree to which it focusses on weak state capacity. Furthermore, unlike experimentalist approaches, judges engaging in institutional support might be comfortable relying on a wider range of remedies. Courts could, for example, engage in the kind of strong-form managerialism described above.

Institutional support likewise overlaps with "responsive" judicial review, which has been championed for its ability to compensate for weaknesses in the quality of a country's democracy.[84] Responsive interventions target excess concentrations of political power, "blind spots" in the formulation of legislation and policy, or "burdens of inertia" that can blunt democratic demands for change.[85] Like institutional support, responsive interventions are oriented towards achieving some ideal of state performance. They also both "ask […] a lot of judges", who must be sensitive to their institutional context and to their limited capacities, and who must exhibit "boldness and humility, as well as a mix of legal skill and social and political awareness".[86] The approaches differ, once again, on their points of emphasis. Institutional support remains focused on the kind of garden variety issues that can compromise state capacity, which will often simply mean a government's "ability to accomplish its intended policy goals".[87] Responsive review is more concerned with bolstering the quality of a state's democracy. The two points of focus may be complimentary—and indeed both can be deployed—but they are distinct.

II. An Explanatory and Justificatory Account

What might explain judges comfort in engaging in institutional support, and is it a justifiable form of judicial intervention? This section gestures towards a few potential responses, while acknowledging that more experience and more study would be needed to adequately judge institutional support's worth. Briefly stated, the approach targets structural sources of rights deprivations, and it may present a path for increasing judicial impact. This set of tools can likewise curb some of the enforcement problems associated with the judicialization of social rights. And it can frame the courts' role in a way that better manages the public's expectations.

First, this judicial orientation targets a systemic rights problem. Weak state capacity and a lack of rights consciousness in public decision-making are structural causes of social

83 *Sabel / Simon*, note 62, p. 1020.

84 See notably *Rosalind Dixon*, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age, Oxford 2023; *Dixon*, note 1.

85 *Dixon,* note 86, p. 6.

86 *Dixon*, note 18, p. 106.

87 *Dincecco*, note 11, section 1.1.

rights deprivations.[88] This is true in both Global North and Global South.[89] Government capacity is imagined here in broad terms, and can be undermined by any of the following: a lack of program financing or implementation; breakdowns in coordination between disparate state actors; corruption; inertia or gross incompetence among public officials; rushed and non-deliberative decision-making; a lack of information regarding a particular policy's impact; or, the failure to revise laws and policies continuously, in light of new information or developments. Many of the examples considered above address these governmental shortcomings. To be sure, courts could never resolve all capacity-related shortcomings. Some of the more ambitious interventions considered above strained courts' logistical capacity, and left judges with a limited appetite to re-embark on similar proceedings. Nevertheless, courts might still make a meaningful contribution to realizing social rights by curbing *some* of these obstacles to humane, effective, and responsive government.

Second, institutional support can represent an effective strategy for facilitating judicial impact. Indeed, institutional support might represent one variety of what the scholar Yvonne Tew calls "mini-maximalism".[90] That is, courts can resort to reasoning which is limited and fairly uncontroversial to deliver a decision of significant political consequence.[91] This dynamic is present here. As far as political vision is concerned, institutional support can remain stubbornly modest. The approach allows judges to sidestep rights-related controversies, as well as deep disagreement on matters of political economy and distributive justice. It similarly appears to abandon the promise of substantive, "minimum core" enforcement.[92] Instead, these interventions are marked by ideological commitments that are more moderate, but also presumably more widely-shared. These commitments include an emphasis on effective state action; reasonable information-gathering processes; participation, deliberation and transparency in public decision-making; heightened attention for individuals experiencing poverty; and public policy that is responsive to changing conditions.

This political palatability can lead to greater impact. An approach which is light on ideological commitments may encourage compliance and reduce resistance. Controversial

88 *von Bogdandy et al*, note 4, pp. 6–9; *Landau*, note 4; *Mukherjee / Tuovinen*, note 5, p. 9; regarding South Africa specifically, see *Sandra Liebenberg*, The Art of the (Im)possible? Justice Froneman's Contribution to Designing Remedies for Structural Human Rights Violations, Constitutional Court Review 12 (2022), p. 139.

89 See e.g., *K. Sabeel Rahman,* Building the Government We Need: A Framework for Democratic State Capacity, Roosevelt Institute, 6 June 2024, https://rooseveltinstitute.org/publications/democratic-state-capacity/ (last accessed on 1 September 2025).

90 *Yvonne Tew*, Strategic Judicial Empowerment, American Comparative Law Journal 72 (2023).

91 Ibid.

92 On minimum core enforcement, see *David Bilchitz*, Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance, South African Law Journal 117 (2002).

court rulings can provoke backlash, and orders can sometimes be ignored with impunity.[93] By contrast, it may be harder for officials to publicly rebuke courts which command them to follow-through on their own plans and policies. As discussed above, institutional support also presents other state actors in a sympathetic light, and can avoid antagonizing public officials. Occasionally, state actors might even welcome these kinds of interventions. In 2013, for instance, the Colombian national pension regulator asked the Constitutional Court to find that its various institutional failings resulted in an unconstitutional state of affairs, inviting a response which at times resembled institutional support.[94] Although good relationships are hardly guaranteed, judges have been able to maintain somewhat collaborative relationships with other state actors while engaging in institutional support. To be sure, a court's political clout will depend on its standing with the wider public. And authoritarian governments may resist such judicial interventions, even if they help stage the government in a positive light. As discussed above, institutional support demands much of judges, who must navigate a series of complicated decisions with "a mix of legal skill and social and political awareness".[95]

Nevertheless, the approach's political palatability might encourage judges to be more interventionist than they otherwise would be. Judges sometimes hesitate to issue specific commands, or to supervise state actors' compliance, out of fear of breaking with some sense of institutional comity. This concern shaped South African remedial practice, producing an early preference for declaratory relief and one-shot orders that are not subject to continued supervision.[96] Institutional support's political palatability and supportive posture might encourage judges to feel comfortable drawing on a wider range of remedial solutions—including potentially complex, ongoing supervision of systemic rights problems. This would be valuable, if true, because declaratory relief and one-off orders have some history of failing to instigate timely and meaningful change.[97]

93 On the general problem of social rights non-compliance, see *Langford / Rodríguez-Garavito / Rossi*, note 20.

94 *David Landau*, Choosing Between Simple and Complex Remedies in Socio-Economic Rights Cases, University of Toronto Law Journal 69 (2019), p. 115.

95 *Dixon*, note 18, p. 106.

96 *Kent Roach / Geoff Budlender*, Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable, South African Law Journal 122 (2005), p. 325.

97 Famously, the laggard follow-up to the Constitutional Court of South Africa's declaratory order in Grootboom exposed the risks of assuming government's capacity and cooperation, see e.g., *Kameshni Pillay*, Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights, Law, Democracy and Development 6 (2002); *Sandra Liebenberg*, South Africa: Adjudicating Social Rights Under a Transformative Constitution in: Malcolm Langford (ed.), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge 2008, pp. 90–99; for the view that Grootboom's meaningful effects were felt over the longer-term, see *Malcolm Langford / Steve Kahanovitz*, South Africa: Rethinking Enforcement Narratives in: Malcolm Langford, César Rodriguez-Garavito / Julieta Rossi (eds.), Social Rights and the Politics of Compliance: Making It Stick, Cambridge 2017, p. 315.

Of course, this ideological modesty comes at a cost. Most obviously, this approach declines to enforce the "minimum core" content of social rights. These interventions also shy away from engaging with rights' critical political visions. Social rights, after all, are an integral part of the transformative project's emancipatory commitment,[98] and its critique of existing distributions of social and economic power.[99] These rights are sometimes thought to have a role in creating a critical space for change and contestation—"a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created", where "change is unpredictable but the idea of change is constant".[100] Judges decline to nourish this space of contestation when they pursue enforcement models which largely decline substantive, critical scrutiny of existing distributions and government policy. Indeed, as Sanele Sibanda warns, these interventions may represent a form of "law without politics" that can limit the transformation of socio-economic conditions.[101] For better and for worse, then, institutional support concedes that critical potential underlying social rights in favour of more politically-palatable interventions that may—for that very reason—have greater impact. And if that is true, it would gesture towards some of the tensions and trade-offs inherent in the project of transformative constitutionalism.

Third, institutional support can help courts navigate the distinctive challenges of social rights enforcement. These challenges are well-known. For one, social rights suffer from a meaningful degree of indeterminacy.[102] Rights to access adequate education, healthcare or housing are hardly self-explaining. The indeterminacy problem is especially pronounced for the dimensions of these rights that are said to be "programmatic", "aspirational", or subject to "progressive realization".[103] But indeterminacy persists even when lawyers focus on a

98 *Hailbronner*, note 25, p. 529; *Heinz Klug*, Transformative Constitutionalism as a Model for Africa? in: Philipp Dann, Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford University Press 2020, p. 145.

99 *Karl Klare*, Legal Culture and Transformative Constitutionalism, South African Journal of Human Rights 14 (1998), pp. 153–154; see also *Catherine Albertyn / Beth Goldblatt*, Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality, South African Journal of Human Rights 14 (1998), p. 249.

100 *Pius Langa*, Transformative Constitutionalism, Stellenbosch Law Review 17 (2006), p. 354.

101 *Sanele Sibanda*, Not Purpose-Made - Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty, Stellenbosch Law Review 22 (2011), pp. 489–491; *Sanele Sibanda*, When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism, Law, Democracy and Development 24 (2020).

102 On the difficulties of determining the content of a so-called minimum core of economic and social rights, see *Katharine Young*, The Minimum Core of Economic and Social Rights: A Concept in Search of Content, Yale International Law Journal 33 (2008), p. 160.

103 For states' obligation to progressively realize social rights over time, see *Ben Saul / David Kinley / Jacqueline Mowbray*, The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials, Oxford 2016, p. 146-155; CESCR General Comment

so-called "minimum core", representing human beings' vital needs.[104] It can be difficult to establish precisely what kind of medical treatments, nutrition levels or shelter meets necessary thresholds to support a dignified life.[105] What is perceived to be "vital" has long been shown to vary across cultures, regions, level of development, and time.[106]

Further complicating matters, these rights are consequential. That is, they refer to a state of affairs that has been realized through an intermediate policy.[107] There are countless ways healthcare or housing can be made more accessible. The underlying rights will often be agnostic about the means by which the result is obtained. At most, these rights define only goals and boundaries; they do not outline how these outcomes should be achieved.[108]

Institutional support succeeds in sidestepping this indeterminacy problem altogether. The approach does not require judges to settle on a substantive account of what rights guarantee, and to then encase that right in a binding command. Judges need not necessarily expound on rights doctrine at all. They might instead ask themselves whether the case presented to them falls within one of the accepted classes of "support" that courts are prepared to offer. Such an approach would leave the content of social rights for political debate and contestation outside of the courtroom by elected officials, activists, social movements, and other political actors.[109]

Next, there are sharp limitations on what courts can do, at least legitimately. These concerns are also well-known. Courts lack the expertise to design social welfare programs,[110] or to manage the polycentric issues involved in setting socio-economic policy and allocating resources.[111] Sweeping court orders risk producing unintended consequences, and impacting the interests of countless others.[112] In the area of social rights, judicial interven-

No 3, UN Doc 5/1991/23, 14 December 1990, (distinguishing duties to the minimum core and duties to progressively realize rights) [General Comment 3].

104 See General Comment No 3, note 3, para 10 (referring to "minimum essential levels").

105 *Young*, note 101, p. 130.

106 See e.g., *Johan Galtung*, Goals, Processes, and Indicators of Development: A Project Description, Tokyo 1978, p. 13.

107 *Frank Cross*, The Error of Positive Rights, UCLA Law Review 48 (2003).

108 *Susan Sturm*, A Normative Theory of Public Law Remedies, Georgetown Law Journal 79 (1991), pp. 1363–1364; *David Bilchitz*, Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights, Oxford 2008, p. 198.

109 *Richard Fallon*, Judicially Manageable Standards and Constitutional Meaning, (2006) Harvard Law Review 119, pp. 1324–1328; *Lawrence Sager*, Fair Measure: The Legal Status of Underenforced Constitutional Norms, Harvard Law Review 91 (1978), pp. 1221, 1227; see also *Philip Harvey*, Aspirational Law, Buffalo Law Review 52 (2004).

110 *Joel Bakan*, What's Wrong with Social Rights?, in: Joel Bakan / David Schneiderman (eds.), Social Justice and the Constitution: Perspectives on a Social Union for Canada, Ottawa 1992, p. 86.

111 *Roach*, note 2; see also *Lon Fuller*, The Forms and Limits of Adjudication, Harvard Law Review 92 (1978).

112 *King*, note 80, p. 111–116.

tions run a healthy risk of inefficiently distributing public resources,[113] or of regressively siphoning funds from the vulnerable and unrepresented towards able litigants with sharp elbows.[114] Moreover, courts can strain their relationships with other political actors, whose cooperation is necessary to realize the rights project.[115] Judicial intervention on these matters also risks foreclosing public debate on fundamental political questions.[116]

Institutional support does some work to navigate these risks. The approach rarely positions judges to have the final say on matters of socio-economic policy. Courts thus avoid usurping policy-making prerogatives better left to other state actors. Courts instead shift their efforts to ensure that governmental activity is performed in accordance with certain maxims of effective, rights-fulfilling government. As discussed above, the approach can also help maintain healthy relationships between courts and other state actors: institutional support's political commitments tend to be more neutral and palatable, and it often avoids placing courts in an antagonistic position vis-à-vis the legislature and executive.

This approach may also skirt some of the regressive distributive impacts associated with social rights enforcement. Some of the most objectionable instances of social rights "mis-enforcement" feature a specific dynamic: more affluent litigants obtain judicial orders which drain cash-strapped public programs, harming the most vulnerable in the process.[117] The risk of such regressive enforcement may be low for remedies that fall under the umbrella of institutional support. Many of the specific commands considered above simply "compel the provision of vital goods that have been promised by public policy, but which government actors (or their private proxies) have failed to deliver".[118] Put in different terms, this kind of relief often helps bridge "the government's stated plans and programs, on the one hand, and its weak and underperforming institutions, on the other".[119] Scholars have likewise drawn concern to individualized relief which can prioritize the needs of litigants over those individuals who are similarly situated, compromising the "horizontal

113 *Albie Sachs*, The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case, Current Legal Problems 56 (2003), p. 598.

114 *Octavio Luiz Motta Ferraz*, Social Rights, Judicial Remedies and the Poor, Washington University Global Student Law Review 18 (2019), p. 573; *Octavio Luiz Motta Ferraz*, Health as a Human Right: The Politics and Judicialisation of Health in Brazil, Cambridge 2021; *David Landau*, The Reality of Social Rights Enforcement, Harvard International Law Journal 53 (2012); *Albie Sachs*, The Strange Alchemy of Life and Law, Oxford 2009, pp. 177–179.

115 *Young*, note 1, pp. 161 and 165.

116 *Cross,* note 108; *David Beatty*, The Last Generation: When Rights Lose Their Meaning, in: David Beatty (ed.), Human Rights and Judicial Review: A Comparative Perspective, New York 1994, p. 350; *Young*, note 1, p. 134.

117 See e.g., *Pedro Felipe de Oliveira Santos*, Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socio-economic Rights, Washington University Global Student Law Review 18 (2019); *Ferraz*, note 116, p. 573; *Landau*, note 116, p. 191; *Bechard-Torres*, note 15, pp. 83–85.

118 *Bechard-Torres*, note 15, p. 88.

119 Ibid.

equality" of rights bearers.[120] However, within the broad family of remedies that can be considered institutional support, there are "structural" responses that judges could prefer where this is in issue. Broadly, the interventions defended in this Article possess the kind of attention to context and outcome that can help courts avert the regressive impacts that can result from approaches which are unduly rigid, formalistic or mechanical.

Lastly, as a role-conception for courts, institutional support signals to the public some of the limits of what courts can offer, and can help manage the public's expectations. Positioning judges as "guardians of the constitution" risks setting unduly high expectations. The risk of frustrated expectations is especially pronounced for ambitious "transformative" constitutions, which aspire to reshape social, political and economic institutions in a more egalitarian mold.[121] The public can experience deep frustration when rights go unfulfilled, and when promised transformation fails to arrive. Courts can even become the targets of this general frustration.

Institutional support might better manage the public's expectations. Courts would stand ready to curb some instances of state failure and institutional under-performance. Those who desire more would have to direct their energies towards political and democratic processes. Clarifying the limits of the judicial contribution can also be helpful for rights advocates and civil society organizations, who might benefit from guidance regarding where to strategically invest their resources. Admittedly, managing the public's expectations can be difficult: journalists, lawyers, law professors, activists and judges alike may strain to adequately communicate the court's role. But some modest work of expectation management could still be welcome, particularly in jurisdictions where the public has grown dissatisfied with the perceived lack of judge-led change.

III. Uncoupling Constitutional Rights from Judicial Remedies

There is another move that requires justification. As a judicial orientation, institutional support would see judges neglect the work of developing a substantive account of what social rights guarantee. Instead, may be focused on improving state capacity and institutional performance – or compensating for its absence. But this would result in an uncoupling of constitutional rights, on the one hand, and judicial remedies, on the other. This section defends this uncoupling—and the reframing of the judicial role that comes with it—as both conceptually necessary and politically fruitful.

Scholars across public and private law have occasionally defended such an uncoupling of right and remedy, a view occasionally termed the "disparity thesis".[122] Lawrence Sager

120 *Robert Leckey*, The Harms of Remedial Discretion, International Journal of Constitutional Law 14 (2016), p. 590.

121 *Klare*, note 101, p. 150.

122 *Sager*, note 111; *Stephen Smith*, Rights, Wrongs, and Injustices: The Structure of Remedial Law, Oxford 2019; see generally *John Jeffries*, The Right-Remedy Gap in Constitutional Law, Yale Law Journal 109 (1999).

and Stephen Smith have suggested that rights and remedies are best thought of as distinct spheres of activity that respond to fundamentally different questions.[123] Rights speak to what we are owed—and constitutional rights focus on what the state owes us. Remedies speak to a narrower, pragmatic question—namely, what kind of assistance can courts offer rights-bearing individuals.[124] And when judicial activity is curbed by a variety of institutional considerations—as it inevitably is in the context of social rights litigation[125]—one should not expect the answer to the *rights* question to overlap cleanly with the *remedies* question.

On this view, there will be rights that will inevitably go under-enforced by courts, and the balance would be left to the political process.[126] As political constitutionalists have stressed, rights can have a rich life in social movements, in public debate, in legislatures, and in various state agencies.[127] They can be fruitfully mobilized by social movement leaders, non-governmental organizations, politicians, bureaucrats and other public officials. Rights discourse, after all, has a special potency as a "deeply rooted and attractive moral discourse".[128] Rights rest on solemn constitutional commitments, and have been recognized in prominent international treaties.[129] They can thus help ground a potent critical posture to challenge institutions, laws, and practices.[130]

Other scholars have viewed rights and remedies as deeply and inevitably linked, even reflecting one another. Those who hold this view may begin from the Diceyan premise that judges are guarantors of constitutional norms, and enforcers of the rule of law.[131] The sole function of a remedy is thus to enforce a right and to accomplish effective redress. Legal realists have settled on a similar view of the right-remedy relationship. They doubt the existence of a right in the absence of an effective remedy, since a "right is as big, precisely, as what the courts will do" to enforce it.[132] Remedies can therefore be read as

123 *Smith*, note 122; *Sager*, note 111, p. 1213.

124 See e.g., *Smith*, note 122, p. 8; *Stephen Smith*, Rights and Remedies: A Complex Relationship, in: Hon Robert Sharpe / Kent Roach (eds.), Taking Remedies Seriously, Ottawa 2009, p. 33.

125 *Gaurav Mukherjee*, The Political Economy of Effective Judicial Remedies, International Journal of Constitutional Law 21 (2023), p. 68; *Sager*, note 111, p. 1213.

126 *Sager*, note 111, p. 1221 and 1227; *Harvey*, note 111; *Fallon*, note 111, pp. 1324–1328.

127 See eg, *Mark Tushnet*, Taking the Constitution Away from the Courts, Princeton 1999; *Mark Tushnet*, The Relation Between Political Constitutionalism and Weak-Form Judicial Review, German Law Journal 14 (2013).

128 *Gráinne de Burca*, Reframing Human Rights in a Turbulent Era, Oxford 2021, pp. 3–4.

129 Ibid.

130 See e.g., *Jens Theilen*, The Inflation of Human Rights: A Deconstruction, Leiden Journal of International Law 34 (2021).

131 *Roach*, note 76, pp. 862–865 (noting recent works of "neo-Diceyan critics" who have resurfaced the principle of effective redress).

132 *Karl Llewellyn*, The Bramble Bush: The Classic Lectures on the Law and Law School, Oxford 2008, pp. 83–84.

being revelatory. As Daryl Levinson puts it, the "only way to see the constitutional right […] is to look at remedies".[133]

However, uncoupling right and remedy is important as a matter of conceptual clarity. It can also help lawyers and political actors avoid unduly narrow interpretations of rights. Evidently, institutional dynamics limit what courts are willing or able to order. A courts' remedial practice may be shaped by a wish to be deferential to the political branches, by fear of political backlash, or by some self-awareness of the limits of judges' knowledge and legitimacy.[134] But, crucially, if rights and remedies are thought to reflect one another, the restraint or institutional self-awareness that courts show will be interpreted as a limit on the underlying rights themselves. Such a move would be mistaken. Consider the following example. A court might decline to order relief for an individual experiencing homelessness out of deference for the executive or legislative branches. Such a decision says *something* about the court's sense of its institutional role, but it says little about the nature, or the content, of the right to housing.

This risk of failing to distinguish right and remedy is on display in Lauren Birchfield and Jessica Corsi's important survey of the Indian Supreme Court's interim orders in *PUCL*.[135] As described above, Birchfield and Corsi suggest that the Court's interim orders "gradually defined the right to food in terms of what policies are required of the state".[136] But this reading unduly constrains the right to food's meaning. The right to food can vary in its ambition, it can be realized through a variety of policy or economic arrangements, and it can evolve over time, as the state's resources and capacity increase. As this Article has argued, many of the Supreme Court's brief and specific orders have more to do with buttressing state capacity. As such, they cannot be read as the definitive statement on what the right to food encompasses.

Such a narrow interpretation of rights can also give state officials a way of defending themselves against novel claims. Once an order has been issued by a court and complied with, officials might then argue that the right has already been fulfilled, and that no more work is constitutionally required.[137] Such a move may do harm to political movements whose work will be key to social rights' realization. Lawyers must be wary about stifling rights discourse in this way.

Judges keen on practicing institutional support might even clarify that such an uncoupling has taken place. This would begin with clear recognition that constitutional rights and judicial interventions reflect distinct issues or areas of activity. Social rights might

133 *Levinson*, note 78, p. 880.

134 *Owen Fiss*, Foreword: The Forms of Justice, Harv L Rev 93 (1979), pp. 50–52.

135 *Birchfield / Corsi*, note 29.

136 Ibid., p. 700.

137 On this risk, see *Natalia Angel-Cabo / Domingo Lovera Parmo*, Latin America Social Constitutionalism: Courts and Popular Participation, in: Helena Alviar Garcia / Karl Klare / Lucy Williams (eds.), Social & Economic Rights in Theory and Practice: Critical Inquiries, New York 2014.

be acknowledged as being beyond the judiciary's ability to fully define or enforce. Next, judges might elaborate on the kinds of instances in which they would be willing to award a remedy—or, more specifically in the tradition of institutional support, what kinds of capacity-building orders they would entertain. Courts may well consider other zones of intervention – including those that fall under the umbrella of "responsive" judicial review—but these zones of intervention would all be shaped, honestly and transparently, by the courts' institutional limitations.

Judges' engagement with rights doctrine could then take a couple of forms. They might simply decline to say much about the content of these rights. Far from monopolizing rights enforcement, judges could acknowledge that constitutional rights must remain orienting objectives for the political process, and must be pursued in those arenas. The result might be a *remedies*-first approach to social rights litigation, where litigants and judges could discuss the availability of relief without ever saying much about the constitutional rights that exist in the background.

Alternatively, courts might articulate rights in a maximalist fashion—that is, in their most demanding and ambitious forms—but then clarify that the court's actual *orders* will be limited to certain accepted cases of institutional support. That is, a robust description of social rights would be paired with a flexible selection of remedies running the spectrum from weak to strong, simple to complex, and including varieties of "institutional support" as well as other species of intervention considered appropriate.[138] On this approach, judges would once again gesture towards the importance of the political process. However, they would also offer rights advocates a helping hand by outlining an ambitious, aspirational account of rights that may then be mobilized in political discourse.

D. Conclusion

This Article has surfaced institutional support as a potential orientation for courts in social rights litigation. It centers the problem of weak state capacity as a structural rights obstacle. It includes within its broad umbrella both structural and individual remedies, as well as some managerial, dialogic, and experimentalist interventions. Indeed, some of the orders in landmark social rights proceedings are perhaps better understood as putting institutional support into motion. This Article has argued that this approach can deliver meaningful rights victories, better manage public expectations, and curb some of the risks related to the judicialization of social rights.

Admittedly, this remedial orientation comes at a steep cost. The investment of court resources and goodwill required to help build state capacity is considerable. Courts which have embarked on impactful proceedings sometimes lack the appetite to re-commit to

138 In a sense, this approach represents a variation of "dialogic judicial activism" described by Rodriguez-Franco and Rodriguez-Garavito, which they describe as including a strong account of rights, moderate remedies, and strong monitoring, see *Rodríguez-Garavito / Rodríguez-Franco*, note 6, pp. 16–17.

such endeavors again. The approach also declines to recognize a minimum core of social rights that are susceptible to immediate fulfillment. Similarly, institutional support can concede the judicial effort to elaborate on social rights' critical political. Its emergence in comparative law thus gestures towards some of the tensions inherent in the project of transformative constitutionalism.