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JUDICIALIZING THE POSITIVE RIGHT TO HEALTH IN INDIA, SOUTH AFRICA AND COLOMBIA:

IMPLICATIONS FOR SEPARATION OF POWERS

By

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Submitted to

Central European University

Department of Legal Studies

On April 1, 2024

In partial fulfillment of the requirements for the degree of

Doctor of Juridical Science

The dissertation contains no materials accepted by any other institution for any other degree and no materials previously written and/or published by any other person unless otherwise acknowledged.

s/Mariam Begadze

Abstract

The literature discussing social rights adjudication has primarily focused on its outcomes and less so on its intersection with Separation of Powers (SoP), while the prism of SoP doctrines, practices, and structures in respective jurisdictions was entirely omitted. Given the implications of positive rights regarding SoP and democratic decision-making, this dissertation addresses the gap by assessing the effect of social rights adjudication on SoP doctrines in India, South Africa and Colombia, using the example of a social right – the right to health. The present doctrinal approach is premised on a 'minimum core' of SoP conceptualized in the dissertation. The overarching research question posed by the dissertation is - *to what extent is SoP doctrine and theory transformed through health (and social) rights jurisprudence in a comparative context of India, South Africa, and Colombia?* In the empirical study, despite the shared general concept of the SoP rejecting any form of the political question doctrine, the institutionally strong apex courts – ISC in India, SACC in South Africa, and CCC in Colombia - displayed a rather different judicial role. In turn, the locally applicable general SoP doctrines determined the intensity of review on health (and social) rights, ultimately reflecting a continuum of judicial review with the weakest ISC role of a partner/negotiator in India, a medium SACC one of a watchdog/scaffolding in South Africa, and the strongest CCC one of a commander/controller in Colombia. The continuum was similar when incorporating the remedial dimension under the label of dialogic justice. Although review standards on social and health rights largely replicated the strength of general judicial power, variations were discernible on the edges of the continuum – in India and Colombia. Weak judicial power in India translated into a weaker position on social rights, while strong judicial power in Colombia led to the further stretching of the SoP doctrine. This shortfall in India, convergence in South Africa and stretching in Colombia in relation to locally applicable SoP doctrines led to a general

observation that judicial review at the edges of the continuum manifests in extremes in the context of social rights adjudication - a claim made by refuting alternative explanations. Drawing on the descriptive analysis, the dissertation identifies a typology with 10 categories of substantive review on social and health rights. On the remedial level, these categories in the typology can be combined with mandatory orders on the decision-making process, participatory remedies, and/or supervisory jurisdiction. The 10 categories range from the least intrusive, namely, equality, rationality-based and/or inclusive interpretation of existing subconstitutional norms, to the most intrusive one – granting of individual benefits absent from legislation. From the descriptive analysis and the resulting typology, three overarching normative conclusions are drawn: 1) SoP limits to adjudication on state inaction are not an abstract imposition; rather, it is determined in the particular circumstances of a case based on available evidence and in accordance with judicially manageable standards. 2) The SoP-compliant judicial action has the (varying) capacity to nudge the political branches, that is, to increase the political cost of their inaction, which tends to increase in a cycle of dialogue between the branches 3) Judicial review erasing the SoP limits risks falling into a pattern of unsustainable, inconsistent stretching of principles that will not necessarily advance the goal of realizing social rights and the right to health in particular. Drawing the threads together, this dissertation demonstrates that (1) means-end reasonableness review (2) with principled rights-based reasoning, that is (3) sensitive to the self-correction capacity of the political branches, and depending on the latter, (4) integrates some standards for the policy-making process, including (not automatically) participatory remedies and court-led monitoring of implementation comes closest to the golden mean of judging on unconstitutional state inaction in the context of social rights.

Acknowledgements

I am immensely thankful to my supervisor, András Sajó, for inspiring and guiding me through this journey.

I am deeply indebted to the Legal Studies Department of the Central European University for the ample opportunities, personal and professional, it has been giving me since 2014. I want to thank my teachers during the LLM studies, especially Renáta Uitz and Eszter Polgári, who have sparked my intellectual curiosity and made me see the 'fun' parts of human rights and comparative constitutional law. I also want to thank Prof. Mathias Möschel for leading the doctoral seminars, which kept me and my SJD colleagues motivated. I will also thank Lilla Sugó, Tünde Szabó, and Ildiko Torok for their support throughout. My special thanks to Ágnes Diós-Tóth from the Center for Academic Writing for her assistance in the final stages of the writing process. I want to thank Prof. Kirsten Robert Lyer for offering me the chance to participate in academic projects and teaching activities of the CEU Public Policy Department.

I want to thank Professors, lawyers, and activists from South Africa, Cathi Albertyn, Sandra Liebenberg, Timothy Fish Hodgson, Sasha Stevenson, and Mark Heywood, who shared invaluable insights during my visiting scholarship. My special thanks to a PhD student at Wits University, Coline Bruintjies, and her family for giving me the warmest welcome.

I am also indebted to the CEU Democracy Institute. My special thanks to Prof. Dimitry Kochenov and Dr. Barbara Grabowska-Moroz for giving me the opportunity to grow professionally in an environment of leading scholars.

I am eternally grateful to my mom for instilling an unwavering wish for growth and the belief that with hard work, nothing is beyond reach.

Last but not least, I salute my SJD colleagues and friends, especially Ani, Mariam, Teodora, Dora, Zoki, Rohit, Ana, Maka, Lela, Gvantsa, Eto, Tako, Tamta, my sisters Nino and Nato, and my tech genius brother-in-law Giorgi, who tolerated me, stood by me and supported me in every step of the PhD journey.

Table of Contents

Contents

Abstract ii

Acknowledgements iv

Table of Contents vi

List of Abbreviations x

Introduction 11

1. Literature Review and Gaps 13

2. *Why SoP Prism* 16

3. *Why Health* 17

4. Research Questions 21

5. Methodology 22

6. Structure 23

Chapter 1. Normative Foundations: Theory of SoP and Dialogic Justice 25

1. Containing Separation of Powers Theory 26

2. Advancing Judicial Review within (not due to) SoP 30

3. Tailoring *Dialogic Justice* to Social Rights 31

4. *A caveat:* Substantiating Judicial Review on State Inaction 36

5. Making *Dialogic Justice* Institutionally Distrustful Again 39

6. Conclusion 49

Chapter 2. Judging as Nudging in India....51

Part I: SoP doctrine of the ISC....52

1.1. Transformative Constitutionalism Delayed....52

1.2. Institutional Setting for the ISC in an Evolving Democracy....53

1.3. Consolidation Dynamics of the ISC Power....56

1.4. SoP Doctrine: Coaxing Political Will....58

1.5. Social Rights Policy and Doctrine....66

1.5.1. Social Rights Policy....67

1.5.2. Social Rights Doctrine: Weak Justiciability....69

Part II: Right to Health through the Prism of SoP....78

2.1. Population Health, Health Care and Legislative/Policy Framework....78

2.2. Weak Justiciability of the Right to Health in the Apex Court....81

2.3. Nudging for the Right to Health in a Crisis....90

2.4. Right to Health in HCs: Outliers?....99

2.5. Conclusion....101

Chapter 3. Elyian Reasonableness in South Africa....108

Part I: SoP doctrine of the SACC....109

1.1. Transformative Culture of Justification....109

1.2. Institutional Setting for the SACC in a Dominant Party Democracy....111

1.3. Consolidation Dynamics of the SACC Power....116

1.4. SoP Doctrine: Judicial Review as Scaffolding....119

1.5. Social Rights Policy and Doctrine 123

1.5.1. Social Rights Policy 124

1.5.2. Social Rights Doctrine: Thickening Reasonableness 126

Part II: Right to Health through the Prism of SoP 135

2.1. Population Health, Health Care and Legislative/Policy Framework 135

2.2. Policing the Democratic Process on Health Rights? 142

2.3. Right to Health in HCs: Outliers? 155

2.4. Conclusion 158

Chapter 4. Rule of Judge-Made Exceptions in Colombia 163

Part I: SoP doctrine of the CCC 164

1.1. Judiciary Served with the Thick Constitution 164

1.2. Institutional Setting for the CCC with a Weak Legislature 166

1.3. Consolidation Dynamics of the CCC Power 169

1.4. SoP Doctrine: Thick by Default 171

1.5. Social Rights Policy and Doctrine 175

1.5.1. Social Rights Policy 175

1.5.2. Social Rights Doctrine: *Ad hoc* Individual Enforcement 177

Part II: Right to Health through the Prism of SoP 189

2.1. Population Health, Health Care and Legislative/Policy Framework 189

2.2. Individual Enforcement of Health Rights 194

2.3. Towards Dialogue Temporarily? 199

2.4. Individual *Ad hoc* enforcement Prevails over Dialogue 205

2.5. Conclusion 212

Conclusion 218

Part I. SoP Doctrines through Health Rights: A Continuum 219

Continuum of Judicial Review.....219

Continuum of Judicial Review on Social/Health Rights 221

Continuum of Dialogic Justice.....223

Part II. Typology of Social Rights Adjudication 224

Part III. Normative Argument: Judging on Positive Social Rights.....225

Bibliography 234

Case Law.....280

List of Abbreviations

African National Congress Party – ANC

Anti-retroviral therapy – ART

Bharatiya Janata Party – BJP

Colombian Constitutional Court – CCC

Directive Principles of State Policy – DPSP

ECtHR – European Court of Human Rights

German Constitutional Court - CCG

Health Technology Assessment - HTA

High Court – HC

Indian Supreme Court – ISC

International Covenant on Economic, Social, and Cultural Rights – ICESCR

International Labor Organization - ILO

Multidimensional Poverty Index - MPI

Out-of-pocket expenditure - OOP

Prime Minister – PM

Public Interest Litigation – PIL

Research and Development - R&D

Rule of Law - RoL

Separation of Powers – SoP

South African Constitutional Court – SACC

Supreme Court of the United Kingdom – UKSC

Universal Declaration of Human Rights - UDHR

Universal Health Coverage - UHC

World Health Organization – WHO

Introduction

civilization advances when what
was perceived as misfortune is perceived as injustice[*]

The world has become more affluent and technology more advanced than ever. At the same time, people, including newborn babies, continue to fall victim to preventable and treatable health conditions. With that material and technological progress, gaps in health status within and among countries even widened.

In the *Faces of Injustice,* Judith N. Shklar asks one of the most pertinent questions for human rights: '[w]hen is a disaster a misfortune and when is it an injustice?' For her, these two cannot easily be distinguished if we recall that 'what is treated as unavoidable and natural, and what is regarded as controllable and social, is often a matter of technology and of ideology or interpretation.' Indeed, as she argues, 'the difference between misfortune and injustice frequently involves our willingness and our capacity to act or not to act on behalf of the victims, to blame or to absolve, to help, mitigate, and compensate, or to just turn away.'[1]

There is more agreement today that not all suffering is a misfortune but a matter of justice, and in a relatively just world with human rights - a matter of law. Think of how politically costly it would be for politicians from all ideological spectrums to claim that the disabled persons unable to access

[*] J. N. Shklar quoted in Harvard Law School Human Rights Program, *Economic and Social Rights and the Right to Health: Session II: Defining the Right to Adequate Health* (Harvard Law School Human Rights Program, 1995), 30.
[1] Judith N. Shklar, The Faces of Injustice (Yale University Press, 1990), 1-2.

public transport are merely facing a misfortune, 'tough luck'. Still, the misfortune/injustice distinction is not always this straightforward.

That is even less straightforward in an inescapable reality of scarce resources.[2] Questions remain as to how one can rectify one injustice without leading to another. Is it an injustice or a misfortune if a child from a poor family is refused expensive chemotherapy based on medical advice that any further health benefit is unlikely after a comprehensive cancer treatment failed? Is it just that once such a case ends up in court, a judge refuses the relief of clinging to a slim chance? Would a judge be making the same old misfortune excuse if they lament that one must remember we live in the real world? Is it unjust that judges allocate these 'agonizing' judgments to political branches rather than use the slim chance of 'rescuing' patients themselves?[3]

These questions entail prevailing moral dilemmas. To answer them, one must first identify the judicial intuition and explain it to the extent possible. The dissertation precisely engages with such an inquiry in a comparative context. Broadly, it examines judicial intuition of distinguishing misfortunes from injustice based on the examples of poor health and links that inquiry to a normative question in Shklar's language: to what extent should courts decide merits of cases previously understood as health (and by extension social) misfortune?

[2] concurring opinion of Justice Sachs in Soobramoney v Minister of Health, KwaZulu-Natal 1998 1 SA 765 (CC), para 54.
[3] These questions are derived from an actual case scenario in R (B) v Cambridge Health Authority [1995] EWCA Civ 43.

1. Literature Review and Gaps

Since the 1990s, scholars have been debating the theoretical question of social rights adjudication. In the footsteps of emerging social rights jurisprudence in domestic courts, the theoretical question was also approached from a practical perspective. The literature has had two recently overlapping directions.[4] The first focused on the Separation of Powers (SoP) objection and its rebuttal,[5] and the second turned to the actual doctrinal approaches and their effectiveness, sometimes assessed through interdisciplinary methods.[6] In the post-jurisprudence scholarship reflecting on the actual doctrines and consequences resulting from social rights adjudication, four camps of scholars emerged: 1) those who essentially endorse the doctrinal directions taken[7] and the actual consequences achieved;[8] 2) who lament the insufficiency of judicial action;[9] 3) who find both points of criticism and endorsement, for instance, emphasize spillover effects on the poor including by positively affecting social mobilization, democratic processes, and functioning of administrative and regulatory bodies,[10] or challenge the narrative of adverse distributional effects

[4] In the most recent and comprehensive summary of this literature, Boyle categorizes these strands as pre- and post-jurisprudence scholarship, Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge, 2020), 19-22.

[5] Dennis M. Davis, "The Case against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles," *South African Journal on Human Rights* 8, no. 4 (January 1, 1992): 475–90. Frank B. Cross, "The Error of Positive Rights," *UCLA Law Review* 48, no. 4 (2001 2000): 857–924. Cass R. Sunstein, "Against Positive Rights Feature," *East European Constitutional Review* 2, no. 1 (1993): 35–38. Etienne Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution," *South African Journal on Human Rights* 8, no. 4 (January 1, 1992): 464–74.

[6] Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2002). Tatiana S. Andia and Everaldo Lamprea, "Is the Judicialization of Health Care Bad for Equity? A Scoping Review," *International Journal for Equity in Health* 18, no. 61 (June 3, 2019): 1-12.

[7] Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave*, Comparative Constitutional Law and Policy (Cambridge: Cambridge University Press, 2016); Nick Ferreira, "Feasibility Constraints and the South African Bill of Rights: Fulfilling the Constitution's Promise in Conditions of Scarce Resources," *South African Law Journal* 129, no. 2 (January 2012): 274–302.

[8] Malcolm Langford, "The Impact of Public Interest Litigation: The Case of Socio-Economic Rights," *Australian Journal of Human Rights* 27, no. 3 (September 2, 2021): 505–31.

[9] David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance Note," *South African Law Journal* 119, no. 3 (2002): 484–501.

[10] Mariana M. Prado, "The Debatable Role of Courts in Brazil's Health Care System: Does Litigation Harm or Help?," *The Journal of Law, Medicine & Ethics* 41, no. 1 (April 1, 2013): 124–37. Daniel M. Brinks and William Forbath, "Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-Poor Interventions," *Texas Law Review* 89 (2011): 1943-1955.Cesar Rodriguez-Garavito, "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin

using differentiated data;[11] 4) who remain critical of social rights adjudication now also considering consequences; The latter camp's prevailing skepticism is based on downstream (at the point of delivery to individuals) instead of upstream (concerning structural factors) enforcement of rights,[12] middle-class orientations, inappropriateness of such a majoritarian judicial role,[13] and its effects on distributive justice.[14]

In the post-jurisprudence phase, consequentialist observations, such as the extent to which social rights adjudication bettered the welfare of the population, often wrongly dominated the debate. Loosely measurable outcomes, although helpful, must not determine the theoretical questions.[15] Besides, the discussion rarely went beyond refuting SoP objections.[16] This has led to a loss. It is time to refocus on developing a positive framework for the judicial review of social rights. These

America," *Texas Law Review* 89 (2010-2011): 1679, 1696. Daniel M. Brinks and Varun Gauri, "The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights," *Perspectives on Politics* 12, no. 2 (2014): 375–93; Katharine G. Young and Julieta Lemaitre, "The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa," *Harvard Human Rights Journal* 26, no. 1 (November 1, 2013): 179–216. Andia and Lamprea, "Is the Judicialization of Health Care Bad for Equity?" 9.

João Biehl et al., "Judicialization 2.0: Understanding Right-to-Health Litigation in Real Time," *Global Public Health* 14, no. 2 (February 1, 2019): 190–99.

[11]João Biehl, Mariana P. Socal, and Joseph J. Amon, "The Judicialization of Health and the Quest for State Accountability: Evidence from 1,262 Lawsuits for Access to Medicines in Southern Brazil," *Health and Human Rights* 18, no. 1 (June 2016): 209–20.

[12] Everaldo Lamprea, "The Judicialization of Health Care: A Global South Perspective," *Annual Review of Law and Social Science* 13, no. 1 (2017): 431–49.

[13] András Sajó, "Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court," in *Courts and Social Transformation in New Democracies*, ed. Roberto Gargarella, Pilar Domingo and Theunis Roux (Routledge, 2006), 83-107.

[14] David Landau, "The Reality of Social Rights Enforcement," *Harvard International Law Journal* 53. no. 1 (2012): 189-248.

David Landau, "The Promise of Aminimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures," in *Economic and Social Rights after the Global Financial Crisis*, ed. Aoife Nolan (Cambridge: Cambridge University Press, 2014), 279. Daniel W.L. Wang and Octavio L.M. Ferraz, "Reaching Out to the Needy? Access to Justice and Public Attorneys' Role in Right to Health Litigation in the City of São Paulo," *Sur International Journal on Human Rights* 10, no. 18 (2013): 158-175; Helena A. García, "Distribution of Resources Led by Courts: A Few Words of Caution," in *Social and Economic Rights in Theory and Practice: Critical Inquiries*, ed. Helena A. García, Karl Klare, and Lucy A. Williams (Routledge, 2015), 67–84.

Alicia Ely Yamin, "The Right to Health in Latin America: The Challenges of Constructing Fair Limits," *University of Pennsylvania Journal of International Law* 40, no. 3 (2019): 695–696, 700, 720. Octávio L.M. Ferraz, *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (Cambridge University Press, 2020). Octavio Luiz Motta Ferraz, "Harming the Poor through Social Rights Litigation: Lessons from Brazil Symposium: Latin American Constitutionalism: Section II: Social and Economic Rights," *Texas Law Review* 89, no. 7 (2011): 1643–68.

[15]James Fowkes, "Normal Rights, Just New: Understanding the Judicial Enforcement of Socioeconomic Rights," *The American Journal of Comparative Law* 68, no. 4 (December 1, 2020): 726. Martín Sigal, Julieta Rossi, and Diego Morales, "Argentina: Implementation of Collective Cases," in *Social Rights Judgments and the Politics of Compliance: Making It Stick*, ed. César Rodríguez-Garavito, Julieta Rossi, and Malcolm Langford (Cambridge University Press, 2017), 172.

[16]Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2013).

limitations of the scholarly frame[17] have diverted attention from the complexity of social rights cases and their connection to universal judicial review dilemmas. As Fowkes observes, the distinction between socio-economic rights cases that impose 'new demands' as opposed to those that are more or less entrenched in statutory or subordinate legislation has mostly slipped through the fingers, alongside other similarities across rights.[18]

A few authors in the post-jurisprudence phase did try to defend social rights adjudication on non-consequentialist grounds with a universal logic. According to the common argument, incremental[19] and weak forms[20] of judging can reinforce the deliberative form of democracy, in that manner, contributing to the fulfillment of these[21] or other positive rights.[22] In particular, scholars have argued that judicial review is an appropriate response against 'burdens of inertia' in the political process[23] or when the majority will is ignored (e.g. due to requirements from international financial institutions).[24]

The dissertation engages in a similar exercise of identifying non-consequentialist arguments for judicial review of social rights. However, unlike previous works, it examines social rights adjudication in the context of locally applicable SoP doctrines. The dissertation narrowly focuses

[17] Fowkes, "Normal Rights, Just New," 724–726, 730, 741.
[18] Ibid, 748-749, 732. See also Madhav Khosla, "Making Social Rights Conditional: Lessons from India," *International Journal of Constitutional Law* 8, no. 4 (October 1, 2010): 739–65.
[19] Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012); Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge, 2020).
[20]Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009).
[21] Katharine G. Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012), 172.
[22] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008), 92. Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012).
[23] Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited," *International Journal of Constitutional Law* 5, no. 3 (July 1, 2007): 391, 402-403, 418.
[24] Kim Scheppele, "Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments," in *Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments*, ed. Adam W. Czarnota, Martin Krygier, and Wojciech Sadurski (Central European University Press, 2005), 47-52.

on one social right and looks at it through a broad prism of SoP doctrine. The choice of the right to health and the prism of SoP requires a more detailed justification, which is set out below.

2. Why SoP Prism

Under SoP, resource distribution, and budgeting/spending strategy belong to the democratic accountability of the legislative and executive branches. Hence, social rights of a predominantly costly and positive nature[25] face a dilemma of non-justiciability from the SoP prism. It is true that civil and political rights also have positive dimensions and cost money[26] (e.g. access to justice, right to vote, right to assemble, freedom to strike). However, it cannot be denied that such a difference in degree matters (note that needed resources are often difficult to cap)[27] even if it does not amount to a difference in kind.[28] One cannot overlook the particular polycentric features of social rights cases either.[29] From these two related factors, a lack of democratic legitimacy and competence of the judicial branch follows, which affects a potential (normatively justified) judicial response.

Though acknowledging the expected failures of the market for the unfortunate and the needed private initiative to address it,[30] Hayek even objects to the protection of social rights by political branches, fearing coercive measures in the name of distributive justice (while strongly supporting

[25] Even social rights originating in a state action (e.g., eviction, regulation of informal recycling) have positive dimensions (e.g. provision of alternative accommodation, inclusion in the forthcoming scheme to retain means of income), see relevant jurisprudence discussed in Chapters 3 and 4.

[26] Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (W. W. Norton & Company, 2000).

[27] Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly* 9, no. 2 (1987): 184. András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press, 2017), 394-396.

[28] Fowkes, "Normal Rights, Just New," 724–726, 730, 748.

[29] Lon L. Fuller and Kenneth I. Winston, "The Forms and Limits of Adjudication," *Harvard Law Review* 92, no. 2 (1978): 353–409. A similar position is also taken by others see Owen M. Fiss, "The Supreme Court, 1978 Term," *Harvard Law Review* 93, no. 1 (1979): 1–59. Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012), 5-7, 189-210. Donald L. Horowitz, *The Courts and Social Policy* (The Brookings Inst, 1977). Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press, 2018), 65.

[30] Friedrich Hayek, *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (Chicago, IL: University of Chicago Press, 1978).

judicial review of all coercive government action).[31] However, the power of political branches to determine redistributive policies, especially in the jurisdictions of the dissertation, is accepted so universally and unequivocally that it will not be defended separately.

3. Why Health

Among other social rights, the right to health is most appropriate to answer the dissertation's research questions. The objections related to courts' democratic legitimacy and competence are most evident in health rights cases amongst social rights, considering the ever-increasing expenses and the highly technical nature of the medical, pharmaceutical, and public health management fields. On the other hand, courts are more likely to stretch the SoP doctrine on the right to health, among other social rights, for the six reasons below:

1. The right to health has a far more tangible connection to the right to life, and judges tend to be particularly sensitive to the right to health claims when it comes to life-threatening conditions (see cases from Brazil,[32] Germany,[33] Colombia, and India in this thesis, also ECtHR[34]) even if they eventually dismiss the case as was in the U.K.[35] The literature describes such a theoretical basis for judicial action under the label of 'rule of rescue'.[36]

2. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) and relevant General Comments are most demanding and elaborate with the right to health (e.g. absolute

[31] Friedrich Hayek, *The Constitution of Liberty* (The University of Chicago Press, 1978), 211, 231.
[32] Daniel W. L. Wang, "Courts and Health Care Rationing: The Case of the Brazilian Federal Supreme Court," *Health Economics, Policy and Law* 8, no. 1 (January 2013): 75–93.
[33] BVerfG, decision of December 6, 2005 - 1 BvR 347/98; Stefanie Ettelt, "Access to Treatment and the Constitutional Right to Health in Germany: A Triumph of Hope over Evidence?," *Health Economics, Policy and Law* 15, no. 1 (January 2020): 30–42.
[34] Lopes de Sousa Fernandes v. Portugal [GC], no. 56080/13, 19 December 2017
[35] R (B) v Cambridge Health Authority [1995] EWCA Civ 43; Chris Ham, "Tragic Choices in Health Care: Lessons from the Child B Case," *BMJ* 319, no. 7219 (November 6, 1999): 1258–61.
[36] John McKie and Jeff Richardson, "The Rule of Rescue," *Social Science & Medicine* 56, no. 12 (June 1, 2003): 2407–19.

minimum core, WHO list as part of minimum core[37]) among other social rights. The exception to the progressive realization principle - minimum core[38] (e.g. basic shelter and essential primary healthcare) is subject to heightened scrutiny rather than absolute protection in the case of other social rights.[39] Although the minimum core remains ambiguous,[40] and the Optional Protocol to ICESCR seems to establish reasonableness review for all social rights,[41] as will be observed in this dissertation, the minimum core from the General Comments still influences domestic jurisprudence, including under the framework of the reasonableness review.[42]

3. Health has a more universal, cross-cutting relevance for all classes of society. Hence, this could be a strategic means of increasing public support for the court as an institution.[43] Indeed, an exceptional mobilization potential of HIV/AIDS patients across all strata of society during a global epidemic in the 1990s eased judicial intervention from such a pragmatic point of view.[44]

4. Health systems resemble core social institutions such as the justice system,[45] and in one way or another, states undertake some responsibility in this regard.

[37] under General Comment 14, the minimum core was made absolute for the right to health. Namely, the committee stressed that a 'State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations […] which are non-derogable, see UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para 47.

[38] Alongside progressive realization principle and minimum core obligations, the ICESCR establishes the general duty of taking 'deliberate, concrete and targeted steps', eliminating discrimination in delivering social rights, and prioritizing the most vulnerable.

[39] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, paras 1, 2, 9, 10;

[40] Katharine G. Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content," *Yale Journal of International Law* 33 (2008): 113.

[41] This is confirmed in the most recent authoritative elaborations in the Optional Protocol, Optional Protocol to the Covenant on Economic, Social and Cultural Rights, E/C.12/2007/1, 21 September 2007, para. 8 (f).

[42] On implicit combination of minimum core and reasonableness in South Africa, see infra note 663 and accompanying text.

[43] David Landau and Rosalind Dixon, "Constitutional Non-Transformation? Socioeconomic Rights beyond the Poor," in *The Future of Economic and Social Rights*, ed. Katharine G. Young (Cambridge University Press, 2019), 112.

[44] Everaldo Lamprea, "The Judicialization of Health Care: A Global South Perspective," *Annual Review of Law and Social Science* 13, no. 1 (2017): 435; Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (Oxford, New York: Oxford University Press, 2020), 19.

[45] Alicia Ely Yamin, "Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care," *Health and Human Rights* 10, no. 1 (2008): 49.

5. The theoretical justification for judicial interference can be derived under a more uncontroversial representation-reinforcing framework (see Chapter 1, Section 2) due to the lack of influence some groups of patients have on the democratic process, for instance, those with orphan diseases.

6. The theoretical basis to intervene also stems from most manifest market failures when it comes to health goods and services.[46]

The discussion of the right to health jurisprudence in this dissertation will cover both normal times and crisis situations such as the HIV/AIDs epidemic and COVID-19 pandemic, which, as 'critical junctures' make room for previously unseen or infeasible options,[47] including those in the context of SoP theory.[48] Cases decided during these health crises are a further test for the potential of stretching SoP through health rights. Indeed, the HIV/AIDS epidemic was the first catalyst for health rights litigation worldwide, including in the jurisdictions selected in this dissertation. Apart from being a crisis, AIDS was particularly salient in the early 2000s,[49] as it commonly killed people in their middle age, the most productive years economically. Furthermore, HIV/AIDS patients often faced discrimination that judicial bodies are designed to be sympathetic to, while the cost-effectiveness of HIV/AIDS medicine led judges to see their role to 'rescue' AIDS patients

[46] According to Flood and Gross, '[m]arket failures include the following factors: first, uncertainty about our health needs (will we be unlucky enough to get cancer or not?); second, demand for many kinds of health care services does not decrease in response to rising prices ("inelastic demand"); and finally, health care providers generally have much more information than patients, thus negating the usual free-market assumption of perfect information (an "information asymmetry" exists between health providers and patients) as to the real costs and benefits of different treatments.' see Colleen M. Flood and Aeyal Gross, "Conclusion: Contexts for the Promise and Peril of the Right to Health," in *The Right to Health at the Public/Private Divide: A Global Comparative Study*, ed. Aeyal Gross and Colleen M. Flood (Cambridge University Press, 2014), 453.

[47] Mariana Prado and Michael Trebilcock, "Path Dependence, Development, and the Dynamics of Institutional Reform," *The University of Toronto Law Journal* 59, no. 3 (2009): 341–79. Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *The American Political Science Review* 94, no. 2 (2000): 251–67.

[48] Arianna Vedaschi, "Introduction to Part III Separation of Powers in Times of Crisis," in *New Challenges to the Separation of Powers* (Edward Elgar Publishing, 2020), 173.

[49] In 2000, HIV along with malaria was explicitly included under the Millennium Development Goals and in 2002, Global Fund to Fight HIV, Malaria and Tuberculosis was founded, see Benjamin Mason Meier and Alicia Ely Yamin, "Right to Health Litigation and HIV/AIDS Policy," *Journal of Law, Medicine & Ethics* 39, no. S1 (2011): 83.

against the foot-dragging of political branches.[50] The logic of this HIV-related health rights litigation then spread quickly beyond HIV.[51]

Due to the infeasibility of discussing the right to health claims exhaustively, the dissertation will be limited to the right to access health care and essential medicine – aspects that are most frequently judicialized and fall under the category of core obligations in General Comment 14, namely 'equitable distribution of all health facilities, goods, and services' and 'provision of essential drugs as from time to time defined by WHO'.[52] The right to health, even excluding its social determinants (e.g. access to water, sanitation, food), is one of the most difficult to define or set limits to (e.g. note unpredictability of diseases; health risks combined with the untapped potential of technology). The relevant public health theories acknowledge this. Daniels proposed a fair and public process of decision-making based on relevant criteria, revisability, and enforceability - 'accountability for reasonableness'[53] – a framework acquiring the broadest acceptance in the scholarship and jurisprudence on health rights adjudication.[54] In a more ambitious attempt, Ruger proposed using an incremental consensus-based paradigm of incompletely theorized agreements to define the right to health as embedded in Sen's capability theory.[55] Noticeably, both theories are more concerned about the decision-making process than the

[50] Noah Novogrodsky, "The Duty of Treatment: Human Rights and the HIV/AIDS Pandemic," *Yale Human Rights and Development Law Journal* 12 (2009): 1-61. Canadian HIV/AIDS Legal Network, *Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV* (UNAIDS Best Practice Collection, 2006) https://www.refworld.org/jurisprudence/caselawcomp/unaids/2006/en/47143

[51] Alicia Ely Yamin, *When Misfortune Becomes Injustice: Evolving Human Rights Struggles for Health and Social Equality, Second Edition* (Stanford University Press, 2023), 164.

[52] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para 43.

[53] Norman Daniels, "Accountability for Reasonableness," *BMJ: British Medical Journal* 321, no. 7272 (November 25, 2000): 1300–1301.

[54] Alicia Ely Yamin, "Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Framework to Health," *Health and Human Rights* 10, no. 2 (2008): 7. Colleen M. Flood and Aeyal Gross, "Conclusion: Contexts for the Promise and Peril of the Right to Health," in *The Right to Health at the Public/Private Divide: A Global Comparative Study*, ed. Aeyal Gross and Colleen M. Flood (Cambridge University Press, 2014), 452, 475.

[55] Jennifer P. Ruger, "Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements," *Yale Journal of Law & the Humanities* 18, no. 2 (2006): 1-47.

actual, exhaustive substance of the right to health. The inherent limitations evidenced in these theories, as well as the constitutional statements of the right in the respective jurisdictions, further justify limiting the inquiry in this dissertation to claims of access to health care and essential medicines.

4. Research Questions

The dissertation primarily asks descriptive questions. However, observations that emerge through description help formulate (work-in-progress) typological and normative conclusions. The main descriptive research question that the dissertation answers is as follows: *To what extent is SoP doctrine and theory transformed through health (and social) rights jurisprudence in a comparative context of India, South Africa, and Colombia?* To answer this research question, the dissertation poses the following subquestions for each jurisdiction: *1) How does the judicial branch position itself vis-à-vis political branches when enforcing the right to health? 2) How similar or different are the apex Courts' approaches to other social rights? 3) How does the court's treatment of health and other social rights correspond to the SoP doctrine in other areas of jurisprudence?* The dissertation then categorizes the types of judicial reasoning and review identified in the selected jurisdictions into a *typology* and assesses it from a *normative point of view* through the prism of SoP.

The broader descriptive view, which includes the discussion of non-social cases relevant to SoP doctrines in each jurisdiction, marks a break from the fixation on the rebuttal of SoP objections on the level of theory only. Instead, the dissertation depicts a wholesome view of judicial self-conception as affected or intact through social and health rights jurisprudence, which eventually prepares grounds for a positive framework for judicial review on social rights.

5. Methodology

The dissertation answers these research questions descriptively through comparative doctrinal research of three jurisdictions of India, South Africa, and Colombia. The jurisdictions were chosen along the lines of 'most similar cases' design and rests on 4 justifications: 1) Landmarks display signs of a different judicial role conception in a continuum of judicial review on social/health rights among the jurisdictions. 2) All three apex courts in these jurisdictions enjoy broad decision-making and remedial powers, at least exceptionally exercising judicial power at the margins. 3) each pair of apex courts share additional similarities that affect the strength and nature of judicial review: a) India and Colombia have a weak constitutional right to health with direct access to flexible judicial process; b) ISC and CCC decide cases in small benches. c) The Constitutions of Colombia and South Africa were enacted much later than the Indian one when international human rights protection system was recognized and accepted domestically d) ISC and SACC are more likely to face backlash (and have faced it) from the political branches; 4) Finally, the fact that India, South Africa, and Colombia are jurisdictions most discussed in the context of social rights adjudication is an advantage for this dissertation, given that it introduces a new prism of SoP doctrines, practices, and structures entirely omitted in the literature.

The research methodology for this comparative doctrinal research is inductive, both on account of the right to health and SoP. There are three clusters of inquiry: 1) SoP-relevant non-social rights jurisprudence in light of the respective constitutional systems; 2) legislative and policy framework relevant to social and health rights; 3) social and health rights jurisprudence; The focus on one social right – the right to health - bearing in mind the developments in other social rights cases are matched by a similar gradation of focus on social and health policies. All three levels of inquiry are aimed at critically analyzing social and health rights adjudication through the prism of SoP

doctrines in each jurisdiction. Jurisprudence is not investigated in a vacuum but in the respective institutional, political, and social contexts. In this manner, the thesis takes a contextual approach, enabling a more nuanced description.[56] A nuanced description is a solid foundation for drawing typological and normative conclusions. The consequential observations from the descriptive analysis are given secondary significance for the normative arguments, which depart from a premise that outcomes, though helpful, cannot be the sole basis for justifying one or another type of judicial review in social rights.

6. Structure

The dissertation will be organized into four Chapters. Chapter 1 will set out the theoretical scope of the SoP relied on in this dissertation that will serve as the basis for normative arguments made in the Conclusion. Chapters 2 through 4 will be devoted to the descriptive analysis of social and health rights jurisprudence in each jurisdiction contextualized in their respective constitutional systems, organizing principles, SoP doctrines, welfare, and healthcare legislative and policy frameworks. General social rights adjudication standards are included in Part I of each Chapter formulating a baseline for the wholesome SoP position of each apex Court before it is tested through health rights jurisprudence in Part II of each Chapter. Each of these Chapters will answer the 3 research subquestions formulated above. Finally, the Conclusion will answer the main research question, identifying a continuum of SoP doctrines with and without social and health rights adjudication. The Conclusion will also formulate a typology of judicial reasoning and review of social rights in the selected jurisdictions and draw normative conclusions through the prism of SoP as conceptualized in Chapter 1. Final remarks will also be made on the universal relevance of

[56] Vicki C. Jackson, "Comparative Constitutional Law: Methodologies," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), 54-74.

the findings for positive rights in general against the background of empirical evidence beyond the jurisdictions of the dissertation and relevant literature on this.

Chapter 1. Normative Foundations: Theory of SoP and Dialogic Justice

For conceptual clarity, this Chapter defines the theoretical scope of SoP understood in terms of relations between the judicial and political branches (the legislature and executive). Although political branches will be considered together in this dissertation, it must be borne in mind that, in principle, SoP tensions with the legislative branch are higher than with the executive (though epistemic disadvantage remains[57]) given the latter's less deliberative decision-making.[58] The theoretical scope of SoP will be embedded in the critical analysis of narrow and broad approaches in the literature. Section 1 will first discuss the uncontroversial features of SoP and contrast the narrower rationale with the recent broad formulations of SoP to conclude that the latter theories are not a defensible interpretation of SoP. Section 2 will turn to the theories of judicial review, its defense, and criticism, located within the defensible theory of SoP discussed in Section 1. Tailoring judicial review theories to social rights, Section 3 will move on to the emerging theory of dialogic justice, commonly considered most appropriate for social rights adjudication. Section 4 will deal with a theoretical dilemma often overlooked when applying dialogic justice to social rights – judicial substantiation of unconstitutional state inaction. Finally, Section 5 will turn to what is missing or overlooked from the dialogic justice theory within and beyond social rights – the need to retain the dimension of institutional distrust corresponding to the SoP rationale discussed in Section 1. This sets the stage for discussing the social and health rights jurisprudence in the

[57] Matthew Adler, "Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty," *University of Pennsylvania Law Review* 145, no. 4 (January 1, 1997): 759–892.
[58] Ibid, 1697, 1728, fn. 119; Jeremy Waldron, "The Core of the Case against Judicial Review," *The Yale Law Journal* 115, no. 6 (2006): 1352–1354.

selected jurisdictions through the prism of their SoP doctrines in Chapters 2 through 4 and is a necessary foundation for evaluating the empirical evidence of the case law.

1. Containing Separation of Powers Theory

There is broad theoretical agreement that SoP has two components: division of labor (separation of institutions, functions, and personnel) and checks and balances. The level of separation between branches (independence in formation and decision-making[59]) varies according to jurisdictions and their institutional arrangements (e.g. civil v. common law systems, parliamentary v. presidential systems, federal v. unitary states).[60] Functional separation also operates as a matter of degree (the same function is primary for one branch and peripheral for another)[61] and methodology of decision-making (judicial law-making differs from legislating).[62] Provided that the core of separateness is not compromised, watertight separation is not required.[63] Hence, some modifications in the decision-making methodology for better fulfillment of the function are perfectly acceptable.[64] Separation as such does have significance in terms of implying a limit, as no branch can act without the cooperation of others, but for such cooperation not to be induced, appropriate space overlap is carved out for checks and balances.

[59] András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999), 76-77.

[60] Cheryl Saunders, "Theoretical Underpinnings of Separation of Powers," in *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor (Edward Elgar Publishing, 2018), 73. William Partlett, "Separation of Powers," in *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing Limited, 2023), 387–92. Jenny S. Martinez, "Horizontal Structuring," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), 547-575. Peter L. Strauss, "Separation of Powers in Comparative Perspective: How Much Protection for the Rule of Law?," in *The Oxford Handbook of Comparative Administrative Law*, ed. Peter Cane et al. (Oxford University Press, 2020), 395-419.

[61] David Kosař, Jiří Baroš, and Pavel Dufek, "The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism," *European Constitutional Law Review* 15, no. 3 (September 2019): 430-432.

[62] Michel Rosenfeld, "Judicial Politics versus Ordinary Politics: Is the Constitutional Judge Caught in the Middle?," in *Judicial Power*, ed. Christine Landfried (Cambridge University Press, 2019), 40, 47. For a similar view see Neil K. Komesar, "Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis," *The University of Chicago Law Review* 51, no. 2 (1984): 420.

[63] Saunders, "Theoretical Underpinnings of Separation of Powers," 66, 74.

[64] Guillermo O. Lozano, "Commandeering the Institutions: The Legitimacy of Structural Judicial Remedies in Comparative Perspective," *ICL Journal* 12, no. 4 (December 1, 2018): 387–429.

Relying on this foundation, original and dominant SoP theories hold that SoP is about limiting power and preventing the formation of a despotic government. According to this view, SoP ultimately serves the endurance of a negative aspect of liberty and democracy (e.g. to protect it from partisan lockups[65]),[66] Rule of Law (RoL), and legal accountability of government,[67] which is fallible and thus, in need of precommitment to institutional constraints.[68] This rationale also determines (but does not exhaust) the role of the judicial review in this scheme (see Section 2 below).

This narrow take of SoP has been challenged by scholars who claim that effective government (in *Kavanagh*'s formulation - coordinated (joint) institutional effort) is an equally cogent aim of the SoP[69] resonating with accounts such as 'transformative constitutionalism' in the context of social rights.[70] This has featured in many of the third-wave constitutions,[71] including Colombia and

[65] Samuel Issacharoff and Richard H. Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process," *Stanford Law Review* 50, no. 3 (1998): 643–717. Claude Lefort refers to it as 'institutionalized uncertainty', Claude Lefort, *Democracy and Political Theory* (University of Minnesota Press, 1988).

[66] Sajó, *Limiting Government*, 63. Sajó and Uitz, *The Constitution of Freedom*, 166-167.

[67] Federalist no. 47 (Madison), Federalist no. 48 (Madison), Federalist no. 51 (Madison) in *The Federalist Papers*, edited by A. Hamilton, J. Madison and J. Jay (Signet Classics, 2005). Strauss, "Separation of Powers in Comparative Perspective," 396–419.

[68] Holmes states that 'constitutional democracy is the most "humane" political system because it thrives on the ability of individuals and communities to recognize their own mistakes', Stephen Holmes, "Precommitment and the Paradox of Democracy," in *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad (Cambridge University Press, 1988), 240. Also see the discussion of Ulysses' example in Renata Uitz, "Barber's Pursuit of Positive Constitutionalism in The Principles of Constitutionalism: Towards Exposing Illiberal Constitutional Chicanery," *Jerusalem Review of Legal Studies* 24, no. 1 (December 1, 2021): 78-80.

[69] Nick W. Barber, "Prelude to the Separation of Powers," *The Cambridge Law Journal* 60, no. 1 (2001): 61, 63, 74-88. N. W. Nick W. Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018). 53-56; Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press, 2013), 86-89.Christoph Möllers, "Separation of Powers," in *The Cambridge Companion to Comparative Constitutional Law*, ed. Robert Schütze and Roger Masterman (Cambridge University Press, 2019), 242, 245-246, 256–257. Maxwell Cameron, *Strong Constitutions: Social-Cognitive Origins of the Separation of Powers* (Oxford University Press, 2013), 139, 207. Aileen Kavanagh, "The Constitutional Separation of Powers," in *Philosophical Foundations of Constitutional Law*, ed. David Dyzenhaus and Malcolm Thorburn (Oxford University Press, 2016), 235, 237-240; Saunders, "Theoretical Underpinnings of Separation of Powers," 75.

[70] Karl Klare, "Self-Realisation, Human Rights, and Separation of Powers A Democracy-Seeking Approach," *Stellenbosch Law Review* 26, no. 3 (August 31, 2015): 445–70; Karl E. Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14, no. 1 (1998): 150.

[71] See also Art. 2 of the Constitution of Brazil, Daniel B. Maldonado, "The Conceptual Architecture of the Principle of Separation of Powers," in *The Evolution of the Separation of Powers* (Edward Elgar Publishing, 2018), 150, 154-155.

South Africa, studied in this thesis. Some theorists have taken this broader approach to its extreme by claiming the priority of 'reasoned ordering to a common good' over limitation of power in constitutional theory.[72]

This broader approach to SoP is mistaken for its reasoning and normative justification. The scholars following this approach argue for a broader scope of SoP based on the final arrangement that facilitates achievement of the rationale behind SoP, that is, limiting government, namely that once separated, branches fulfill the functions they are institutionally more appropriate to perform,[73] and that they happen to be interdependent and in constant interaction.[74] However, the incidental arrangement needed for achieving the limitation of government cannot be a sufficient reason for broadening the scope of SoP to the extent that effective government is equal to the historical rationale of SoP. It is true that separation must not destroy the possibility of effective government.[75] Nevertheless, the primary function of SoP remains the maintenance of a balanced distribution of powers. Besides, the equal inclusion of a cooperative element under SoP would contradict the dynamic of institutionalized distrust[76] and universalization of pessimism[77] behind the doctrine.[78] This proposition stands even as this limitation-oriented function itself ultimately

[72] Adrian Vermeule, *Common Good Constitutionalism* (Polity, 2022).
[73] N. W. Barber, "Self-Defence for Institutions," *The Cambridge Law Journal* 72, no. 3 (2013): 571–77. Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford University Press, 2017), 138.
[74] Aileen Kavanagh, "The Constitutional Separation of Powers," in *Philosophical Foundations of Constitutional Law*, ed. David Dyzenhaus and Malcolm Thorburn (Oxford University Press, 2016), 227-228, 235-236.
[75] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The SCOTUS notes: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." see also Sajó, *Limiting Government*, 9.
[76] For the discussion of the virtues of personal trust and corresponding necessity of institutionalizing distrust, see John Braithwaite 'Institutionalizing Distrust, Enculturating Trust' in *Trust and Governance*, ed. Valerie Braithwaite and Margaret Levi (Russell Sage Foundation, 1998) 343-344.
[77] Stephen Holmes, *The Anatomy of Antiliberalism*, revised ed. (Harvard University Press, 1996), 59.
[78] Daniel B. Maldonado, "The Conceptual Architecture of the Principle of Separation of Powers," in *The Evolution of the Separation of Powers* (Edward Elgar Publishing, 2018), 145, 166.

does contribute to effectiveness, although indirectly[79] akin to how the formal concept of RoL ultimately serves liberty.[80]

This narrow view is without prejudice to how varied the rationales behind constitutional law can be. Constitutional law is not exhausted by SoP and serves purposes regardless of what can be envisaged within SoP, even as the modern idea of constitutionalism is often (rightly) associated with checks and balances.[81] There is nothing extraordinary about the observation that liberal tradition, as well as modern constitutions, are or should be concerned with more than that.[82] It is uncontroversial that non-state actors can violate liberty,[83] and thus, its positive dimension also matters.[84] Indeed, as constitutions embraced more positive dimensions, judicial power has also acquired new institutional attributes. Courts no longer fulfill just the function of an arbiter between two parties, looking to past events and offering binding, final remedies.[85] Rather, they exercise judicial review over legislative and executive decisions affecting everyone in the future, even doing so with inconclusive orders.[86] A most extreme example of the evolution in the judicial

[79] Holmes argues that a limited government by restricted arbitrary exercise of power can increase the state's capacity to focus on specific problems and mobilize collective resources for common purposes, see Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, 1997), Holmes makes an analogous point in the emergency context, that contrary to intuition constraints may be crucial for preventing avoidable (and expected) mistakes under the psychological pressure of the situation, see Stephen Holmes, "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," *California Law Review* 97, no. 2 (2009): 301–55. Barbara Geddes, Joseph Wright, and Erica Frantz, *How Dictatorships Work: Power, Personalization, and Collapse* (Cambridge University Press, 2018). Sajó and Uitz, The Constitution of Freedom, 14-17.

[80] Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71, no. 4 (1958): 630–72.

[81] Sajó, *Limiting Government*.

[82] Uitz, "Barber's Pursuit of Positive Constitutionalism in The Principles of Constitutionalism," 70-75. Stephen Holmes, *The Anatomy of Antiliberalism*, revised ed. (Harvard University Press, 1996), 198-200. Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016), 23-24.

[83] Barber, "Self-defense for Institutions," 565-566.

[84] Amartya Sen, "Elements of a Theory of Human Rights," *Philosophy & Public Affairs* 32, no. 4 (2004): 315–356. Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford University Press, 2000).

[85] Henry M. Hart et al., *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994). Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1986); Möllers, *The Three Branches*, 90, 139. Strauss, "Separation of Powers in Comparative Perspective," 405.

[86] Möllers himself discusses the global presence of constitutional courts and judicial review see Möllers, *The Three Branches*, 124-142. Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89, no. 7 (1976): 1281–1316; Owen M. Fiss, "The Supreme Court, 1978 Term," *Harvard Law Review* 93, no. 1 (1979): 1–59; Ran Hirschl, "The Judicialization of

branch is *suo moto* petitions, which have allowed judges to be proactive and set the judicial agenda (see for India, Chapter 2). The narrow view supported in this dissertation does not deny the value of such developments. Indeed, cooperation between branches and the positive dimension of rights are legitimate concerns of constitutional law, including judicial review; however, such concerns do not directly derive from SoP itself.

2. Advancing Judicial Review within (not due to) SoP

The developments in judicial review have attracted much scholarly attention from both defenders and critics. Moving away from the Lockean legislative supremacy/exclusivity in law-making,[87] the scholarly skepticism towards judicial review powers now mostly rests on the dilemma of counter-majoritarian difficulty,[88] which presupposes greater trust in the political processes (provided they are in 'reasonably good working order') about solving reasonable disagreements on rights.[89] The republican theorists along the lines of Bellamy express similar skepticism to judicial supremacy, insisting on institutional design as a sufficient guarantee against arbitrary power.[90]

Mega-Politics and the Rise of Political Courts," *Annual Review of Political Science* 11, no. 1 (June 1, 2008): 93–118. Strauss, "Separation of Powers in Comparative Perspective,"396–419. Norman Dorsen et al., *Comparative Constitutionalism: Cases and Materials*, Fourth edition, American Casebook Series (Saint Paul: West Academic Publishing, 2022), 207-252.

[87] Larry Alexander and Saikrishna Prakash, "Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated," *The University of Chicago Law Review* 70, no. 4 (2003): 1297–1329.

[88] Alexander M. Bickel, *The Least Dangerous Branch* (Yale University Press, 1986).

[89] Waldron, "The Core of the Case against Judicial Review," 1346.

[90] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007). Richard Bellamy, "The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy," *Political Studies* 44, no. 3 (August 1, 1996): 436–56. Cf. other republican theorists Iseult Honohan, "Republicans, Rights, and Constitutions: Is Judicial Review Compatible with Republican Self-Government?," in *Legal Republicanism: National and International Perspectives*, ed. Samantha Besson and José Luis Martí (Oxford University Press, 2009), 83–101. Tom Hickey, "The Republican Core of the Case for Judicial Review," *International Journal of Constitutional Law* 17, no. 1 (May 6, 2019): 288–316.

These theories are most effectively countered by those defending judicial review based on (deliberative) democracy-based arguments in terms of maintaining background conditions for democracy,[91] addressing the lack of political power of discrete and insular minorities;[92] creating an additional judicial veto on rights given the greater risks of legislative underenforcement;[93] or serving the intrinsic value of procedural fairness/right to a hearing to benefit from reconsideration of allegedly rights-impugning decisions in light of the focused deliberation in court.[94] The idea of a judicial role in correcting democracy's imperfections in this broader logic of Ely's representation-reinforcement shows both the potential[95] and risks of pouring too much content into judicial power.[96] Indeed, judicial review protecting democracy differs from that of 'perfecting' it,[97] which would fall outside the province of an essentially minimalist idea of constitutionalism.[98] These justifications do resonate with arguments for the justiciability of social rights. However, those would need to be more tailored.

3. Tailoring *Dialogic Justice* to Social Rights

Dialogic justice is an umbrella term for its earlier version of democratic experimentalism and sequel of deliberative/participatory justice. It is commonly believed to best address SoP tensions

[91] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978). Sajó and Uitz, *The Constitution of Freedom*, 24, 370-371, 385.
[92] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard Univ. Press, 1980), 75-77.
[93] Richard H. Fallon, "The Core of an Uneasy Case for Judicial Review," *Harvard Law Review* 121, no. 7 (2008): 1693–1736. Similar argument is made in W. J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press, 2009).
[94] Alon Harel and Adam Shinar, "The Real Case for Judicial Review," in *Comparative Judicial Review*, ed. Erin F. Delaney and Rosalind Dixon (Edward Elgar Publishing, 2018), 13–35.
[95] Gardbaum has endorsed scrutiny of legislative process in a dominant party democracy context of South Africa precisely with reference to that logic, Stephen Gardbaum, "Pushing the Boundaries : Judicial Review of Legislative Procedures in South Africa," *Constitutional Court Review* 9, no. 1 (December 2019): 1–18. See also Samuel Issacharoff and Richard H. Pildes, "Politics As Markets: Partisan Lockups of the Democratic Process," *Stanford Law Review* 50, no. 3 (1998): 643–717.
[96] Manuel José Cepeda Espinosa and David Landau, "A Broad Read of Ely: Political Process Theory for Fragile Democracies," *International Journal of Constitutional Law* 19, no. 2 (April 1, 2021): 548–68.
[97] David Prendergast, "The Judicial Role in Protecting Democracy from Populism," *German Law Journal* 20, no. 2 (April 2019): 245–62.
[98] Sajó, *Limiting Government*, 9, 12.

characteristic of social rights adjudication. Dialogic justice implies a judicial role without deciding the details of a policy. According to one of the definitions, which can be extended to the executive branch, the dialogic review is a 'distinct form of institutional interaction whereby the pursuit of legislative goals can be constructively altered, but not foreclosed, by judicial input into the lawmaking process'.[99] Deliberative/participatory justice now integrates the participation of the previously excluded affected persons in a triadic, rather than an interbranch model, as an additional element of dialogic justice. [100]

The dialogic review emerged as an alternative middle ground to traditional classifications of deferential[101] and substantive review, gaining approval even from scholars who placed more trust in the legislative determination of rights.[102] Even before the term dialogic justice captivated the minds, justifying constitutional adjudication in light of Habermas's discourse theory, Sajó highlighted that democracy does not end with the formal vote in parliament, and the legislative process is continued by other means - through constitutional adjudication subject to the control of democratic public opinion. [103] Dialogic review was first viewed as a distinct theory since commonwealth jurisdictions (e.g. Canada, UK, New Zealand) allowed the overriding of judicial

[99] Po J. Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, 2015);Varun Gauri and Daniel M. Brinks, "Human Rights as Demands for Communicative Action," *Journal of Political Philosophy* 20, no. 4 (December 2012): 407–31.
[100] Roberto Gargarella, "Dialogic Justice in the Enforcement of Social Rights: Some Initial Arguments," in *Litigating Health Rights*: *Can Courts Bring More Justice to Health?,* ed. Alicia Ely Yamin and Siri Gloppen, (Harvard University Press, 2011), 233–237, 243. Sandra Liebenberg and Katherine Young, "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?" in *Social and Economic Rights in Theory and Practice: Critical Inquiries,* ed. H.A. García, K. Klare and L.A. Williams (Routledge 2015), 237-257. Pedro F. Santos, "Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socioeconomic Rights," *Washington University Global Studies Law Review* 18, no. 3 (January 1, 2019): 493–558; Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (London: Routledge 2013), 174-177, 184, 186. Sandra Liebenberg, "Participatory Justice in Social Rights Adjudication," *Human Rights Law Review* 18, no. 4 (December 14, 2018): 623–49.
[101] For more on deference David Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" in *The Province of Administrative Law,* ed. Michael Taggart (Hart Publishing, 1997), 279-307.
[102] Waldron, "The Core of the Case against Judicial Review," 1370. Conrado Hübner Mendes, "Is It All about the Last Word?: Deliberative Separation of Powers," *Legisprudence* 3, no. 1 (July 2009): 90.
[103] András Sajó, "Constitutional Adjudication in Light of Discourse Theory," *Cardozo Law Review* 17, nos. 4-5 (1996): 1193-1229.

determinations.[104] Scholars have also used the term 'weak form' review to signify the same type of adjudication.[105]

There is much debate about the ambiguity of the metaphor of dialogue and its distinct analytical value.[106] However, even if the logic of dialogic justice is embedded in the nature of constitutional democracy broadly as recently demonstrated by Kavanagh,[107] it still retains distinct analytical value, most importantly in the social rights context.[108] Indeed, the dialogic elements can be traced back to the tradition of judicial supremacy[109] and the possibility of constitutional amendment,[110] even administrative law.[111] It is also true that, in practice, the dialogic review could revert to judicial supremacy if override is rare or courts become more categorical towards the intransigence

[104] Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)," *Osgoode Hall Law Journal* 35, no. 1 (January 1, 1997): 75–124; Peter Hogg, Allison Bushell, and Wade Wright, "Charter Dialogue Revisited: Or 'Much Ado About Metaphors,'" *Osgoode Hall Law Journal* 45, no. 1 (January 1, 2007): 1–65; Kent Roach, "Dialogic Judicial Review and its Critics", *Supreme Court Law Review* 23, no. 1 (2004): 49–104; Christine Bateup, "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue," *Brooklyn Law Review* 71, no. 3 (January 1, 2006), 1109-80. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

[105] Tushnet, *Weak Courts, Strong Rights*, 245-250. Rosalind Dixon, "Weak-Form Judicial Review and American Exceptionalism," *Oxford Journal of Legal Studies* 32, no. 3 (2012): 487–506. Aileen Kavanagh, "What's so Weak about 'Weak-Form Review'? The Case of the UK Human Rights Act 1998," *International Journal of Constitutional Law* 13, no. 4 (October 1, 2015): 1008–39.

[106] David S. Law and Mark Tushnet, "The Politics of Judicial Dialogue," in *Research Handbook on the Politics of Constitutional Law*, ed. Mark Tushnet and Dimitry Kochenov (Edward Elgar Publishing, 2023), 286–309; Rosalind Dixon, "Constitutional 'Dialogue' and Deference," in *Constitutional Dialogue: Rights, Democracy, Institutions*, ed. Geoffrey Sigalet, Grégoire Webber, and Rosalind Dixon (Cambridge University Press, 2019), 161–85. Sandra Fredman, "Adjudication as Accountability: A Deliberative Approach," in *Accountability in the Contemporary Constitution*, ed. Nicholas Bamforth and Peter Leyland (Oxford University Press, 2013), 112.

[107] Aileen Kavanagh, *The Collaborative Constitution* (Cambridge: Cambridge University Press, 2023), 1-28.

[108] Alison L. Young, "Dialogue and Its Myths: 'Whatever People Say I Am, That's What I'm Not,'" in *Constitutional Dialogue: Rights, Democracy, Institutions*, ed. Geoffrey Sigalet, Grégoire Webber, and Rosalind Dixon (Cambridge University Press, 2019), 35–67.

[109] for instance, dialogic elements were present in the famous *Brown v. Board of Education*, in which the SCOTUS instructed lower instance courts to take measures for ensuring desegregation takes place 'with all deliberate speed', see Brown v. Board of Education of Topeka, 349 U.S. 294 (1955); Kent Roach, "Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response," *The University of Toronto Law Journal* 66, no. 1 (2016): 12.

[110] Mark Tushnet, "Dialogic Judicial Review: the Hartman Hotz Lecture," *Arkansas Law Review* 61, no. 2 (2009): 209. C. Ignacio Guiffré, "Deliberative Constitutionalism 'without Shortcuts': On the Deliberative Potential of Cristina Lafont's Judicial Review Theory," *Global Constitutionalism* 12, no. 2 (July 2023): 222.

[111] Liebenberg, "Participatory Justice in Social Rights Adjudication," 623-634.

of political branches.[112] As Schor states, 'constitutional dialogue and judicial supremacy co-exist along a spectrum [..].'[113]

The forms and rationales of the dialogic review differ. At a minimum, the dual and specialization models of dialogic review can be distinguished. In the specialization model of dialogic review, each institution plays its own distinct/specialized role conclusively, and judicial determinations within their authority are not up for debate by the political branches. Such a dialogic review only mitigates rather than erases SoP tensions. SoP is not an issue in the dual review model, in which the judicial role is limited to the interruption of political processes, conclusions are not treated as binding, and the legislature has the upper hand in overruling them.[114]

The characterization of dialogic justice (in Klein's terminology, 'judging as nudging'[115]), more recently also encompassing the participatory element, has become particularly favored in the

[112] Tushnet, *Weak Courts, Strong Rights*. Ming-Sung Kuo, "In the Shadow of Judicial Supremacy: Putting the Idea of Judicial Dialogue in Its Place," *Ratio Juris* 29, no. 1 (2016): 83–104.
[113] Miguel Schor, "Constitutional Dialogue and Judicial Supremacy," in *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor (Edward Elgar Publishing, 2018), 100.
[114] Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press, 2012), 35, 38, 48, 51, 53-54. Geoffrey Sigalet, "On Dialogue and Domination," in *Constitutional Dialogue: Rights, Democracy, Institutions*, ed. Geoffrey Sigalet, Grégoire Webber, and Rosalind Dixon (Cambridge University Press, 2019), 85–126.
[115] Alana Klein, "Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights," *Columbia Human Rights Law Review* 39, no. 2 (2008 2007): 351–422.

context of social rights adjudication,[116] including in India,[117] South Africa,[118] and Colombia.[119] This is so due to the potential of dialogic remedies to address SoP concerns. As noted, SoP tensions are most mitigated with the dual model of dialogic review, in which the courts deciding social rights cases leave the discretion to specify policy content to the political branches.[120] Advancing dialogic justice further, social rights decisions and court-led monitoring over their implementation now also entail categorical orders on the policy-making process.[121] This could include orders on the collection and processing of statistical information, the launching of meetings/negotiations, and the calculation of necessary resources, as observed in this dissertation. In contrast, the specialization model of dialogic review in social rights cases - the enforcement of the minimum core of social rights against the government's arguments of resource constraints, raises more SoP tensions.[122] Apart from the SoP-attenuating effect, dialogic justice is also more tailored to social rights cases as its enforcement inevitably requires the cooperation of political branches. Indeed,

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[116] Roberto Gargarella, "Dialogic Justice in the Enforcement of Social Rights: Some Initial Arguments," in *Litigating Health Rights*: *Can Courts Bring More Justice to Health?*, ed. Alicia Ely Yamin and Siri Gloppen, (Harvard University Press, 2011), 233–237, 243. Sandra Liebenberg and Katherine Young, "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?" in *Social and Economic Rights in Theory and Practice: Critical Inquiries*, ed. H.A. García, K. Klare and L.A. Williams (Routledge 2015), 237-257. Pedro F. Santos, "Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socioeconomic Rights," *Washington University Global Studies Law Review* 18, no. 3 (January 1, 2019): 493–558; Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (London: Routledge 2013), 174-177, 184, 186. Sandra Liebenberg, "Participatory Justice in Social Rights Adjudication," *Human Rights Law Review* 18, no. 4 (December 14, 2018): 623–49.

[117] Gaurav Mukherjee, "Democratic Experimentalism in Comparative Constitutional Social Rights Remedies," *Milan Law Review* 1, no. 2 (2020): 75–97. Mark Tushnet and Rosalind Dixon, "Weak-Form Review and Its Constitutional Relatives: An Asian Perspective," in *Comparative Constitutional Law in Asia* (Edward Elgar Publishing, 2014), 108. Shylashri Shankar, "India's Judiciary: Imperium in Imperio?," in *Routledge Handbook of South Asian Politics*, ed. Paul R. Brass (Routledge, 2010), 166. Rehan Abeyratne and Didon Misri, "Separation of Powers and the Potential for Constitutional Dialogue in India," *Journal of International and Comparative Law* 5, no. 2 (2018): 363-386. Ranjita Chakraborty, "Judiciary in India: The Dialogic Space" *Journal of Political Studies* 11 (2015): 125-147. Zachary Holladay, "Public Interest Litigation in India as a Paradigm for Developing Nations," *Indiana Journal of Global Legal Studies* 19, no. 2 (2012): 572.

[118] Ray, *Engaging with Social Rights*, 302-312; Danie Brand, "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa," Stellenbosch Law Review 22, no. 3 (January 2011): 614–38. Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (NISC (Pty) Ltd, 2021).

[119] Roberto Gargarella, "'We the People' Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances," *Current Legal Problems* 67, no. 1 (January 1, 2014): 1–47.

[120] Geoffrey Sigalet, "On Dialogue and Domination," in *Constitutional Dialogue: Rights, Democracy, Institutions*, ed. Geoffrey Sigalet, Grégoire Webber, and Rosalind Dixon (Cambridge University Press, 2019), 85–126.

[121] David Landau, "Aggressive Weak-Form Remedies," *Constitutional Court Review* 5, no. 1 (January 2013): 244–245.

[122] César Rodríguez-Garavito, "Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication," in *The Future of Economic and Social Rights*, ed. Katharine G. Young (Cambridge University Press, 2019), 235–246..

the key objection to dialogic review that it harms the RoL by the absence of single, stable, and predictable decisions[123] has less traction in the social rights context due to the nonetheless non-final nature of remedies without the cooperation of political branches.

4. *A caveat:* Substantiating Judicial Review on State Inaction

One evident caveat in tailoring dialogic justice to social rights is the possibility that courts overlook the significance of judicially substantiating the unconstitutionality of state inaction even when they sufficiently argue for compliance with SoP boundaries. The constitutionality review of law/state action in classic Kelsenian constitutional courts - also a relatively new phenomenon - has acquired broad acceptance.[124] In contrast, despite ample empirical evidence both in constitutional and administrative law, with few exceptions,[125] recently in the context of inaction/delays during the COVID-19 pandemic context,[126] the constitutionality review of state inaction has remained invisible, at least implicit, in constitutional theory. This stems from a familiarity with negative liberty as opposed to a more recent conceptualization of the judicial role in guaranteeing the positive one and is not because there is any inherent or insurmountable obstacle to finding unconstitutional inaction through judicial standards.

Social rights (together with positive duties under civil and political rights) are bringing to the forefront precisely this dimension of constitutional law. However, the fixation on the rejection of SoP objections let the significance of identifying judicially manageable standards on the

[123] Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," *Harvard Law Review* 110, no. 7 (1997): 1359–87. Owen Fiss, "Between Supremacy and Exclusivity," *Syracuse Law Review* 57, no. 2 (2007 2006): 187–208. Jeff King, "Dialogue, Finality and Legality," in *Constitutional Dialogue: Rights, Democracy, Institutions*, ed. Geoffrey Sigalet, Grégoire Webber, and Rosalind Dixon (Cambridge University Press, 2019), 186–206.

[124] see sources cited in supra note 86.

[125] Argument regarding bias of constitutional law towards status quo is made in Cass R. Sunstein, *The Partial Constitution:* (Harvard University Press, 1998). see also Tushnet, *Weak Courts, Strong Rights*, 225, 227;

[126]Kouroutakis, "Inaction as a State Response to the Coronavirus Outbreak," 84-108.

unconstitutionality of state inaction slip through the fingers. Indeed, democratic experimentalists downplayed this problem of judicially establishing unconstitutional inaction when they stated, "[t]he court's principal contribution is to indicate publicly that the status quo is illegitimate and cannot continue".[127]

The discretion to define situations as illegitimate status quo as a matter of law is not a negligible power to acquire. The less controversial 'cousins' of such judicial action are the doctrines of 'unconstitutionality by omission' based on the specific constitutional duty[128] and an equivalent in administrative law when omission contradicts a clear statutory mandate.[129] In contrast, courts are reluctant to rule on the discretion of taking no action without a clear duty to do so in a statute, especially if using that power requires resources.[130] Judicial reluctance is attributable to a lack of democratic legitimacy as the law (statutory or constitutional) is not explicit about the appropriate duties of action. However, as there is no watertight distinction between state action and inaction and broad and specific duties, in theory, nothing in administrative or constitutional law outright rules out scrutiny of inaction incompatible with some general principle or duty. This blurring between state action and inaction, on the one hand, and broad and specific duties, on the other hand, is well illustrated in a case decided by the Supreme Court of the United Kingdom (UKSC), in which decisions of respective authorities were revoked for lacking justification when accommodation was offered outside the area of the homeless applicants' prior residence, even

[127] Charles Sabel and William Simon, "Destabilization Rights: How Public Law Litigation Succeeds," *Harvard Law Review* 117, no. 4 (January 1, 2004): 1056, 1092.

[128] See Arc. 283 (2) of the Constitution of the Portuguese Republic: 'the Constitutional Court shall review and verify any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable.' The German Constitutional Court sets the standard that an express obligation determining in essence the content and scope of the duty to legislate must be present in the Basic Law for an applicant to claim a constitutional omission, see BVerfG, decision of January 14, 1981 - 1 BvR 612/72.

[129] Peter H. A. Lehner, "Judicial Review of Administrative Inaction," *Columbia Law Review* 83, no. 3 (1983): 627–89.

[130] Stovin v Wise [1996] UKHL 15; Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15; For SCOTUS, see DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989); For the discussion of this case-law, see Antonios Kouroutakis, "Inaction as a State Response to the Coronavirus Outbreak: Unconstitutionality by Omission," *Seattle University Law Review SUpra* 45 (July 19, 2022):102-106.

though there was a duty to provide housing in that area 'so far as reasonably practicable' (conversely, not to provide it in that area if reasonable).[131] Neither does the general *Wednesbury* test of reasonableness make any indication that discretionary decisions based on irrelevant considerations or in ignorance of relevant ones cannot be decisions of inaction.[132] Indeed, reasonableness review in the UK courts is routinely exercised in the health-rationing context without distinguishing state action and inaction, going as far as scrutinizing scientific evidence.[133]

Translating this logic to constitutional law, in theory, inaction can be as illegitimate in terms of a constitutional standard (rather than violating some conception of 'good life' beyond it) as the interference with action/use of state power. It is a different matter how easily or frequently courts will find judicial standards for reaching such a conclusion. The social rights cases in this thesis and comparable decisions from other jurisdictions discussed in the Conclusion of the dissertation precisely demonstrate this. The intuition behind the judgments recognizing the impermissibility of state inaction is that under exceptional circumstances, political branches cannot exercise the discretion of inaction provided that this would be arbitrary under judicial (rather than) political standards, be it on a constitutional, statutory basis, or some combination of both.

It is true that judicial action in such cases will not necessarily lead to better policy. As with any other critical juncture for path-dependent policies, the court decision may be followed by a façade action, be abused, and/or aggravate problems.[134] However, if actual policy changes are left to the

[131] Nzolameso v City of Westminster [2015] UKSC 22.

[132] According to this test interference by a court is only permissible if one of the following conditions are satisfied: the order is in violation of law (*ultra vires*); irrelevant factors were considered, or relevant factors were not considered; or the decision was one that no reasonable person could have taken, see Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1947] EWCA Civ 1.

[133] Daniel W. L. Wang, "From Wednesbury Unreasonableness to Accountability for Reasonableness," *The Cambridge Law Journal* 76, no. 3 (November 2017): 642–70.

[134] Fleur Alink, Arjen Boin, and Paul T'Hart, "Institutional Crises and Reforms in Policy Sectors: The Case of Asylum Policy in Europe," *Journal of European Public Policy* 8, no. 2 (January 1, 2001): 286–306. Arjen Boin and Paul 'T Hart, "Institutional Crises and Reforms in Policy Sectors," in *Government Institutions: Effects, Changes and Normative Foundations*, ed. Hendrik Wagenaar,

political branches as they are under dialogic review, the judicial branch would not be 'robbing' too much democratic legitimacy from the political system, and the outcome would be that of the political doing. This is not to endorse any of the theories envisaging effective government as an equal rationale behind SoP alongside limiting of government, but rather to propose that a judicial review against arbitrary inaction is defensible despite SoP that assigns policymaking and resource-allocation as primary functions of the political branches.

5. Making *Dialogic Justice* Institutionally Distrustful Again

Although evidently helpful analytically, dialogic justice does strike as ambiguous given the assumption of trustful relations behind the metaphor.[135] This is not to blame the metaphor, but rather the common meanings attached to it. Kavanagh favoring a broader framework of collaborative constitutionalism for capturing the complexities of institutional relations in fulfillment of fundamental rights, does recognize the need for distrustful dimensions alongside more partnership modes of collaboration. For her, nudging is precisely the golden mean between 'squaring off against each other to get the last word on rights in fierce constitutional combat' and 'having a cosy constitutional conversation on the meaning of rights […]'[136] distinguished 'by persuasion rather than prescription, coaxing rather than coercion.'[137] Terminological quibbles aside, this Section argues that dialogic justice must retain the distrustful dimension that may slip through the fingers without comprehensive theorizing.

(Springer Netherlands, 2000), 17, 20, 25. Pim Derwort, Nicolas Jager, and Jens Newig, "Towards Productive Functions? A Systematic Review of Institutional Failure, Its Causes and Consequences," *Policy Sciences* 52, no. 2 (June 1, 2019): 290–293.

[135] As Khosla and Tushnet recently put it: 'The idea of a judicial dialogue moves beyond a conflictual framing of the relationship between the legislature and the judiciary. The interpretive moves performed by both branches are part of a conversation, one in which the popular branches of government can deliberate based on constitutional considerations that courts bring to light.' See Madhav Khosla and Mark Tushnet, "Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry," *The American Journal of Comparative Law* 70, no. 1 (March 1, 2022): 133. Jeff King, "The Instrumental Value of Legal Accountability," in *Accountability in the Contemporary Constitution*, ed. Nicholas Bamforth and Peter Leyland (Oxford University Press, 2013), 149.

[136] Kavanagh, *The Collaborative Constitution*, 3.

[137] Ibid, 312.

This is particularly pertinent in the social rights context, in which corresponding state action will take some nudging.[138] First catching the attention when Thaler and Sunstein used it in an individual context,[139] nudging was recently broken down by Kavanagh precisely in the context of judging. According to her, nudging describes 'judicial practice of alerting the legislature; offering soft suggestions; making judicial pleas for legislative action; and issuing warnings and threats with a view to "prompting" or "prodding" the legislature to respect rights.[140] Justice S.B. Sinha of the ISC referred to a similar phenomenon with 'prodding' (see Chapter 2, Section 1.4).[141] This dissertation will use nudging with an expanded definition, that is, the capacity to increase the political cost of avoidance/inaction, which would entail categorical orders provided that they do not determine the precise policy but set frameworks, both substantive and procedural, for the decision-making process. This is precisely the aspect – ease of avoiding nudges - in which the institutional definition of nudging in this dissertation differs from the one used by Thaler and Sunstein. This dimension of nudging/prodding in judicial review is where SoP is positively relevant. However, not to overstep the SoP, the nudges could only be grounded in such evolution of the judicial review, which does not amount to the erasing of lines between decision-making methodologies of the judicial and political branches.[142]

[138] Ibid, 298. For an earlier and less comprehensive but more social rights-oriented use of the concept of nudging, see Klein, "Judging as Nudging," 351–422.

[139] In that individual context, define a 'nudge' is defined as 'any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid.' See Richard H. Thaler and Cass R. Sunstein, Nudge: Improving Decisions about Health, Wealth, and Happiness (Yale university press, 2008), 6; see also Riccardo Viale, *Nudging* (The MIT Press, 2022), for nudges in social rights context, see Varun Gauri, "The Right to Be Nudged? Rethinking Social and Economic Rights in the Light of Behavioral Economics," *World Bank Policy Research Working Papers 8907* (2019):1-19.

[140] Kavanagh, *The Collaborative Constitution*, 312.

[141] State of Uttar Pradesh v Jeet S Bisht (2007) 6 SCC 586 [per Justice S.B Sinha, para 78]

[142] Supra note 62-63.

It would be wrong to connect such nudging to a broad definition of SoP (see Section 1).[143] Instead, this conception of judicial review derives from within the narrow SoP theory (see Section 2). As noted, with constitutionalism encompassing issues broader than SoP, there are separate normative arguments for capitalizing on institutions' relative strengths and weaknesses in making rights-related decisions,[144] including in the specific context of dialogic review.[145] Institutional realists could go further in comparing not just the ideal type but also the real-life functioning of institutions[146] (e.g. the functioning of Parliament,[147] party, and electoral systems[148]). This is precisely what has been argued in the more fragile institutional setting of the Global South.[149]

Setting aside domestic specificities, a baseline map of the institutional strengths of adjudication vis-à-vis the democratic processes, also specifically on social rights, can be distilled from the literature. The institutional strengths include independence (both from politicians and the majority); the procedurally constrained, principled, consistency-oriented, evidence-based, and

[143] Dimitrios Kyritsis, *Where Our Protection Lies* 138.

[144]Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, 1997); Mendes, "Is It All about the Last Word?" 109-110. Timothy Endicott, "The Coxford Lecture: Arbitrariness," *Canadian Journal of Law & Jurisprudence* 27, no. 1 (January 2014): 62. King, "The Instrumental Value of Legal Accountability" 124-152. Michel Rosenfeld, "Judicial Politics versus Ordinary Politics: Is the Constitutional Judge Caught in the Middle?," in *Judicial Power: How Constitutional Courts Affect Political Transformations*, ed. Christine Landfried (Cambridge University Press, 2019), 40, 47.

[145] Tushnet, "Dialogic Judicial Review," 212. Sathanapally, *Beyond Disagreement*, 35, 38, 48, 51, 53-54. O'Connell, *Vindicating Socio-Economic Rights*, 174-175, 184, 186.

[146] Richard H. Pildes, "Institutional Formalism and Realism in Constitutional and Public Law," *The Supreme Court Review* 2013, no. 1 (January 2014): 1–54.

[147] Michael J. Teter, "Congressional Gridlock's Threat to Separation of Powers," *Wisconsin Law Review* 2013, no. 5 (2013): 1097–1160.

[148] Martin Shapiro, "Parties and Constitutional Performance," in *Assessing Constitutional Performance*, ed. Tom Ginsburg and Aziz Huq (Cambridge University Press, 2016), 137, 139-140; Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, Not Powers," *Harvard Law Review* 119, no. 8 (2006): 2311–86.

[149] David Landau, "Institutional Failure and Intertemporal Theories of Judicial Role in the Global South," in *The Evolution of the Separation of Powers* (Edward Elgar Publishing, 2018), 31–56. Natalia Angel-Cabo and Domingo L. Parmo, "Latin American Social Constitutionalism: Courts and Popular Participation" in *Social and Economic Rights in Theory and Practice: Critical Inquiries*, ed. H.A. García, K. Klare and L.A. Williams (Routledge 2015), 101.

argumentative mode of decision-making; legitimacy as a neutral legal actor;[150] and remedial flexibility.[151] Through the combination of these features, courts have the following capacities: to nurture 'culture of justification' in anticipation of judicial scrutiny[152] and trigger[153] a more rights-sensitive and evidence-based policy-making process, among other things, by focusing attention on individual situations;[154] to spot and rectify 'blind spots' from otherwise acceptable laws and policies;[155] and to act as a 'fire alarm' for the public[156] to overcome coordination (e.g. lack of rights consciousness) and collective action (e.g. assurance that others will join the cause) problems both within the public,[157] and state authorities,[158] also reinforce symbolic meaning of constitutional values.[159]

[150] Ely, *Democracy and Distrust;* Dimitrios Kyritsis, "Constitutional Review in Representative Democracy," *Oxford Journal of Legal Studies* 32, no. 2 (2012): 303, 321; Sathanapally, *Beyond Disagreement*, 35, 38, 48, 51, 53-54; O'Connell, *Vindicating Socio-economic Rights*, 174-175, 184, 186; Michael A. Rebell, "The Right to Education in the American State Courts," in *The Future of Economic and Social Rights*, ed. Katharine G. Young (Cambridge University Press, 2019) 155–156; Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton University Press, 2011), 123, 133, 141- 142, 145, 147. King, "The Instrumental Value of Legal Accountability", 131-132, 140. Christoph Möllers, "Separation of Powers," 250. Daniel Smilov, "Judiciary: The Least Dangerous Branch?," in *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), 870.

[151] Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited," *International Journal of Constitutional Law* 5, no. 3 (July 1, 2007): 405. King, "The Instrumental Value of Legal Accountability" 136.

[152] Etienne Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution," *South African Journal on Human Rights* 8, no. 4 (January 1, 1992): 464, 471. For similar psychological effect of anticipating a counterargument on an individual level demonstrate the positive effect of see Hugo Mercier and Dan Sperber, see *The Enigma of Reason* (Harvard University Press, 2017), 297-298.

[153] Kavanagh, *The Collaborative Constitution*, 320.

[154] Jeremy Webber, "Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)," *Australian Journal of Human Rights* 9, no. 1 (June 1, 2003): 173.

[155] Dixon, "Creating Dialogue about Socioeconomic Rights" 391, 402-403, 418.

[156] David S. Law, "A Theory of Judicial Power and Judicial Review," *Georgetown Law Journal* 97, no. 3 (2009): 723, 731-732; Hickey, "The Republican Core of the Case for Judicial Review," 288–316. David Landau, "Political Support and Structural Constitutional Law," *Alabama Law Review* 67, No. 4 (2016), 1069, 1121. King, "The Instrumental Value of Legal Accountability" 129.

[157] For coordination and collective action problems in the rights context, see Chilton and Versteeg, *How Constitutional Rights Matter*, 18-19, 40-44, 54-56; Adam Chilton and Mila Versteeg, "Rights without Resources: The Impact of Constitutional Social Rights on Social Spending," *The Journal of Law and Economics* 60, no. 4 (2017): 720; Mila Versteeg, "Can Rights Combat Economic Inequality?" *Harvard Law Review* 133, no. 6 (2020): 2021, 2057 - 2058, 2060, 2065-2071. King, "The Instrumental Value of Legal Accountability," 147. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change? 2 edn.* (University of Chicago Press, 2008), 33-35.

[158] Sabel and Simon, "Destabilization Rights," 1065-1066.

[159] Sajó and Uitz, *The Constitution of Freedom*, 371; King, "The Instrumental Value of Legal Accountability," 146-147.

These capacities are particularly significant for enabling 'nudging' in the social rights context with the needed cooperation from the political branches. These capacities are what democratic experimentalists believe can 'destabilize' institutions falling below 'minimum standards of adequate performance'[160] that 'are substantially insulated from the normal processes of political accountability'.[161] This resonates with Dixon's justificatory account of judicial review against 'burdens of inertia' extended to social rights cases.[162] *Fredman*[163] and *Young*[164] compare courts in social rights cases to a 'catalyst' of deliberative democracy, implying that courts increase the political cost of inaction in this manner. Indeed, as in the case of law in general,[165] due to the publicity of the problem and its root causes, [166] the political response is at least less likely to be evidently unjust.

These advantages of adjudication are relative, depending on the ground reality and problem considered, and should be understood in connection with the shortcomings of the democratic process. Democracy is weak in terms of policy-specific accountability. The electorate votes for the complex mix of policies offered by a limited number of political parties,[167] and voting is inevitably simplistic in that moral reasons remain omitted.[168] On the other hand, the electorate is not always ideally informed, motivated, or able to catch up to ensure policy-specific accountability.[169] Once

[160] Sabel and Simon, "Destabilization Rights," 1062.
[161] Ibid, 1020. Liebenberg, "Participatory Justice in Social Rights Adjudication," 631-632.
[162] Dixon, "Creating Dialogue about Socioeconomic Rights," 391, 402-403, 418.
[163] Fredman, *Human Rights Transformed*, 92.
[164] Young, *Constituting Economic and Social Rights*, 172.
[165] Thompson has argued rule of law and its publicity work against evident unjust formulations if it is wished to be used for legitimizing power, see Edward. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Allen Lane, 1975): 260-263. Similar attributes of rule of law can be implied in the discussion of apartheid laws, see David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture," *South African Journal on Human Rights* 14, no. 1 (January 1, 1998): 11–37.
[166] Sabel and Simon, "Destabilization Rights," 1072-1073.
[167] Ian Shapiro, *The State of Democratic Theory* (Princeton University Press, 2006), 11-12.
[168] Ronald Dworkin, "Constitutionalism and Democracy," *European Journal of Philosophy* 3, no. 1 (1995): 2–11. Pierre Rosanvallon and Arthur Goldhammer, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge University Press, 2008), 227-248.
[169] Sabel and Simon, "Destabilization Rights," 1094.

the legislative branch is constituted, ordinarily, through election by the majority of the franchised population, in theory, with a low quorum (e.g., half +1 of the representatives), laws can be enacted by representatives of just more than one-eighth of the population[170] following discussions inclined to rhetoric more than deliberation.[171]

Besides, over time, certain policy choices/institutions are conducive to status quo bias, in other words, the path-dependence problem[172] described by the schools of democratic experimentalism and historical institutionalism. Path-dependence implies the pattern that once embarking on a specific path, over time, a policy/institution becomes subject to self-reinforcing processes (due to investments of time, money, skills, and networks), which means increasing returns in maintaining the status quo, even if rationally better choices are available. This is exacerbated in the political sphere by the short-termism of democracy, namely, that the fruits of a change might not be seen before the new elections.[173] In this constellation, politicians inclined to 'blame avoidance'[174] evade prospective responsibility by maintaining the status quo. Additional factors may further impede change, for instance, the fact that policies concern stigmatized, vulnerable minorities.[175]

Nevertheless, as historical institutionalists claim, despite these complications, substantive reforms do occur occasionally during 'critical junctures', which bring brief 'windows of opportunity' for previously infeasible options.[176] Critical juncture is not an objective category: a situation may be

[170] Sajó, *Limiting Government*, 55-56.
[171] Diego Gambetta, "'Claro!': An Essay on Discursive Machismo," in *Deliberative Democracy*, ed. Jon Elster (Cambridge University Press, 1998), 19–43.
[172] Sabel and Simon also refer to individual psychological determinants of this phenomenon, see Sabel and Simon, "Destabilization Rights," 1020, 1055, 1075-1076. Constraints on change including relevant psychological evidence and need for friction are also discussed in Stu Woolman, "South Africa's Aspirational Constitution and Our Problems of Collective Action," *South African Journal on Human Rights* 32, no. 1 (January 2, 2016): 159–65. Woolman, *The Selfless* Constitution, 147-180.
[173] Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," 261-262.
[174] Kent Weaver, "The Politics of Blame Avoidance," *Journal of Public Policy* 6, no. 4 (October 1986): 371–98.
[175] Sabel and Simon, "Destabilization Rights," 1064.
[176] Prado and Trebilcock, "Path Dependence, Development, and the Dynamics of Institutional Reform," 341–80. Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," 251–67; A similar logic is followed by Sabel and Simon, "Destabilization Rights," 1075-1077.

interpreted as a crisis due to media reports.[177] As argued in this Chapter, a situation may be perceived as a crisis due to court decisions as well. The phenomenon of path-dependence[178] and possible change through critical junctures is what democratic experimentalists Dixon and King seem to have in mind when they discuss the judicial advantage of focusing attention. The changed circumstances and reactivation of the political process due to judicial decisions may even make it more convenient for the political branches to acquiesce (even delegate[179]).

These claims about judicial capacities are empirically demonstrated by decisions in which political branches conform to the court decisions despite the possibility of override.[180] In social rights cases, policy change often follows even before a judgment is issued or after a deferential one (Canada,[181] Israel,[182] U.S.,[183] Indonesia,[184] UK,[185] South Africa[186]). Sometimes, even the threat of litigation affects the political process[187] (see Chapter 3, Section 2.2. on the implementation of *Treatment Action Complaint*). Moreover, scholars show how judicial review impacts the quality of

[177] Alink, Boin, and T'Hart, "Institutional Crises and Reforms in Policy Sectors," 286–306.
[178] The status quo bias is also demonstrated on the individual level addressed with arguments in favor of nudging – active engineering of choice architecture. Thaler and Sunstein, *Nudge* (Yale university press, 2008).
[179] Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," 106-107.
[180] Hogg, Bushell, and Wright, "Charter Dialogue Revisited,"1–65. Tushnet, "Dialogic Judicial Review," 215.
[181] Auton v British Columbia (Attorney General) 2004 SCC 78; see Fredman, *Comparative Human Rights Law*, 252-253.
[182] HCJ 3071/05 Louzon v Government of Israel (2008); HCJ 2974/06 Israeli v. Committee for the Expansion of the Health Basket (2006); Aeyal Gross, "The Right to Health in Israel between Solidarity and Neoliberalism," in *The Right to Health at the Public/Private Divide: A Global Comparative Study*, ed. Aeyal Gross and Colleen M. Flood (Cambridge University Press, 2014), 166, 176. Aeyal Gross, "In Search of the Right to Health" in *Israeli Constitutional Law in the Making*, ed. Sapir, Gidon, Daphne Barak-Erez, and Aharon Barak (Hart Publishing, 2013), 312.
[183] G. Alan Hickrod et al., "The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis," *Journal of Education Finance* 18, no. 2 (1992): 207–208.
[184] Varun Gauri and Daniel M Brinks, "The Impact of Legal Strategies for Claiming Economic and Social Rights," in *Closing the Rights Gap: From Human Rights to Social Transformation*, ed. LaDawn Haglund and Robin Stryker (University of California Press, 2015), 93-94.
[185] R (B) v Cambridge Health Authority [1995] EWCA Civ 43; Chris Ham, "Tragic Choices in Health Care: Lessons from the Child B Case," *BMJ* 319, no. 7219 (November 6, 1999): 1258–61.
[186] Malcolm Langford, "The Impact of Public Interest Litigation: The Case of Socio-Economic Rights," *Australian Journal of Human Rights* 27, no. 3 (September 2, 2021): 505–31.
[187] Laura Donnelly, "NHS Agrees to Fund Drug for Children with Incurable Batten Disease after High Court Threat," *The Telegraph*, September 11, 2019, https://www.telegraph.co.uk/news/2019/09/11/nhs-agrees-fund-drug-children-incurable-disease-high-court-threat/.

deliberation[188] and decision-making in the political branches, including in the context of health care-rationing.[189] Elaborations of policy in statutes or subordinate legislation could, in turn, attenuate SoP tensions and/or expose irrationalities of political branches' approach to enforcing social rights duties.[190] Fowkes describes this as the process of rights becoming 'less new' through the gradual process of codification.[191] This is the gist of the dialogue, at least in the social rights context, which, against the thrust of the metaphor, is still embedded in the logic of institutionalized distrust, through which both sides, judicial and political, incrementally specify their standards in consideration of the input coming from one another.

Nevertheless, the prima facie benefits of accountability through courts may only function as an asset in some situations. For instance, focused attention to tragic choices or individual suffering in health care allocation (rather than structural problems behind it) may lead to overlooking broader distributive justice considerations.[192] The parliamentary process, which collects a vast amount of information and subjects it to technical expertise, may deal with this matter better. Furthermore, unlike the political process, precedents make judicial politics constrained and self-correction more burdensome. Courts may attempt to reverse/rectify the paths taken upon reflection. However, this is unlikely to be smooth (for Colombia, see Chapter 4 and Brazil[193]). Besides, the justifications for judicial review based on the imperfections of the political process vis-à-vis institutional architecture of courts in the spirit of Ely's theory entail risks of overbroad application. For instance,

[188] J. Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System* (Duke University Press, 2004).
[189] Wang, "From Wednesbury Unreasonableness to Accountability for Reasonableness," 642–70.
[190] Klein, "Judging as Nudging: 383.
[191] Fowkes, "Normal Rights, Just New," 722.
[192] King, "The Instrumental Value of Legal Accountability" 129-130, 135, 151.
[193] Mariana M. Prado, "The Debatable Role of Courts in Brazil's Health Care System," 130.

problems will remain as to defining the democracy-seeking[194] judicial action and drawing the line between protecting and perfecting democracy.[195]

Integration of participatory justice elements to dialogic review also brings its own benefits and weaknesses. It responds to the imperfections of democracy[196] in terms of democratic legitimacy by refocusing on the overlooked high intensity of stakes of a group vis-à-vis the public in specific situations[197] and by introducing a new layer of democracy and accountability-reinforcing fragmentation of power.[198] This moral democracy-based argument can find its roots in the idea of procedural fairness and the right to a hearing in administrative law, namely that those affected by a decision will have 'a chance of influencing the outcome.'[199] As noted above, scholars have specifically based their case for judicial review on such a right to a hearing in courts.[200] Apart from these moral justifications, it is argued that attention to those with firsthand knowledge of problems and heightened motivation to solve them can be pragmatically beneficial for the decision-making process.[201] In that sense, in some cases, courts could facilitate that participation serves democracy through a deliberative decision-making process[202] in a way that the democratic branches are

[194]Klare, "Self-Realisation, Human Rights, and Separation of Powers," 468. Writing about the doctrine of unconstitutional state of affairs from the Colombian Constitutional Court and its possible utility in the South African context, Klare refers to Ely's political process theory and by analogy claims that a 'default in social provision or neglect of fundamental rights [..] unbalances the equilibrium in the constitutionally controlled relationship between the represented and the representatives.' Hence, according to him, court action in such cases would be democracy-enhancing; Espinosa and Landau, "A Broad Read of Ely," 548–68.

[195] Prendergast, "The Judicial Role in Protecting Democracy from Populism".

[196] Following this logic, participation has been linked with citizenship, democratic governance and the right to development (by the UN), see John Gaventa, "Towards participatory governance: Assessing the transformative possibilities," in *Participation: From Tyranny to Transformation: Exploring New Approaches to Participation in Development*, ed. Samuel Hickey and Giles Mohan (Zed Books, 2004), 25-41. UN General Assembly, Declaration on the Right to Development, the General Assembly, 4 December 1986, A/RES/41/128, Art. 1 and 2.

[197] Sajó, *Limiting Government*, 60. Mendes, "Is It All about the Last Word?" 108. Danie Brand, "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa," *Stellenbosch Law Review* 22, no. 3 (January 2011): 614–38. Theunis Roux, "," *Democratization* 10, no. 4 (November 2003): 96.

[198] Sabel and Simon, "Destabilization Rights," 1094.

[199] Cora Hoexter, *Administrative Law in South Africa*, 2nd ed (Juta, 2012), 363. Shanelle van der Berg, "Meaningful Engagement: Proceduralising Socio - Economic Rights Further or Infusing Administrative Law with Substance?," *South African Journal on Human Rights* 29, no. 2 (January 2013): 376–98.

[200] Harel and Shinar, "The Real Case for Judicial Review," 13–35.

[201] Liebenberg, "Participatory Justice in Social Rights Adjudication," 625-634. Fredman "Adjudication as Accountability," 106-123; Gargarella, "'We the People' Outside of the Constitution," 1–47.

[202] King, "The Instrumental Value of Legal Accountability" 143-145. Fredman, *Human Rights Transformed*, 105–109.

unable/unlikely to do. This task would be most appropriately assigned to the judicial branch in cases concerning the marginalized, broadly aligning with the traditional representation-reinforcing framework.[203] Even if courts fail to live up to the ideal[204] of compensating for the power imbalances, it could still advance the cause.

However, the judicial solution is not a *panacea* in the context of participatory justice either. The shortcomings of democracy can and are sometimes better addressed with better representation in the democratic branches, which experiment with the policy-making process, focus on continuous learning, and revision of standards, commonly involving some diversification and decentralization of participation.[205] Unlike guaranteeing a right to hearing and participation in situations in which the challenged decision primarily concerns an individual before the court (discontinuation of social benefits),[206] participatory remedies in social rights cases often concern groups difficult to identify or circumscribe, for instance, as would be the case with the health care system overhaul that potentially concerns everyone. In such situations, participation may be better streamlined without judicial involvement. Furthermore, if unconstrained and ever-expanding, court-initiated participatory measures could reinforce the grievance culture.[207] This is besides the possibility that, if misapplied, just like when instituted by political branches, court-initiated participatory measures

[203] Ely, *Democracy and Distrust*; Aileen Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron," *Law and Philosophy* 22, no. 5 (2003): 451–86. Siri Gloppen and Rachel Sieder, "Courts and the Marginalized: Comparative Perspectives," *International Journal of Constitutional Law* 5, no. 2 (April 1, 2007): 183–86.

[204] Fernando Filgueiras, "Transparency and Accountability: Principles and Rules for the Construction of Publicity: Transparency, Accountability, and Publicity," *Journal of Public Affairs* 16, no. 2 (May 2016): 198-199. Roberto Gargarella, "Why Do We Care about Dialogue?: 'Notwithstanding Clause', 'Meaningful Engagement' and Public Hearings: A Sympathetic but Critical Analysis," in *The Future of Economic and Social Rights*, ed. Katharine G. Young (Cambridge University Press, 2019), 212–32. Sandra Liebenberg, "The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence," in *The Future of Economic and Social Rights*, ed. Katharine G. Young (Cambridge University Press, 2019), 208–211.

[205] Patrick Heller, "Democracy, Participatory Politics and Development: Some Comparative Lessons from Brazil, India and South Africa," *Polity* 44, no. 4 (2012): 643–65. Archon Fung and Erik Olin Wright, "Deepening Democracy: Innovations in Empowered Participatory Governance," *Politics & Society* 29, no. 1 (March 1, 2001): 5–41. Charles Sabel and William Simon, "Minimalism and Experimentalism in the Administrative State," *The Georgetown Law Journal* 100 (January 1, 2011): 53.

[206] See Goldberg v. Kelly: 397 U.S. 254 (1970).

[207] Bradley Campbell and Jason Manning, *The Rise of Victimhood Culture* (Cham: Springer International Publishing, 2018).

could add legitimacy to decisions made through token, façade involvement of those without any actual impact on the process or the result.[208]

To sum up, courts have institutional strengths suitable for nudging the political branches into the fulfillment of constitutional duties and for nurturing popular control over the government after judicially substantiating that a state action or inaction was unconstitutional. However, the legitimacy and effectiveness of each judicial capacity of this kind, including participatory remedies, will depend on the individual situations in which it is applied.

6. Conclusion

The judicial branch does not possess the credentials for determining the policy details in fulfillment of positive state duties including when derived from social rights under any defensible theory of SoP. This is not to say that judicial supremacy disappears from social rights, for instance, in terms of excluding certain options from the purview of political branches (e.g. criminalization of euthanasia, prohibition of abortion, denial of equal access to health care, especially emergency care facilities) even as they entail some positive duties (e.g. to regulate conscientious objections claims, to ensure availability of health facilities, goods, and services). Indeed, courts may categorically establish the constitutionality of inaction and set the policymaking frameworks without violating SoP. In this manner, judicial review is strong vis-à-vis the discretion to do

[208] John Gaventa, "Finding the Spaces for Change: A Power Analysis," *IDS Bulletin* 37, no. 6 (2006): 23–33. Andrea Cornwall and Karen Brock, "What Do Buzzwords Do for Development Policy? A Critical Look at 'Participation', 'Empowerment' and 'Poverty Reduction,'" *Third World Quarterly* 26, no. 7 (October 1, 2005): 1043–60.

nothing and/or how to arrive at the solution but weak in defining the actual means.[209] Such a judicial role is not a requirement of SoP in the sense that those assigning equal weight to effective government alongside its limitation would interpret it. Instead, it is defended despite SoP, although informed by it in its distrustful dimension that must not be lost in the metaphor of a dialogue. In this framework of dialogic justice most tailored to social rights, the assets of judicial architecture could be deployed for remedying rights violations/nudging provided that its effectiveness is reassessed in the individual circumstances of a case. The court decisions on social and especially health rights discussed in this dissertation precisely react to state inaction and do so with consequential nudges for positive state action. The dissertation investigates how this relates to the locally applicable SoP doctrines and feeds back to SoP theory. Drawing on a theoretical framework in Chapter 1, Chapters 2 through 4 will answer the descriptive research subquestions for each jurisdiction, enabling the response to the main research question with typological and normative implications. The following Chapter answers the three research subquestions for India, which stands for the weakest judicial position including on social and health rights in the continuum eventually identified in the Concluding Chapter of the dissertation.

[209] Fallon seems to imply a similar argument when stating weak and strong review distinction is a matter of degree and that the issue is 'some degree of invulnerability to override by ordinary legislation', rather than a complete one matters, see Richard Fallon, "The Core of an Uneasy Case for Judicial Review," 1733.

Chapter 2. Judging as Nudging in India

This Chapter will take the SoP doctrine of the Indian Supreme Court (ISC) as the starting point for discussing the social and health rights jurisprudence. Part I will examine the SoP doctrine, including general social rights adjudication standards based on the ISC jurisprudence (Section 1.4 and 1.5.2). To understand the context of SoP jurisprudence, Part I will also consider the relevant organizing principle(s) of the Constitution (Section 1.1), institutional arrangement, democratic system (Section 1.2), evolving relations between the political branches and the apex Court (Section 1.3) that account for some of the divergencies among the jurisdictions. To understand the context of general social rights jurisprudence, Part I will also touch upon the general political posture in relation to social rights policies and the trajectory of such policies themselves (Section 1.5.1). In Part II, the SoP and social rights doctrine will be examined through the right to health jurisprudence both in the apex and High Courts (HCs), assessing convergencies and divergencies between them. As the ISC overcame the express non-justiciability of the Directive Principle of State Policy (DPSP) on the right to health only by the 1990s, the Chapter covers the period starting from then (Sections 2.2-2.4). Part II will also single out cases decided in connection with the COVID-19 pandemic (Section 2.3). The analysis of jurisprudence is preceded and situated in the context of the population health, health care, and constitutional, legislative, and policy frameworks, which provides a picture of the democratic processes parallel to health jurisprudence (Section 2.1).

By formulating the SoP doctrine and general social rights adjudication standards in Part I and health rights jurisprudence in Part II, the conclusion will answer the following overarching research question for India - *to what extent is the SoP doctrine transformed through health (and social) rights jurisprudence?* – and the three subquestions: *How do the ISC and HCs position*

themselves vis-à-vis political branches when enforcing the right to health? How similar or different is the apex court's approach to other social rights? How does the apex court's treatment of health and other social rights correspond to the SoP doctrine in other areas of jurisprudence? Ultimately, the descriptive analysis in this Chapter, coupled with those in the other jurisdiction Chapters, will produce a continuum of the intensity of review among the jurisdictions alongside drawing typological and normative conclusions through the prism of SoP as conceptualized in Chapter 1.

Part I: SoP doctrine of the ISC

1.1. Transformative Constitutionalism Delayed

Among the jurisdictions of this dissertation, the Indian constitutional system has undergone the longest evolution since the enactment of the Constitution in 1950. As in South Africa and Colombia, the Constitution of India has transformative aspirations. Considering the absence of binding international obligations when adopting the Constitution,[210] the inclusion of social rights-related state duties under DPSPs, [211] even if not justiciable[212] was a significant transformative aspect together with state duties on promoting welfare and minimizing inequalities. [213] The transformative nature of the Constitution was furthered through constitutional amendments on affirmative action in favor of Scheduled Castes and Tribes, and Backward Classes[214] and guarantee of free legal aid.[215] As will be seen in this Chapter, these aspects did not immediately lead to

[210] State duties under the right to health were recognized by ICESCR in 1966 with the respective General Comment 14 on its interpretation forthcoming only in 2000.
[211] Art. 39 to 51 discussing DPSPs, including nutrition, standard of living and public health (Art. 47).
[212] Art. 37 of the Constitution.
[213] Art. 46 of the Constitution
[214] Art. 15 and 16 of the Constitution,
[215] Art. 39 (a) of the Constitution.

expansive jurisprudence of the Court, at least on social rights, which came to be reimagined in the late 1970s when the Court seemed to have overcome the most significant challenge to its autonomy.

1.2. Institutional Setting for the ISC in an Evolving Democracy

India is a federal state with a bicameral parliamentary system.[216] In this federal parliamentary system, especially with the increasing role of regional parties in sustaining coalition governments (since 1989),[217] SoP is heavily dependent on its vertical dimension.[218] This vertical SoP in India includes limits to Union legislative powers through the respective powers of state legislatures. This limit is itself circumscribed to the extent that the Union legislature possesses overriding powers over state legislatures.[219] For instance, unless under the exclusive list of State competencies, the Union legislation overrides state laws to the extent of incompatibility, even if adopted afterward.[220] The impossibility of conclusive determination of applicable competence lists and compatibility of state laws with the Union ones based on the text of the Constitution increases judicial interpretative power in this area.[221] The executive can also override state powers during a state of emergency[222] or do so through the President's Rule by claiming the breakdown of constitutional machinery in a state[223] - the broad power that the ISC set limits to (e.g. checking the substantiation for the

[216] Anashri Pillay, "The Constitution of the Republic of India," in *The Cambridge Companion to Comparative Constitutional Law*, ed. Roger Masterman and Robert Schütze (Cambridge University Press, 2019), 144–145.
[217] Wilfried Swenden and Rekha Saxena, "Policing the Federation: The Supreme Court and Judicial Federalism in India," *Territory, Politics, Governance* 10, no. 1 (January 2, 2022): 4-8.
[218] Philipp Dann and Arun K. Thiruvengadam, "Federalism and Democracy," in *Democratic Constitutionalism in India and the European Union* (Edward Elgar Publishing, 2021), 252–85.
[219] Art. 249-254 of the Constitution.
[220] Art. 254 of the Constitution.
[221] V. Niranjan, "Legislative Competence: The Union and the States," in *The Oxford Handbook of the Indian Constitution*, ed. Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, 1st ed. (Oxford University Press, 2017), 466–86.
[222] Art. 353 of the Constitution.
[223] Art. 356 of the Constitution.

breakdown) in jurisprudence.[224] Narrow tax categories also weaken states in terms of their fiscal autonomy. Since 2015, mandatory tax devolution to the states has risen (amounting to 70% of the total allocations of the Union to the states). However, discretionary grants remain a source of states' dependence on often politically charged Union transfers.[225]

The House of the People (Lok Sabha), constituted through direct elections, overrides the indirectly elected Council of States (the Rajya Sabha) in the legislative process due to its larger composition (around twice as large). One-third of the Council of States's members retire every two years reflecting possible change in popular will before the new elections of the House of the People take place every five years.[226] The House of the People is responsible for forming and dismissing the Union government. Formally appointed by the President,[227] the Prime Minister (PM)[228] is the leader of a party receiving the most votes in the House of the People.[229] The Comptroller and Auditor-General of India responsible for checking unjustified public expenditures does not add much to the checks and balances scheme without sufficient guarantees of independence.[230]

The judicial branch, equipped with broad powers, serves as an arbiter not only between the legislative and executive branches but also the Union and State governments, which contributes to

[224] S.R. Bommai v. Union of India, (1994) 3 SCC 1.
[225] Abishek Choutagunta, G. P. Manish, and Shruti Rajagopalan, "Battling COVID -19 with Dysfunctional Federalism: Lessons from India," *Southern Economic Journal* 87, no. 4 (April 2021): 1279–1283; K. S. Hari, "Cooperative Federalism: Implications for Social Sector Expenditure in India," in *Challenges and Issues in Indian Fiscal Federalism*, ed. Naseer Ahmed Khan, India Studies in Business and Economics (Springer Singapore, 2018), 15–30.
[226] M. R. Madhavan, "Legislature: Composition, Qualifications, and Disqualifications," in *The Oxford Handbook of the Indian Constitution*, ed. Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (Oxford University Press, 2016), 270-272.
[227] Art. 75.
[228] Art. 74-75.
[229] Pillay, "The Constitution of the Republic of India," 147.
[230] The President makes the discretionary appointment upon PM recommendation even without preset selection criteria, see Art. 148 (1). Ruma Pal, "Separation of Powers," in *The Oxford Handbook of the Indian Constitution*, ed. Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (Oxford University Press, 2016), 267-268.

the consolidation of its power. According to the Constitution, judges, including those of the ISC, are appointed through a consultative process involving both the executive (President) and judicial branches; however, since 1993, through the judicial re-interpretation, the judicial branch has acquired the final authority on appointments, thereby cementing the independence guarantees of courts.[231] The powers afforded to this independent judicial branch are vast. Two upper tiers of the judicial system – HCs and the ISC - have constitutional review powers alongside acting as appellate courts in other matters. The ISC has original jurisdiction on matters of fundamental rights[232] and has discretionary power to consider appeals on any order passed by any court or tribunal (Special Leave Petition).[233] The ISC has full freedom in choosing the remedies it deems appropriate.[234] Despite strong institutional standing, in practice, the ISC is facing serious capacity problems and delays[235] noted by the Court itself as early as 1980.[236] Furthermore, due to the high turnover of judges,[237] and the practice of 2-judge benches deciding most cases,[238] jurisprudence has moved away from strong adherence to precedent and principle, with more divergence among benches and more exposed ideologies of judges[239] leading to the so-called 'polyvocal' nature of the Court.[240]

[231] Pillay, "The Constitution of the Republic of India," 156-157.
[232] Art. 32 (1).
[233] Art. 136
[234] Art. 32 and 142.
[235] Aparna Chandra, Sital Kalantry, and William H. J. Hubbard, *Court on Trial: A Data-Driven Account of the Supreme Court of India* (Penguin Random House India, 2023), 21-43.
[236] The P.N. Eswara Iyer v. Supreme Court of India, (1980) 4 SCC 680.
[237] On average, judges spend five years at the ISC, see Chandra, Kalantry, and Hubbard, *Court on Trial*, 104, 113.
[238] Data from 2010-2015 shows that around 90% of cases were decided by a two-judge bench, including over 71% of PIL cases, and nearly all the rest were decided by three-judge benches. In this period there were no benches larger than five judges, see Aparna Chandra, William H. J. Hubbard, and Sital Kalantry, "The Supreme Court of India: An Empirical Overview of the Institution," in *A Qualified Hope: The Indian Supreme Court and Progressive Social Change*, ed. Gerald N. Rosenberg, Shishir Bail, and Sudhir Krishnaswamy (Cambridge University Press, 2019), 61-63.
[239] Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis*, Comparative Constitutional Law and Policy (Cambridge: Cambridge University Press, 2018), 182.
[240]Nick Robinson, "Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts," *The American Journal of Comparative Law* 61, no. 1 (2013): 173–208. Chandra, Hubbard, and Kalantry, "The Supreme Court of India," 43-44, 73. Nick Robinson, "Judicial Architecture and Capacity," in *The Oxford Handbook of the Indian Constitution*, ed. Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (Oxford University Press, 2016); Shankar, "India's Judiciary," 172.

1.3. Consolidation Dynamics of the ISC Power

The power of the ISC has been affected by the evolving relations between the political and judicial branches on the ground. This relation has undergone phases demarcating shifts from initial partnership to periods of more confrontation and back to more partnership, eventually leading to the relative consolidation of the judicial power. As demonstrated below, the radical shift from the peak of tensions to coalition governments around the late 1970s affected the judicial power and SoP dynamics, at minimum, contributed to the defensive/restorative politics of the Court best captured in the rule on self-appointment of the judiciary, introduction of Public Interest Litigation (PIL) and justiciability of social rights.

The first break from partnership to confrontation revolved around the judicial resistance against the redistribution reform followed by constitutional amendments, which led the Court to extend review over the constitutional amendments in a departure from its legalist tradition.[241] The tension with attempts to reduce judicial power intensified with PM Indira Gandhi, especially during the state of emergency,[242] when the ISC abdicated its judicial review power over mass detentions undertaken in this period.[243] This peak of tensions ended after Gandhi lost in the election against a united opposition - the Janata Alliance as India entered the period of coalition governments (1989-2014). In this period, neither of the two main parties - the Congress Party and Bharatiya

[241] For the legalist tradition, see A.K. Gopalan v. State of Madras, 1950 SCR 88. For the shift see I. C. Golaknath & Ors v. State of Punjab & Anrs (1967) 2 SCR 762; Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[242] Theunis Roux, *The Politico-Legal Dynamics of Judicial Review*, 156-163.
[243] ADM, Jabalpur v. Shivakant Shukla (1976) 2 SCC 521; The only dissenting judge was later denied the position of the Chief Justice despite his seniority.

Janata Party (BJP)[244] - could rule independently.[245] This allowed the Court to continue expanding its power, sometimes contradicting the textual interpretations of the Constitution.[246]

This experience of confrontation with the political branches must have contributed to the defensive/restorative politics of the ISC. This was best illustrated in jurisprudence on judicial appointments (see Section 4), in judicial focus on the rights of marginalized groups (defendants,[247] prisoners, including females,[248] residents of mental health facilities,[249] bonded laborers,[250] and children[251]) through PIL as the 'last resort for the oppressed and the bewildered'[252] and justiciability of social rights under DPSPs. These shifts are commonly seen as part of the Court's strategy to re-imagine itself and restore its reputation after it acquiesced to political branches during the emergency.[253] It is often overlooked, though, that PIL was part of the political agenda

[244] BJP was constituted by former members of the Janata Party.

[245] The new ruling coalition restored many of the key components of the Court's judicial review power through 43rd and 44th amendments, see Theunis Roux, *The Politico-Legal Dynamics of Judicial Review*, 167. Alexander Fischer, "The Judicialisation of Politics in India: Origins and Consequences of the Power of the Indian Supreme Court." (PhD diss., Heidelberg University, 2020): 19; Surya Deva, "Public Interest Litigation in India: A Critical Review," *Civil Justice Quarterly* 28 (2009):38.

[246] The Court introduced substantive due process in Maneka Gandhi v. Union of India, (1978) 1 SCC 248; see also Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608.

[247] Madhav Hayawadanrao Hoskot vs State of Maharashtra (1978) 3 SCC 544.

[248] Hussainara Khatoon (I) v. State of Bihar (1980) 1 SCC 81; Hussainara Khatoon (V) v. Home Secy., State of Bihar, (1980) 1 SCC 108; Sheela Barse v. State of Maharashtra (1983) 2 SCC 96; Anil Yadav v. State of Bihar (1981) 1 SCC 622.

[249] Dr. Upendra Baxi vs. State of Uttar Pradesh (1983) 2 SCC 308; Rakesh Chandra Narayan v. State of Bihar (1989) SCC Supl. (1) 644.

[250] Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161, see also Modhurima Dasgupta, "Public Interest Litigation for Labour: How the Indian Supreme Court Protects the Rights of India's Most Disadvantaged Workers," *Contemporary South Asia* 16, no. 2 (June 2008): 165.

[251] Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244; Upendra Baxi (1) v State of UP (1983) 2 SCC 308.

[252] State of Rajasthanv. Union of India (1977) 3 SCC 592.

[253] Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India," *Third World Legal Studies* 4, no. 1 (January 6, 1985), 113; Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?," *The American Journal of Comparative Law* 37, no. 3 (1989): 495. Venkat Iyer, "The Supreme Court of India," in *Judicial Activism in Common Law Supreme Courts*, ed. Brice Dickson (Oxford University Press, 2007), 162. Shylashri Shankar and Pratap Bhanu Mehta, "Courts and Socioeconomic Rights in India," in *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, ed. Daniel M. Brinks and Varun Gauri (Cambridge University Press, 2008), 149. Manoj Mate, "Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India," *Temple International & Comparative Law Journal* 28 (2014): 361-362, 278. Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India*, 1st ed. (Cambridge University Press, 2016); Theunis Roux, *The Politico-Legal Dynamics of Judicial Review.*

since 1971,[254] especially around 1976-1977,[255] and that political branches had themselves pushed for erasing the hierarchy between civil and political rights and DPSPs in the Constitution.[256] With the end of coalition governments in 2014, during PM Modi's rule in an illiberal setting, [257] the judiciary became institutionally vulnerable once again and, seemingly, more cautious about outright confrontations with the elected branches.[258] However, the ISC retained its principled position on several issues, including the judicial self-appointment rule,[259] and continued to consider social rights issues mostly within the flexible PIL proceedings. The section below will locate the dynamic judicial power within the general SoP doctrine of the ISC.

1.4. SoP Doctrine: Coaxing Political Will

The SoP principle is recognized as part of the RoL and since the departure from the English tradition of parliamentary sovereignty,[260] also as part of the basic structure of the Constitution. The ISC emphasizes checks and balances, the accountability-enhancing function of SoP, the

[254]Note the work of the Bhagwati Committee of Gujerat on Legal Aid in 1971, Krishna Iyer Committee on Processual Justice to the People in 1973, and the Rajasthan Law Reform Committee in 1975, see Jeremy Cooper, "Poverty and Constitutional Justice: The Indian Experience," *Mercer Law Review* 44, no. 2 (March 1, 1993), 614.

[255] In 1976 constitutional amendment (42nd) was adopted on issues of access to justice and free legal aid and in August 1977, months after emergency ended, a government-commissioned report contained draft legislation for legal services referring to Social Action Litigation (the committee working on this included justices Bhagwati and Krishna Iyer).

[256] Shankar and Mehta, "Courts and Socioeconomic Rights in India," 149.

[257] John Harriss, "Hindu Nationalism in Action: The Bharatiya Janata Party and Indian Politics," *South Asia: Journal of South Asian Studies* 38, no. 4 (October 2, 2015): 712–18.

[258] Belated and ineffective was the Court's response to the internet shutdown in Kashmir after the abolition of the autonomy for Jammu and Kashmir making it a Union Territory, see Anuradha Bhasin v Union of India (2020) 3 SCC 637.; also Nandini Sundar, "India's Unofficial Emergency," in *The Emergence of Illiberalism: Understanding a Global Phenomenon*, ed. Boris Vormann and Michael Weinman (Routledge & Taylor & Francis Group, 2021),188-189; Arun K. Thiruvengadam, *The Intertwining of Liberalism and Illiberalism in India*, in *Routledge Handbook of Illiberalism*, ed. András Sajó, Renáta Uitz, and Stephen Holmes (Routledge, 2022), 747-749. The ISC also upheld the characterization of the Bill, which validated the national biometric identity program, as a money bill, through which consideration in the upper house was circumvented, see Justice K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1; also Tarunabh Khaitan, "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India," *Law & Ethics of Human Rights* 14, no. 1 (May 26, 2020): 66.

[259] The bi-partisan reform on judicial appointments enacted through constitutional amendments was declared unconstitutional based on the basic structure doctrine, see Supreme Court Advocates-on-Record Association v. Union of India (2016) 5 SCC 1. Khaitan, "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India," 68-70, 74.

[260] Lloyd I. Rudolph and Susanne Hoeber Rudolph, "Judicial Review versus Parliamentary Sovereignty: The Struggle over Stateness in India," *The Journal of Commonwealth & Comparative Politics* 19, no. 3 (November 1, 1981): 238.

importance of coordinated action per institutional strengths of branches, and, more recently, the idea of deliberative democracy.[261] Rigid separation and political question doctrine are rejected, while judicial review must guarantee that the essential function of a branch is not taken over by another.[262]

Despite being a thick document, the Constitution does not always empower the Court. It even bars judicial review in specific cases, for instance, over DPSPs and 'irregularity of procedure'[263] in the legislative process. This has meant the need for creative, non-textual interpretations for asserting judicial power in these[264] and other spheres (for DPSPs, see Section 5.2). The ISC pioneered judicial review of constitutional amendments otherwise passed relatively easily[265] through the basic structure doctrine.[266] This doctrine then encompassed the judicial self-appointment rule, itself derived through the creative interpretation of constitutional provisions.[267]

In contrast to the expansion of judicial power in these spheres, the ISC acts with restraint towards the political branches' power to determine policy. First and foremost, this is visible in a narrow

[261] Rai Sahib Ram Jawaya Kapur v. State of Punjab, (1955) 2 SCR 225; Bhim Singh v. Union of India & Others (2012) 13 SCC 477, paras 59, 78, 90. Ashwani Kumar v. Union of India (2020) 13 SCC 585, para 10-11.
[262] Special Reference No.1 of 1964 (1965) 1 SCR 413; Kesavananda Bharati vs. State of Kerala, (1973) 4 SCC 225; K.S. Puttuswamy v. Union of India, (2017) 10 SCC 1. See also Vikram A. Narayan and Jahnavi Sindhu, "A Case for Judicial Review of Legislative Process in India?," *Verfassung in Recht Und Übersee* 53, no. 4 (2020): 367-368.
[263] Art. 212 of the Constitution.
[264] The ISC qualified some procedural shortcomings as 'substantive or gross illegality or unconstitutionality', distinguishing it from 'alleged irregularity of procedure', see Raja Ram Pal v. The Hon'Ble Speaker, Lok Sabha (2007) 3 SCC 184; Ramdas Athawale v. Union of India, (2010) 4 SCC 1.
[265] Constitutional amendment is passed by two-thirds of the members of each House of Parliament if it constitutes a majority of the total membership of each House, see Art. 368 of the Constitution.
[266] In a carefully crafted *GolakNath* decision postponing the exercise of its newly declared power to future cases, the Court included amendments under the interpretation of 'law', for the purposes of checking its compatibility with fundamental rights. After constitutional amendments were passed to override *Golaknath,* in *Kesavananda,* the Court overruled its own decision to declare that those fundamental rights were amendable as such, however, certain parts of the Constitution, namely the basic structure of it, was not, see I. C. Golaknath & Ors v. State of Punjab & Anrs (1967) 2 SCR 762; Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[267] Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 SCC 441.

conceptualization of rationality and reasonableness scrutiny, which is applied as a composite test checking the political branches' discretion. Unlike the SACC in South Africa (see Chapter 3, Section 1.4), this test conflates rationality and reasonableness review and operationalizes it as a weak Wednesbury unreasonableness from the English common law tradition.[268] This test implies invalidation of discretionary exercise of power against total defiance of logic or moral standards that no sensible person who weighed the pros and cons could have made.[269] This minimum test is applied to decisions implicating DPSPs[270] and social rights (see Section 5 and Part II) without incorporating a more principled means-end analysis that restrictions of negative civil and political rights are subject to,[271] even if the political sensitivity affects the scrutiny[272] or remedy used in these cases as well.[273] Judicial review of negative social rights incorporates means-end analysis[274] when stating that restrictions need not be arbitrary, unfair, and unreasonable,[275] but yet only in the context of procedural guarantees (see *Olga Tellis*) narrow itself.[276]

An in-depth analysis of the PIL litigation reveals that the judicial branch leaves decisions implicating policy choices and resources to the political branches. This contrasts with the

[268] Union of India v. G. Ganayutham, (1997) 7 SCC 463, para 28 discussing Associated Provincial Picture Houses v Wednesbury Corporation [1947] EWCA Civ 1.
[269] R.K. Garg v. Union of India (1981) 4 SCC 675; Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223. Delhi Science Forum v. Union of India, (1996) 2 SCC 405; Union of India v. G. Ganayutham, (1997) 7 SCC 463.
[270] Sachidananda Pandey and Another v State of West Bengal and others (1987) 3 SCC 251.. According to the ISC: 'If the Government is alive to the various considerations re-quiring thought and deliberation and has arrived at a conscious decision after taking them into account, it may not be for the court to interfere in the absence of mala fides.'
[271] Ramlila Maidan Incident, In re (2012) 5 SCC 1.
[272] K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1, see also Khosla Tushnet, "Courts, Constitutionalism, and State Capacity," 126-131.
[273] Upon finding violation in the case on indefinite internet shutdown in Jammu and Kashmir, restrictions were not lifted, and the decision was to be revisited considering the judgment, Anuradha Bhasin v. Union of India (2020) SCC Online SC 25.
[274] Om Kumar v Union of India (2001) 2 SCC 386; Navtej Singh Johar & Ors. Vs. Union of India & Ors (2018) 10 SCC 1. Aparna Chandra, "Limitation Analysis by the Indian Supreme Court," in *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice*, ed. Andrej Lang, Mordechai Kremnitzer, and Talya Steiner, (Cambridge University Press, 2020), 458–541. Abhinav Chandrachud, "Wednesbury Reformulated: Proportionality and the Supreme Court of India," *Oxford University Commonwealth Law Journal* 13, no. 1 (September 30, 2013): 192, 197–208.
[275] Maneka Gandhi v Union of India and another (1978) 1 SCC 248.
[276] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608; Madhyamam Broadcasting Limited vs Union of India (2023) SCC OnLine SC 366.

interpretations in literature and even that of the Court itself.[277] In fact, the practice follows the language of those judges who emphasize SoP limitations of the judicial branch to decide 'merits or demerits of the government action'[278] except to enforce statutory duties and non-binding recommendations,[279] especially in the context of scarce resources. These judges limit judicial power to 'prodding' political branches into action if they shortfall in the fulfillment of their duties.[280] The fact that the Court itself interprets judicial activism[281] and good governance[282] narrowly in terms of active enforcement of existing norms is also telling about a narrow conception of judicial power. Indeed, the practice discussed below, as well as in Part II, illustrates that even in its most far-reaching decisions, the ISC is not substituting political branches in policy-making domains but rather acting upon existing laws, political acquiescence/commitments, either pre-existing or emerging including under pressure of judicial supervision.

The Court took measures to attenuate SoP tensions proactively by appointing experts or creating/mandating committees to fill in the expertise gaps of the judiciary.[283] Said experts or committees, often involving state officials themselves,[284] produced recommendations, later

[277] Narmada Bachao Andolan Vs Union of India and Others (2000) 10 SCC 664; BALCO Employees' Union v. Union of India, (2002) 2 SCC 333; Dattaraj Nathuji Thaware vs State Of Maharashtra & Ors (2005) 1 SCC 590; State of Uttar Pradesh v Jeet S Bisht (2007) 6 SCC 586; Common Cause (A Regd. Society) v. Union of India & Others (2008) 5 SCC 511, paras 1, 20, 36-40, 59-60; Aravali Golf Club and Ors. v. Chander Hass and Ors. (2008) 1 SCC 683; University of Kerala v. Council of Principals of Colleges, Kerala, (2010) 1 SCC 353; Kuchchh Jal Sankat Nivaran Samiti v. State of Gujarat, (2013) 12 SCC 226.
[278] Ashwani Kumar v. Union of India (2020) 13 SCC 585, para 10, 13-14, 21, 28.
[279] State of Uttar Pradesh v Jeet S Bisht (2007) 6 SCC 586, paras 62-63, 69, 75-77. Common Cause (A Regd. Society) v. Union of India & Others (2008) 5 SCC 511, paras 20, 25, 30, 36-40, 53, 56; Aravali Golf Club and Ors. v. Chander Hass and Ors. (2008) 1 SCC 683, paras 25, 28.
[280] State of Uttar Pradesh v Jeet S Bisht (2007) 6 SCC 586 [per Justice S.B Sinha, para 78]
[281] Pravasi Bhalai Sangathan v. Union of India, (2014) 11 SCC 477, para 22.
[282] Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal, (2007) 8 SCC 418, para 79. Manoj Narula v. Union of India, (2014) 9 SCC 1.
[283] Po Jen Yap, "Remedial Discretion and Dilemmas in Asia," *University of Toronto Law Journal* 69, no. supplement 1 (November 2019): 100.
[284] P. N. Bhagwati, "Judicial Activism and Public Interest Litigation," *Columbia Journal of Transnational Law* 23, no. 3 (1985): 573-577. Cooper, "Poverty and Constitutional Justice," 631-633. Parmanand Singh, "Enforcing Social Rights through Public Interest Litigation: An Overview of the Indian Experience," in *Socio-Economic Rights in Emerging Free Markets: Comparative Insights from India and China*, ed. Surya Deva (Routledge, 2015), 105.

incorporated into court orders [285] or, exceptionally, were tasked with overseeing the implementation (e.g. administration of a mental hospital[286] or forests[287]). This practice originated in the PIL proceedings (see Section 1.5.2.) and continues until today as evidenced in COVID-related jurisprudence (e.g., on de-congestion of prisons,[288] monitoring of hospitals,[289] allocation of medical oxygen[290]).

Otherwise, the judiciary got involved when SoP tensions were the lowest. Namely, ISC relied on existing legislative frameworks and positions of respective state bodies. In the wake of the Bhopal tragedy in 1984, the Court started to actively enforce existing legislation on environment and ecology, [291] sometimes expanding its scope [292] and incorporating relevant international standards.[293] The famous order on the total substitution of petrol/diesel in public transport with compressed natural gas (CNG) by 2001 relied on the recommendation by the Environmental Pollution Authority established by the Central Government during the proceedings, as already

[285] Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161; Rural Litigation and Entitlement Kendra & Ors v. State of U. P. & Ors (1985) 2 SCC 431; B. R. Kapoor v. Union of India, (1989) 3 SCC 387.
[286] Rakesh Chandra Narayan vs State of Bihar 1989 SCC Supl. (1) 644.
[287] Godavarman v. Union of India, (1997) 2 SCC 267.
[288] The Court ordered establishment of 'High Powered Committee' on decongestion of prisons, to decide 'which class of prisoners can be released' suggesting that those be persons whose offences were punishable by less than 7 years, Re: Contagion of Covid 19 Virus in Prisons (2020) SCC OnLine SC 344 (23 March, 2020).
[289] The Court ordered establishment of expert committees specifying their composition (e.g., senior doctors from central government hospitals) for monitoring the situation in hospitals in Delhi, also based on good practice in one of the hospitals in Delhi, the Court directed states to install CCTV in wards and make materials available to expert committees, see Re: Proper Treatment of Covid-19 Patients & Dignified Handling of Dead Bodies in the Hospitals, (2021) 2 SCC 519 (order of December 18, 2020)
[290] The Court constituted a National Task Force, to provide a public heath response to the issue of allocating medical oxygen to all States and UTs. The Union Government had agreed to the creation of such a Task Force and made suggestions of possible members but, final composition was determined by the Court, see Re: Proper Treatment of Covid-19 Patients & Dignified Handling of Dead Bodies in the Hospitals (2021) 2 SCC 519, para 18.
[291] The Court placed strict liability for the leak of oleum gas from a factory in New Delhi (M.C. Mehta vs. Union of India (1987) 1 SCC 395), gave direction to check pollution in and around the Ganges River (M.C. Mehta vs. Union of India (1988) 3 SCC 471) and ordered relocation of hazardous industries from the municipal limits of Delhi (Mehta vs. Union of India (1996) 4 SCC 750).
[292] The Court introduced the definition of forest absent in the Forest (Conservation) Act 1980 to extend the protection to all forests irrespective of its classification. The Court stated that such broad 'dictionary' understanding of forests in the Act was needed for the purpose of preventing deforestation recognized under the existing legislation. The Court also ordered the creation of a central empowered committee as envisaged under the Environment (Protection) Act 1986, however, contrary to law it made the committee answerable to the Court only, see T.N. Godavarman Thirumulpad v. Union of India, (1997) 2 SCC 267.
[293] Vellore Citizens Welfare Forum v Union of lndia (1996) 5 SCC 647.

envisaged under the legislation of 1986. The Court became more categorical later once the authorities had accepted the initial orders.[294] In a similar vein, the ISC ordered the adoption of legislation [295] for the safety of blood transfusion when the political branches had already acknowledged regulatory failures and the need for solutions.[296]

The ISC also interfered when SoP tension was attenuated with relevant parliamentary reports. This was the case when the ISC put clinical trials on hold before appropriate safeguards were adopted following a critical parliamentary report on the issue.[297] The ISC directly banned smoking in public places when a draft bill on the issues was being considered in Parliament,[298] and the government approved the judicial action.[299] Recently, the ISC explicitly elaborated on the significance of Parliament-affiliated committees' 'meticulous' work and explained that judicial reliance on their reports complied with the modern concept of SoP.[300]

[294] When in 2002, the Union of India had failed to supply sufficient CNG to the capital, ISC refuted the objections based on shortages, underlining that no objection was expressed before. ISC also strengthened its position by reference to increased production of CNG and its generous allocation to industries. It concluded that the directions issued by Environmental Pollution Authority had statutory force and it was 'not open to the Union of India to seek variation of the same without any justifiable reason.', see M. C. Mehta v. Union of India (1998) 9 SCC 589. M.C. Mehta v. Union of India, (2002) 4 SCC 356.

[295] The Court ordered licensing of all blood banks in the country in maximum 1 year and elimination of the system for professional donors in maximum 2 years, it also ordered the creation of appropriate bodies on the national and state level.

[296] A private firm commissioned by the Government had issued a report with recommendations in 1990, which the Union Government followed up with measures for improving storage conditions, among others revised relevant rules of licensing and operation of blood banks, for instance, that the license could only be granted/renewed by Drugs Controller of India. Central Council of Health had also issued recommendations, see Common Cause v. Union of India, (1996) 1 SCC 753.

[297] Swasthya Adhikar Manch and Ors v. Union of India (UOI) and Ors (2014) 14 SCC 788, see also Carolijn Terwindt, "Health Rights Litigation Pushes for Accountability in Clinical Trials in India," *Health and Human Rights* 16, no. 2 (December 11, 2014): 87. Gerard Porter, "Regulating Clinical Trials in India: The Economics of Ethics," *Developing World Bioethics* 18, no. 4 (December 2018): 369. R. Roy Chaudhury and D. Mehta, "Regulatory Developments in the Conduct of Clinical Trials in India," *Global Health, Epidemiology and Genomics* 1 (2016): 1. Matthew M. Kavanagh, "Constitutionalizing Health: Rights, Democracy and the Political Economy of Health Policy," (PhD diss., the University of Pennsylvania, 2017), 251-257. Sibille Merz, "Global Trials, Local Bodies: Negotiating Difference and Sameness in Indian For-Profit Clinical Trials," *Science, Technology, & Human Values* 46, no. 4 (July 1, 2021): 889.

[298] This case seems to conflict with the ISC's recent assertion that the Court must not act when a legislative process on an issue is already pending as that would qualify as interference with the law-making process entrusted to the legislative branch, see Ashwani Kumar v. Union of India (2020) 13 SCC 585, paras 28, 31.

[299] Murli S. Deora v. Union of India, (2001) 8 SCC 765.

[300] Kalpana Mehta and ors v. Union of India and ors (2018) 7 SCC 1, para 74.

This reliance on official expert or representative positions as a factor attenuating SoP concerns became clearer in the 1990s in corruption-related cases.[301] The Court issued guidelines (e.g. allowed prosecution of high-ranking officials without prior authorization) for the work of the Central Bureau of Investigation (CBI) following up on a scathing report of the Independent Review Committee (IRC) constituted by the Central Government. The guidelines would be replaced if the corresponding legislation was adopted. The ISC was most elaborate about its SoP-sensitive approach in another case, in which it made the CBI accountable to the Central Vigilance Commission (CVC) instead of the Central Government. Under the section *Need for the Court's Intervention*, the Court discussed the aligning views of IRC and HC decisions, explaining that the absence of a 'negative reaction' from the Central Government made it 'safe to act upon' IRC recommendations, which, according to the ISC, were not enforced yet due to '*certain practical difficulties'*.[302] In this manner, the Court carved out the power to embark and act upon officially accepted positions, even if not coming directly from the central government. More categorical interpretations, such as the court order against the first come–first served principle preferring auction instead, were later reversed to leave the choice of an alternative methodology to the executive.[303]

[301] The Court had first become active in ordering transfer of investigation to the Central Bureau of Investigation (CBI) in cases when independence of investigation was questionable due to implication of police authorities in alleged crimes, Inder Singh v. State of Punjab, (1994) 6 SCC 275; R.S. Sodhi v. State of U.P., 1994 Supp (1) SCC 143; for an overview of the relevant case-law, see Subrata Chattoraj & Another v. Union of India & Others (2014) 8 SCC 768.

[302] Vineet Narain v Union of India (1998) 1 SCC 226, see Chintan Chandrachud, "Structural Injunctions and Public Interest Litigation in India," in *Constitutional Remedies in Asia* (Routledge, 2019), 131-135.

[303] Subramanian Swamy v. A. Raja (2012) 3 SCC 1; Re: Allocation of Natural Resources, Special Reference 1 of 2012, (2012) 10 SCC 1. See also Pratap Bhanu Mehta, "The Indian Supreme Court and the Art of Democratic Positioning," in *Unstable Constitutionalism*, ed. Mark Tushnet and Madhav Khosla (Cambridge University Press, 2015), 249-250, 252, 254; Manoj Mate, "Globalization, Rights, and Judicial Review in the Supreme Court of India," *Washington International Law Journal* 25, no. 3 (June 1, 2016): 661, 668.

The close connection of the judicial position with that of the political branches and their interrelation/evolution within flexible PIL proceedings is best visible in cases on inter-country adoption of children and sexual harassment at the workplace. In a situation of failed attempts to adopt legislation despite revelations of child trafficking,[304] the Court itself formulated norms (e.g. set court approval as a condition of inter-country adoptions) considering the input of the relevant state agencies (e.g. Indian Council of Social Welfare). The petitions were then filed by relevant state agencies themselves for clarification of norms set in the first decision. [305] The rules set were soon codified by the new central agency explicitly established on this matter. In 1992, the government created a body with the participation of adoption agencies chaired by the Chief Justice to issue recommendations on improving regulations, which were accepted by the Government and issued as guidelines in 1995.[306] Similarly, following a gang rape of a social worker for stopping child marriage, the ISC issued a set of rules for the prevention of sexual harassment at the workplace until the legislator filled in the gap following state participation in the formulation of these rules and consent to the guidelines formulated by the Court.[307] These cases exemplify the potential of harmonious cooperation between the Court and the relevant state agencies within the flexible PIL proceedings. Apart from the noted judicial-law making overridable by corresponding legislation, [308] the ISC also participates in law-making 'by filling in gaps in existing legal

[304] David M. Smolin, "The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals," *Seton Hall Law Review* 35, no. 2 (2005 2004): 426–427.
[305] Lakshmi Kant Pandey vs Union of India (1984) 2 SCC 244; Laxmi Kant Pandey vs Union Of India (1986) 1 SCC 9; Laxmi Kant Pandey vs. Union of India (1987) 1 SCC 66,
[306] Ranjit Malhotra and Anil Malhotra, "Inter-Country Adoptions from India," *Commonwealth Law Bulletin* 33, no. 2 (June 2007): 191–207.
[307] Vishaka & Others v. State of Rajasthan & Others (1997) 6 SCC 241. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (IN) replaced the guidelines.
[308] Pravasi Bhalai Sangathan v. Union of India (2014) 11 SCC 477, para 20; Ashwani Kumar v. Union of India (2020) 13 SCC 585, para 27.

frameworks, extending existing doctrines incrementally on a case-by-case basis, adjusting them to changing circumstances' through reasoning according to existing law.[309]

The in-depth examination of these cases, including court references to affidavits presented by state authorities, reveals that the Court only enters into the competence of political branches if some supportive official position from within the political branches already exists or is being generated. Interim orders capable of being attuned to the political will also help the Court better time the interferences when the political environment is ripe and even modify orders when the Court erred in this assessment. As will be seen, the judicial role conception in the general SoP scheme aligns with the one in the social and health rights jurisprudence discussed below, with the latter even falling below the general position.

1.5. Social Rights Policy and Doctrine

The social rights jurisprudence of the ISC will be assessed against the background of poverty and inequality in the country - two major considerations affecting the attitude of the political branches towards social rights protection and the resulting social policies, even the nature of the political process more broadly.

[309] Ashwani Kumar v. Union of India (2020) 13 SCC 585, para 22.

1.5.1. Social Rights Policy

Having inherited an alarmingly dire situation from pre-independence India (poverty at 80%,[310] illiteracy at 84%),[311] poverty and inequality remain rampant in independent India even though it became a lower-middle-income state in 2009. Economic growth led to a remarkable reduction in poverty, especially since the 1990s (around 39% for 2005/6-2019/21). Based on the latest Multidimensional Poverty Index (MPI)[312] report, 16.4% of the population is considered poor, compared to 6.3% and 4.8%[313] in South Africa and Colombia, respectively. Poverty decreased with almost no change in inequality, with the GINI coefficient ranging from 0.33 to 0.35 between 1977 and 2019.[314] The gap between the richest and poorest quintiles even widened[315] with the situation of the historically marginalized minorities improving the least.[316] Inequality prevails also between states and urban and rural areas.[317] By 2018, 35% of the urban population lived in

[310] Mohan Guruswamy, "How Did We Do in 75 Years? Clearly, Better than Most," Deccan Chronicle, August 18, 2022, https://www.deccanchronicle.com/opinion/columnists/180822/how-did-we-do-in-75-years-clearly-better-than-most.html.

[311] S.Mahendra Dev, "Growth, Employment, Poverty and Human Development: An Evaluation of Change in India since Independence with Emphasis on Rural Areas," *Review of Development and Change* 2, no. 2 (December 1, 1997): 209–50. Thiruvengadam, "The Intertwining of Liberalism and Illiberalism in India*"* 739.

[312] MPI complements traditional monetary poverty measures by capturing the acute deprivations in health, education, and living standards that a person faces simultaneously.

[313] United Nations, "2023 Global Multidimensional Poverty Index (MPI)," *Human Development Reports* (July 11, 2023): 16, 20-21. https://hdr.undp.org/content/2023-global-multidimensional-poverty-index-mpi.

[314] "Gini index - South Africa, India, Colombia," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SI.POV.GINI?locations=ZA-IN-CO

[315] Sadiq Ahmed and Ashutosh Varshney, "Battles Half Won: Political Economy of India's Growth and Economic Policy Since Independence," in *The Oxford Handbook of the Indian Economy*, ed. Chetan Ghate (Oxford University Press, 2012), 56-102. Writankar Mukherjee, "Wealth of India's Richest 1% More than 4-Times of Total for 70% Poorest: Oxfam," *The Economic Times*, January 20, 2020, https://economictimes.indiatimes.com/news/economy/indicators/wealth-of-indias-richest-1-more-than-4-times-of-total-for-70-poorest-oxfam/articleshow/73416122.cms?from=mdr.

[316] Despite dramatic decrease in poverty between 2005 and 2012, certain social groups, such as Adivasis and Dalits are more likely to stay in or fall into poverty and less likely to move out of poverty, see Carlos Felipe Balcázar et. al. "Why Did Poverty Decline in India?: A Nonparametric Decomposition Exercise" *World Bank Policy Research Working Paper* no. 7602 (2016): 8-10, 27 https://openknowledge.worldbank.org/handle/10986/24143

[317] Angus Deaton and Jean Dreze, "Poverty and Inequality in India: A Re-Examination," *Economic and Political Weekly* 37, no. 36 (2002): 3729–48. M. G. Quibria, "Growth and Poverty: Lessons from the East Asian Miracle Revisited," *ADBI Research Paper Series* no. 33 (2002): 74-77; "What Has Driven India's Poverty Reduction?," Hindustan Times, November 1, 2018 https://www.hindustantimes.com/india-news/what-has-driven-india-s-poverty-reduction/story-s83YduiFxOfFyQGIqdLW5L.html

slums.[318] Eighty percent of workers often seeking employment in urban areas are in the informal sector.[319]

Although poverty and inequality are not absent from even the world's most developed economies, the sheer extent of it in India does not leave the functioning of democracy intact. No political group can afford to deemphasize the state's role in eradicating poverty, and the reduction of poverty is the declared goal of any economic policy pursued by the political branches (note high voter turnout from the poor[320]). Paradoxically, this consensus has led politicians to seek an advantage by emphasizing identity lines among the poor.[321]

The evolving social welfare schemes in India illustrate the high political cost of an eventual rejection of anti-poverty state action. The shifts in economic policies, especially from the state-centered to market-oriented policies in the 1990s,[322] have not erased the consensus on the need to positively address poverty and inequality. Furthermore, such shifts were moderated as the government was not reelected, for instance, when the UPA coalition government (2004-2014) came into power, adopting rights-based welfare laws upon recommendations of civil society groups.[323] These laws, which included the National Rural Employment Guarantee Act (NREGA)

[318] "Population living in slums (% of urban population) – India", World Bank Open Data, March 3, 2024 https://data.worldbank.org/indicator/EN.POP.SLUM.UR.ZS?locations=IN
[319] KP Kannan, "COVID-19 Lockdown: Protecting the Poor Means Keeping the Indian Economy Afloat," April 3, 2020, https://www.epw.in/engage/article/covid-19-lockdown-protecting-poor-means-keeping-indian-economy-afloat.
[320] Yogendra Yadav, "Electoral Politics in the Time of Change: India's Third Electoral System, 1989-99," *Economic and Political Weekly* 34, no. 34/35 (1999): 2393–99.
[321] Pradeep K. Chhibber, *Democracy without Associations: Transformation of the Party System and Social Cleavages in India* (University of Michigan Press, 1999), 14. Lloyd I. Rudolph and Susanne Hoeber Rudolph, *In Pursuit of Lakshmi: The Political Economy of the Indian State* (University of Chicago Press, 1987), 20. Ahmed and Varshney, "Battles Half Won," 76-77.
[322] Peter Ronald Desouza and E. Sridharan, *India's Political Parties* (SAGE Publications Inc, 2006), 152.
[323] Poorvi Chitalkar and Varun Gauri, "India: Compliance with Orders on the Right to Food," in *Social Rights Judgments and the Politics of Compliance: Making It Stick*, ed. César Rodríguez-Garavito, Julieta Rossi, and Malcolm Langford (Cambridge University Press, 2017), 307.

2005,[324] the Disaster Management Act (DMA) 2005, the Right of Children to Free and Compulsory Education Act (RTE) 2009, and the National Food Security Act (NFSA) 2013 regulated some of the issues priorly addressed by the judiciary[325] and became the basis of further constitutionalizing these statutory guarantees through judicialization. Among the initiatives of the current BJP government, still leaning towards market-oriented policies, is a centrally financed Universal Health Coverage (UHC) scheme for around 40% of the population (Section 2.1).

1.5.2. Social Rights Doctrine: Weak Justiciability

For over a half-century, the ISC's approach to social rights has evolved in reaction to a changing society, political context, and judicial self-understanding. The initial silence on social rights had legitimate roots in the explicit non-justiciability of these rights in the Constitution.[326] Embracing the post-emergency momentum, in a case concerning the constitutional amendment, with which the then-defeated Congress party government established the precedence of DPSPs over civil and political rights, the Court erased the lines between fundamental rights and DPSPs.[327] In parallel to the relaxation of the judicial process through PIL, the ISC soon declared the justiciability of social rights based on their connection to the right to life[328] and life with dignity.[329] Then, the right to life came to encompass a vast array of social rights, namely, the right to livelihood,[330] shelter,[331]

[324] The Act provides 100 days of paid employment yearly to around 50 million agricultural workers.
[325] Rehan Abeyratne, "Enforcing Socioeconomic Rights in Neoliberal India," *Minnesota Journal of International Law* 29, no. 1 (2020): 21–23.
[326] Art. 37 of the Constitution.
[327] Minerva Mills Ltd. & Ors v. Union of India & Ors (1980) 2 SCC 591.
[328] In a case concerning detainee's right to consult with a lawyer, the Court referred to 'basic necessities of life' and discussed state duties to provide adequate nutrition, clothing and shelter and facilities for reading, writing, and expressing oneself. It held that 'every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live [..], see Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 1 SCC 608.
[329] Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161.
[330] Olga Tellis & Ors v. Bombay Municipal Corporation & Ors. Etc (1985) 3 SCC 545.
[331] M/s. Shantistar Builders v. Narayan Khimalal Totame and Others (1990) 1 SCC 520; Chameli Singh and Others v State of UP (1996) 2 SCC 549.

education,[332] hygienic conditions in the workplace, health and leisure,[333] environment and sustainable development,[334] roads,[335] or sleep.[336] Nevertheless, the scope of these rights was declared to depend on the extent of economic development in the country, implying inevitable resource constraints of social rights enforcement.[337] Indeed, as demonstrated below, social rights did not translate into new entitlements unless it was linked to those already approved by the political branches.[338] The only exception was the right to free elementary education, which, unlike other DPSPs, was subjected to a deadline (10 years) in the Constitution.[339]

Social rights cases did become a frequent subject matter of PIL proceedings, which, as noted above, removed all formal barriers to litigation and demonstrably focused on marginalized segments of the population, at least in its initial phase (Section 1.3). However, these cases did not establish new substantive state duties emanating from constitutional social rights and depended on the codification through the legislative framework or political commitments made within the framework of the flexible judicial process. It is true that when removing the standing requirement and introducing PIL – a 'vast revolution' of the judicial process[340] - the Court stressed a new judicial duty to creatively contribute to social justice[341] and 'come to the rescue' of the deprived and vulnerable.[342] However, this was essentially aimed to serve RoL, noting that breach of duties,

[332] Mohini Jain (Miss) v. State of Karnataka and Others (1992) 3 SCC 666.
[333] Consumer Education and Research Centre v. Union of India (1995) 3 SCC 42.
[334] ND Jayal v Union of India (2004) 9 SCC 362.
[335] State of Himachal Pradesh & Anr vs Umed Ram Sharma & Ors (1986) 2 SCC 68.
[336] Ramlila Maidan Incident, In re (2012) 5 SCC 1.
[337] Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 1 SCC 608.
[338] Burt Neuborne, "The Supreme Court of India," *International Journal of Constitutional Law* 1, no. 3 (July 1, 2003): 501.
[339] Art. 45 of the Constitution.
[340] S.P. Gupta v. Union of India, 1981 Supp SCC 87, paras 17, see also People's Union for Democratic Rights Vs. Union of India (1982) 3 SCC 235; Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161.
[341] S.P. Gupta v. Union of India, 1981 Supp SCC 87, para 27.
[342] Bihar Legal Support Society v. Chief Justice of India (1986) 4 SCC 767.

misuse of power, corruption, and inefficiency must 'not be left unaddressed due to 'technical barriers'. [343]

PIL significantly transformed the judicial process with some effect on the judicial role; however, as with social rights, the Court set SoP limits to PIL, too. Apart from an easy initiation without individual standing and even with letters (epistolary jurisdiction), the Court could now open cases based on media reports and/or upon its own initiative (suo moto).[344] The Court started to adjudicate through interim orders (often short and unsubstantiated) and continuing mandamus,[345] sometimes shifting the central subject of the case without much ado.[346] The Court also innovated with proactive mechanisms for evidence and expertise gathering and for overseeing the implementation in this way attenuating the problems of judicial competence, hence, of SoP (see Section 1.3). Nevertheless, as with social rights, the boundaries were for the PIL from the outset. The ISC explained that the PIL did not intend to intrude into the executive territory but rather 'to ensure observance of social and economic rescue programmes [..]'.[347]

[343] S.P. Gupta v. Union of India, 1981 Supp SCC 87, paras 13, 19; People's Union for Democratic Rights Vs. Union of India (1982) 3 SCC 235.

[344] Bhagwati, "Judicial Activism and Public Interest Litigation," 573; Cooper, "Poverty and Constitutional Justice," 614. Marc Galanter and Vasujith Ram, "*Suo Motu* Intervention and the Indian Judiciary," in *A Qualified Hope: The Indian Supreme Court and Progressive Social Change*, ed. Gerald N. Rosenberg, Sudhir Krishnaswamy, and Shishir Bail (Cambridge University Press, 2019), 92–122.

[345] Baxi, "Taking Suffering Seriously," 107-132. Clark D. Cunningham, "Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience," *Journal of the Indian Law Institute* 29, no. 4 (1987): 511–515; Nick Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance Court," *Washington University Global Studies Law Review* 8, no. 1 (2009): 1–70. Mihika Poddar and Bhavya Nahar, "'Continuing Mandamus' - A Judicial Innovation to Bridge the Right-Remedy Gap," *NUJS Law Review* 10, no. 3 (2017): 565–567. Chintan Chandrachud, "Structural Injunctions and Public Interest Litigation in India," 131, 135-136.

[346] Anuj Bhuwania, "The Case That Felled a City: Examining the Politics of Indian Public Interest Litigation through One Case," *South Asia Multidisciplinary Academic Journal*, no. 17 (March 21, 2018):2. Abeyratne, "Enforcing Socioeconomic Rights in Neoliberal India," 9, 20.

[347] Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161, see also People's Union for Democratic Rights v. Union of India (1982) 3 SCC 235.

Hollow in terms of substantive standards, PIL litigation acquired a shifting focus. As the Court itself categorized, the PIL jurisprudence had three overlapping stages: the first from 1976 on the marginalized groups under the right to life jurisprudence, the second commencing in 1980s on environmental and ecological issues, and the third from 1990s on probity, transparency, and integrity in Governance.[348] Although the Court's language during the latter two stages was not as social rights friendly as before, as demonstrated below, unlike interpretation in literature,[349] this did not qualify as a retreat either for social rights standards or for PIL. Given that there was no material change to the SoP through social rights, no doctrinal retreat could have taken place.

The fact that there never was a substantive systemic doctrine of social rights is best illustrated through the cases that implicated costs and, hence, were polycentric. As demonstrated below, the ISC issued binding orders disregarding costs only when DPSPS materialized in statutory duties. Otherwise, it merely checked whether decisions were procedurally fair and/or read in some of the substantive and procedural guarantees when their inclusion could be an interpretation derived from the existing legislative framework and/or the right to equality. In this way, the ISC paid more respect to the legislative branch and exercised more scrutiny against the plausible interpretation of the statutes by the executive branch. Besides, unlike South Africa and Colombia, proceduralization remained weak and did not even extend to requiring inclusive processes before evictions.

[348] State of Uttaranchal v. Balwant Singh Chaufal, (2010) 3 SCC 402.

[349] Anashri Pillay, "Revisiting the Indian Experience of Economic and Social Rights Adjudication: the need for a principled approach to judicial activism and restraint," *International and Comparative Law Quarterly* 63, no. 2 (April 2014): 392-395; Abeyratne, "Enforcing Socioeconomic Rights in Neoliberal India," 15-16; Theunis Roux, *The Politico-Legal Dynamics of Judicial Review*, 181-182; Sandra Fredman, *Human Rights Transformed*, 138 - 141. Mate, "Globalization, Rights, and Judicial Review in the Supreme Court of India," 643-671. Philippe Cullet, "Human Rights and Displacement: The Indian Supreme Court Decision on Sardar Sarovar in International Perspective," *The International and Comparative Law Quarterly* 50, no. 4 (2001): 986–87. Balakrishnan Rajagopal, "Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective," *Human Rights Review* 8, no. 3 (September 28, 2007): 162-163.

The reasonableness in the lead eviction case *Olga Tellis* was limited to procedural guarantees such as giving of notice, read in the legislation,[350] and its postponement until the monsoon season was over. Reasonableness did not lead to standards such as the provision of alternative accommodation as a condition of eviction, nor the requirement of an inclusive prior process. The Court merely referred to state duties under the existing government scheme on allocating land to eligible slum dwellers. Despite the weakness of judicial review in this case, the Court did adopt language sensitive to the deprivation that compelled evictees to seek the means of livelihood in the city and live in slums in the vicinity.[351] In another eviction case in *Ahmedabad*,[352] the ISC requested a formulation of a scheme on the provision of alternative accommodation only after such a scheme was submitted to the ISC by the political branches themselves. Although SoP was not directly mentioned, the Court did say that the financial constraints of the municipality were a relevant consideration. What set *Ahmedabad* apart from *Olga Tellis* was the making of political branches' commitments binding in a single case against a single local government without making it a universal standard. Similarly, the Court enforced assurances made by the Delhi government that appropriate arrangements would be made when ordering the provision of shelter to the homeless facing death in cold weather. The petition and interim order were made part of the broader *Right to Food* litigation by the ISC connecting malnutrition to vulnerability to cold weather.[353]

In this hollow doctrinal environment for social rights, alongside the shifting focus of PIL, the symbolic social rights language of the ISC also faltered occasionally. *Ahmedabad* already marked

[350] Although the law explicitly permitted evictions without notice, the Court qualified that as a discretion that had to be exercised reasonably and fairly to be constitutional, and it could not be reasonable not to give notice unless exceptional circumstances existed.
[351] Olga Tellis & Ors v. Bombay Municipal Corporation & Ors. Etc (1985) 3 SCC 545.
[352] Ahmedabad Municipal Corporation v Nawab Khan Bulab Khan (1997) 11 SCC 121.
[353] People's Union for Civil Liberties v. Union of India (2010) 5 SCC 423; People's Union for Civil Liberties v. Union of India, (2010) 12 SCC 176; People's Union for Civil Liberties v. Union of India (2010) 5 SCC 318.

this development, when apart from the fate of the evictees, the ISC was concerned with the 'mushroom growth of slums' and the 'encroachment of the pavements/footpaths' - 'unhygienic ecology, traffic hazards and risk prone to lives of the pedestrians'.[354] In *Patel*, the Court rejected PIL against evictions without even expressing any concern with the slum dwellers' deprivation. In this case, the Court ordered the cleaning of Delhi from solid waste, described the creation of slums as a well-organized business, slum dwellers as 'waste-generating' 'encroachers', and compared the provision of alternative sites to rewarding pickpockets.[355] Marking the largest court-sanctioned eviction, *Andolan* was another case, in which the ISC refused to develop a social rights doctrine with problematic reasoning though without any identifiable doctrinal change in it. In essence, by refusing to interfere with the development project, *Andolan* merely upheld the ISC's combined rationality/reasonableness standard that policy decisions such as the construction of dams[356] and thermal power plants[357] were subjected to in jurisprudence. Significant potential rights issues were left unaddressed through the application of this *Wednesbury* type of unreasonableness test. The ISC did not scrutinize the adequacy of relief and rehabilitation (R&R) measures or require its finalization before the dam was constructed (as the dissenting judge suggested); instead, the ISC placed trust in the good faith of the government. This was despite the problems being identified by the government-commissioned World Bank report itself. Besides, alongside criticizing the belated use of PIL as the development project was ongoing for years, the ISC made a value judgment that the tribal people would be better off when relocated than they are 'in their tribal

[354] Ahmedabad Municipal Corporation v Nawab Khan Bulab Khan (1997) 11 SCC 121.
[355] Almitra H. Patel and Another v. Union of India and Others (2000) 3 SCC 575; Nivedita Menon, "Environment and the Will to Rule: Supreme Court and Public Interest Litigation" in *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India*, ed. Mayur Suresh and Siddharth Narrain (Orient Blackswan, 2014), 65.
[356] Tehri Bandh Virodhi Sangharsh Samiti v. State of UP and others 1992 Supl. (1) SCC 44.
[357] Dahanu Taluka Environment Protection Group v. Bombay Suburban Electricity Supply ltd (1991) 2 SCC 539.

hamlets'.[358] It is fair to note that in the subsequent cases on dam-related evictions, the ISC increased its scrutiny over the content of R&R. The Court stated that general benefits of development projects are not an alibi to neglect fundamental rights and that the R&R plan had to be finalized before eviction takes place.[359] In other cases on similar development projects, the Court also underlined the negative consequences of globalization and development.[360]

The *Right to Food litigation* in its entirety also illustrates that there was no retreat or progress for the social rights doctrine of the Court, except progress in terms of enforcement of existing policies and implementation monitoring. While similar petitions were rejected in the 1980s when the court-commissioned report (prepared by a district judge) sided with the Government,[361] in 2001, in the context of a robust civil society movement around drought-related starvation deaths, the ISC decided to grapple with the shortcomings of the Public Distribution System (PDS).[362] Nevertheless, the ISC merely elevated existing government schemes to constitutional entitlements and enforced them, except when it specified calorific amounts of school meals. The Court remained aware of SoP limitations; for instance, it asked the government about the feasibility of solutions proposed by petitioners and endorsed them when no objection or counterevidence was presented. Besides, in this case, SoP tensions were attenuated by the availability of resources, namely, around 50 million tons of grain stocked to control export prices.[363] The success of the case, especially the reach of the midday school meal scheme to around a hundred million children,

[358] Narmada Bachao Andolan v. Union of India and Others (2000) 10 SCC 664, see also Cullet, "Human Rights and Displacement," 974.
[359] ND Jayal v Union of India (2004) 9 SCC 362, para 18-19, see also Mate, "Globalization, Rights, and Judicial Review in the Supreme Court of India," 666.
[360] Nandini Sundar v. State of Chattisgarh, (2011) 7 SCC 547.
[361] Chitalkar and Gauri, "India: Compliance with Orders on the Right to Food," 291-295.
[362] PDS had 3 objectives: to support to farmers; to control market price through stocking and controlled release; and to distribute grain to the poor through subsidized sales in fair price shops.
[363] PUCL vs Union of India and others, order dated November 28, 2001, W.P.(C) No. 196/2001.

must be partially attributable to robust compliance monitoring. Issuing more than 50 orders by 2017, the ISC used contempt orders and created a network of commissioners, advisers, and assistants across the states[364] who actively collaborated with grassroots organizations. Since 2005, the monitoring work has also benefited from the Right to Information Act. [365]

The rights-based laws adopted during the UPA coalition government provided a new impetus for the ISC's social rights jurisprudence. However, the ISC affirmed the same SoP limitation of the Court and did so more explicitly. Emphasizing a lack of expertise and judicially manageable standards, the Court refused to expand substantive entitlements under NFSA, relaxing eligibility criteria only.[366] The ISC also refused to order more water allocation to certain areas in need with explicit reference to SoP limitations.[367] Following the original logic of PIL and social rights, the

[364] Court-appointed commissioners were supported by advisers, while upon the direction of HCs, state and central governments also appointed assistants to commissioners.

[365] Emma C. Neff, "From Equal Protection to the Right to Health: Social and Economic Rights, Public Law Litigation, and How an Old Framework Informs a New Generation of Advocacy," *Columbia Journal of Law and Social Problems* 43, no. 2 (2009): 165-166; Chitalkar and Gauri, "India: Compliance with Orders on the Right to Food," 289-290, 296-305, 308.
Rosalind Dixon and Rishad Chowdhury, "A Case for Qualified Hope?: The Supreme Court of India and the Midday Meal Decision," in *A Qualified Hope: The Indian Supreme Court and Progressive Social Change*, ed. Gerald N. Rosenberg, Shishir Bail, and Sudhir Krishnaswamy (Cambridge University Press, 2019), 256-261. Steven Friedman and Diego Maiorano, "The Limits of Prescription: Courts and Social Policy in India and South Africa," *Commonwealth & Comparative Politics* 55, no. 3 (July 3, 2017): 366-368; Jennifer Geist Rutledge, "Courts as Entrepreneurs: The Case of the Indian Mid-Day Meals Programme," *Asian Politics & Policy* 4, no. 4 (October 2012): 527–47. Abeyratne, "Enforcing Socioeconomic Rights in Neoliberal India," 11, 20, 27.

[366] The Court refused to provide goods not envisaged under NFSA and to modify the current policies on restructuring loans see Swaraj Abhiyan v. Union of India & Others (2016) 7 SCC 498, para 13, 17, see also Gaurav Mukherjee, "The Supreme Court of India and the Inter-Institutional Dynamics of Legislated Social Rights," *Verfassung Und Recht in Übersee* 53, no. 4 (2020): 431–435.

[367] Kuchchh Jal Sankat Nivaran Samiti v. State of Gujarat, (2013) 12 SCC 226.

Court kept enforcing existing statutory duties under DMA,[368] NFSA,[369] NREGA,[370] and RTE,[371] stating PIL was legitimately used against the 'ostrich-like reaction of the executive'.[372] The Court noted that neither the judiciary nor the Union could abdicate their duties when state governments do, even when the court cannot itself lay down standards for declaring a drought.[373] These cases demarcate a new phase in the social rights jurisprudence when the Court does not disguise statutory duties under constitutional standards and explicitly addresses the SoP implications.

To sum up, social rights cases in India aligned with the general SoP doctrine and its rationale and did not revolutionize it, even falling short of it. The ISC enforced existing duties and commitments, giving them constitutional status, and replicated weak rationality analysis. This is not to say that formal justiciability of social rights has not contributed to its specific domestic operationalization. However, this has not 'expropriated' the final say on resource-relevant policies from the political branches. Eventually, the adjudication by interim orders devoid of conclusive interpretation of the law (described by Cunningham as 'remedies without rights')[374] led to the co-existence of weak remedies with more interventionist, managerial orders at the opposite ends of the continuum when

[368] In a petition requesting declaration of droughts, the court issued directives to establish mechanisms envisaged in the DMA, such as the National Disaster Mitigation Fund and National Disaster Response Force, see Swaraj Abhiyan v. Union of India & Others (2016) 7 SCC 498, para 109.

[369] In relation to food shortages, the Court ordered the establishment of District Grievance Redress Committees and State Food Commissions, vigilance committees and the conduct of social audits, already required by NFSA Act, see Swaraj Abhiyan v. Union of India, (2016) 7 SCC 534; Swaraj Abhiyan (V) v. Union of India, (2018) 12 SCC 170, see also Gaurav Mukherjee, "The Supreme Court of India and the Inter-Institutional Dynamics of Legislated Social Rights," *Verfassung Und Recht in Übersee* 53, no. 4 (2020): 434.

[370] In view of the suffering caused by the drought, the Court also ordered the timely release of wages and transfer of 'adequate funds' from the central to state government on the basis of NREGA, Swaraj Abhiyan v. Union of India (2016) 7 SCC 498, see also Abeyratne and Misri, "Separation of Powers and the Potential for Constitutional Dialogue in India," 383.

[371] The Court also issued a decision ordering 'full implementation' of RTE, namely, to provide basic infrastructure to all schools. The Court relied on empirical evidence that absence of toilet facilities leads parents to not send their children (particularly girls) to schools, which results in the violation of the right to free and compulsory education of children, see Environment and Consumer Protection Foundation v. Delhi Administration (2012) 10 SCC 197.

[372] Swaraj Abhiyan v. Union of India (2016) 7 SCC 498, para 15.

[373] Ibid, paras 62, 102.

[374] Cunningham, "Public Interest Litigation in Indian Supreme Court," 511-515: see also Carl Baar, "Social Action Litigation in India: The Operation and Limitations of the World's Most Active Judiciary," *Policy Studies Journal* 19, no. 1 (September 1990): 144.

political commitments were coaxed in the process. This distinct dialogic review in India will become more evident in health rights jurisprudence, including during the COVID-19 pandemic in Part II.

Part II: Right to Health through the Prism of SoP

2.1. Population Health, Health Care and Legislative/Policy Framework

India had an average life expectancy of 71 years in 2019 (before the COVID-19 pandemic led to a drop by 4 years), which is a significant improvement since the independence from the life expectancy of 32 years [375] and is higher than in South Africa among jurisdictions of this dissertation.[376] At least partially, such an improvement is due to the noted reduction in poverty and increased quality of life (see Section 1.5.1). Non-communicable diseases are the most common cause of death.[377] Despite the improvements, as of 2018, India - the 5th economy in the world - ranked 145th out of 195 countries in the Healthcare Access and Quality Index, with significant disparities between population groups and the states. [378]

These health challenges are met by a mixed public-private healthcare system, with dysfunctional public healthcare operating alongside the much larger private sector. The new government of

[375] Dev, "Growth, Employment, Poverty and Human Development," 209–50. Thiruvengadam, "The Intertwining of Liberalism and Illiberalism in India*"* 739.
[376] "Life expectancy at birth, total (years) - India, South Africa, Colombia," World Bank Open Data, March 3, 2024 https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=IN-ZA-CO
[377] Shalendra D. Sharma, "Health Care for India's 500 Million: The Promise of the National Health Protection Scheme," *Harvard Public Health Review* 18 (2018): 5.
[378] Nancy Fullman et al., "Measuring Performance on the Healthcare Access and Quality Index for 195 Countries and Territories and Selected Subnational Locations: A Systematic Analysis from the Global Burden of Disease Study 2016," *The Lancet* 391, no. 10136 (June 2018): 2236, 2245. Y Balarajan, Selvaraj, and Sv Subramanian, "Health Care and Equity in India," *The Lancet* 377, no. 9764 (February 2011): 505–15.

Independent India aimed at universal health care from the outset;[379] however, as the transformation of the impoverished public health care system proved too challenging, the private sector became the only adequately resourced alternative (e.g. the private system has 90% of doctors[380]) for the Union and state government schemes to rely on.[381] The National Rural Health Mission (NRHM),[382] the Employees State Insurance Corporation (ESIC) scheme, the Central Government Health Scheme (CGHS), and the National Health Insurance Scheme (NHIS) all promoted public-private partnerships.[383] The same applies to schemes implemented by state governments. The current government's ambitious plan with Universal Health Coverage (UHC)[384] launched in 2018 also relies on public-private partnerships, rather than rebuilding the public healthcare system.

Although ambitious, the implementation of the UHC scheme[385] is poorly financed and is not without shortcomings.[386] This or any previous policy aimed at UHC was adopted without increasing government spending as a percentage of GDP lowest among the jurisdictions of this dissertation, standing at its highest, 1.08% of GDP in 2020.[387] This is below the global average of 6.9%[388] and the expenditure in other countries with significantly less GDP per capita, such as

[379] Ravi Duggal, "A Financing Strategy for Universal Access to Health Care: Maharashtra Model." *In Equity and Access: Health Care Studies in India*, edited by Purendra Prasad, Amar Jesani and Sujata Patel (Delhi: Oxford University Press, 2018. Oxford Scholarship Online, 2019) 338.
[380] Choutagunta, Manish, and Rajagopalan, "Battling COVID -19 with Dysfunctional Federalism," 1279‑1283.
[381] Duggal, "A Financing Strategy for Universal Access to Health Care," 339.
[382] Sharma, "Health Care for India's 500 Million," 1-14.
[383] Kajal Bhardwaj, Veena Johari, and Vivek Divan, "The Right to Health: A Winding Road to Actualization," in *Equity and Access: Health Care Studies in India*, ed. Purendra Prasad, Amar Jesani, and Sujata Patel (Oxford University Press, 2018), 362, 375-376.
[384] Vikram Patel et al., "Assuring Health Coverage for All in India," *The Lancet* 386, no. 10011 (December 2015): 2422–35.
[385] Vijayaprasad Gopichandran, "Ayushman Bharat National Health Protection Scheme: An Ethical Analysis," *Asian Bioethics Review* 11, no. 1 (March 2019): 69–80,
[386] Patralekha Chatterjee, "Health Debate Rising around the Upcoming Indian Election," *The Lancet* 393, no. 10180 (April 2019): 1490–91.
[387] "Domestic general government health expenditure (% of GDP) - Colombia, India, South Africa," World Bank Open Data, March 3, 2024 https://data.worldbank.org/indicator/SH.XPD.GHED.GD.ZS?locations=CO-IN-ZA
[388] "Domestic general government health expenditure (% of GDP)," World Bank Open Data, March 3, 2024 https://data.worldbank.org/indicator/SH.XPD.GHED.GD.ZS

Pakistan (1.13%), Indonesia (1.4%), and Nepal (1.4%). Out-of-pocket expenditure (OOP) in the public and private healthcare sectors together is also considerably higher than in Colombia and South Africa,[389] standing at 50.6% in 2020, much above the global average of around 16%.[390] Almost two-thirds of OOP is for outpatient care, predominantly medicine (despite ample drug production capacity, free from patent laws until 2005 and subject to one of the most flexible regimes since then[391]). Due to OOP, 55 million people (about twice the population of Texas) fall back into poverty every year, a problem acknowledged by the Union government itself.[392]

In India's federal structure, public health falls under state competencies.[393] However, the Union exercises planning, disease control, and regulatory powers and also finances national programs, while the implementation of those policies falls to the states.[394] However, the states' contribution still accounts for around 70% of the total spent on healthcare.[395] The bifurcation of responsibility often leads to the duplication of central and state government schemes[396] and also creates the possibility for blame-shifting between the Union and opposition-led states. Health care in India operates without an umbrella federal law on public healthcare,[397] although laws and subordinate

[389] "Out-of-pocket expenditure (% of current health expenditure) - Colombia, India, South Africa," World Bank Open Data, March 3, 2024 https://data.worldbank.org/indicator/SH.XPD.OOPC.CH.ZS?locations=CO-IN-ZA

[390] "Out-of-pocket expenditure (% of current health expenditure)," World Bank Open Data, March 3, 2024 https://data.worldbank.org/indicator/SH.XPD.OOPC.CH.ZS

[391] The ISC interpreting the Patents Act held that the cancer drug Novartis did not have a valid patent as otherwise abusive practices, such as evergreening of patents, would be permitted, see Novartis AG v. Union of India, (2013) 6 SCC 1.

[392] Sharma, "Health Care for India's 500 Million," 3.

[393] Part XI of the Constitution.

[394] Surma Das, "Maternal Health, Human Rights, and the Politics of State Accountability: Lessons from the Millennium Development Goals and Implications for the Sustainable Development Goals," *Journal of Human Rights* 17, no. 5 (October 20, 2018): 554.

[395] Peter Berman and Rajeev Ahuja, "Government Health Spending in India," *Economic and Political Weekly* 43, no. 26/27 (2008): 210. "Covid-19: The True State of Healthcare Expenditure in India," *Financialexpress*, December 8, 2020, https://www.financialexpress.com/opinion/covid-19-the-true-state-of-healthcare-expenditure-in-india/2145238/.

[396] By 2018 when the central health insurance scheme was launched, 24 out of 28 state governments had their own health insurance programs. States claiming to have more effective schemes opted out from the central universal health-care scheme launched in 2018, see Sharma, "Health Care for India's 500 Million," 11.

[397] A government-appointed committee had produced the Model Public Health Act as early as 1961, draft Health bill was also advocated since 2009, however such a law has not been adopted still.

legislation[398] such as the Insurance Regulatory and Development Authority of India Act 1999, Medical Devices Regulation Bill 2006, Clinical Establishments Act 2010, Drug (Price Control) Order regulate specific aspects of it.

Before embarking on the analysis of jurisprudence, a few remarks on the rarity of explicit healthcare lawsuits are warranted (by 2019, it was 0.2 per million).[399] Considering the flexibility of PIL proceedings and the seriousness and scale of health challenges, this reality seems counterintuitive. The frequency of health rights cases cannot be a reflection of the actual health needs in India. This is also confirmed by the fact that poorer states with more dysfunctional healthcare systems have fewer health rights lawsuits than the richer states with better ones.[400] In this reality, potential petitioners must be facing obstacles beyond formal access to flexible PIL, such as costs associated with litigation and actual physical access.[401] Furthermore, petitioners must be discouraged from utilizing the courts considering the expected delays of litigation while health needs are ordinarily time-sensitive, also the weak status of the right to health both in the Constitution and jurisprudence.

2.2. Weak Justiciability of the Right to Health in the Apex Court

The right to health as a justiciable guarantee is not included in the Constitution of India[402] but was created through judicial interpretation in the 1990s. The Court had briefly referred to the right to

[398] Bhardwaj, Johari, and Divan, "The Right to Health," 372-374; Uday Shankar, "The Vindicated Market and Vulnerable Health Care: Human Rights Perspectives from India," in *Socio-Economic Rights in Emerging Free Markets* (Routledge, 2015), 222, 233.
[399] Andia and Lamprea, "Is the Judicialization of Health Care Bad for Equity?" 61.
[400] Gauri and Brinks, "The Impact of Legal Strategies for Claiming Economic and Social Rights," 96.
[401] Jayanth K. Krishnan, "Social Policy Advocacy and the Role of the Courts in India" American Asian Review 21, no. 2 (2003): 91–124. Shankar and Mehta, "Courts and Socioeconomic Rights in India," Shylashri Shankar, *Scaling Justice: India's Supreme Court, Social Rights, and Civil Liberties* (Oxford University Press, 2009), 135.
[402] Art. 47 of the Constitution.

health even before, in cases on bonded laborers,[403] accessibility of life insurance[404] or conditions in mental hospitals. [405]

The right to health was expressly read into the right to life in the 1995 *Consumer Education* case regarding workers in the asbestos industry and next in a 1996 case, *Samity*, that concerned the denial of emergency health care. However, in essence, none of these cases led to binding substantive duties of the state emanating specifically from the right to health. Instead, both cases resembled tort claims that ended with compensation for the petitioners.

Consumer Education read in/extended standards to similar situations already protected by law aligning with the logic in *Olga Tellis*. International documents, such as the Universal Declaration of Human Rights (UDHR) and ICESCR, specifically its guarantee of safe and healthy working conditions (though not the right to the highest attainable standard of health), were referenced together with domestic constitutional provisions on state duties to provide welfare and just and humane conditions of work. In light of these standards, the ISC then read in International Labor Organization (ILO) guarantees into domestic legislation and broadened the existing legislative framework to include death and injury that manifested itself after retirement instead of the current rule limiting it to the period of employment. The Court also required that the health records be kept up to 15 years after the employment period.[406]

The *Samity* case entrenched the right to health for all in a specific context of denial of emergency

[403] The Court qualified stone quarry workers as 'bonded labourers' under the Bonded Labour System (Abolition) Act 1976 and ordered the state Government to formulate a rehabilitation scheme within a period of three months, see Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161.
[404] The Court stated that insurance policy excluding certain segments of population due to their low income had 'insidious and inevitable effect of excluding lives in vast rural and urban areas' and was contrary to the right to equality and the notion of socio-economic justice, see Life Insurance Corporation of India v. Consumer Education and Research Centre (1995) 5 SCC 482.
[405] The Court in this case issued detailed directions for improving administration of the mental hospital, see Rakesh Chandra Narayan vs State of Bihar (1989) SCC Supl. (1) 644, paras 29-30.
[406] Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42, paras 24-25, 42.

medical care due to the non-availability of beds simultaneously implicating the right to life of the petitioner. However, no binding standard based on the right to health emerged. The Court stated that '[f]ailure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life.'[407] This decision did not include a theoretical discussion of the right to health and its limits or refer to relevant international norms as would be expected. Comparing a patient's situation to that of a poor defendant in need of free legal aid, the Court stated that despite costs, India as a welfare state had the duty to make primary health facilities available in the whole country. However, given that the situation was eminently life-threatening, the resource-blind standard in *Samity* did not automatically extend to ordinary care, as also demonstrated below. Besides, the case concerned the negligent way of running existing hospitals without proper coordination, resulting in avoidable harm as opposed to the obligation to have them in the first place. As Khosla also observed, in this manner, *Samity* resembled the *Bihar* case, which discussed the adequacy of conditions in existing mental hospitals, rather than their availability in the first place.[408]

The Court in *Samity* did identify systemic problems and made recommendations, however, those did not turn into binding standards, nor was the implementation of those recommendations subject to court monitoring. In a non-binding manner, the ISC called for a positive state action to solve problems such as lack of facilities and beds in public hospitals (priorly also identified by a government committee) and incorporated recommendations of the court-appointed committee (e.g. on increasing the availability of beds, the establishment of a centralized referral system amongst hospitals) in its orders. The Court merely recommended that a 'time-bound plan'

[407] Paschim banga Khet Samity v. State of West Bengal (1996) 4 SCC 37, para 9.
[408] Khosla, "Making Social Rights Conditional," 756.

be formulated in accordance with Committee directions and did not keep the jurisdiction to ensure appropriate steps would be taken, did not request submission of information regarding public investments or other measures for improvement of the public health care infrastructure.[409] Without the Court's monitoring, only minor changes were made in the law, namely in the Code of Medical Ethics[410] and the Clinical Establishments Act 2010, which imposed a duty on private facilities to provide health services in case of an emergency medical condition, however, specified that this was to be done within the available staff and facilities.[411] The law did not refer to the proposed referral or coordination system discussed in the judgment either.[412] In this manner, the recommendations in the judgment remained non-binding and ineffective.

The Court's scrutiny was even less intensive when similar problems of emergency care and lack of facilities came back to the Court in a PIL petition concerning road safety in 2014. Interestingly, without mentioning *Samity* or the right to health, 18 years later, the ISC stated: 'What has been initiated by the Central Government, as stated in its affidavit, shall be suitably implemented and extended subject to the limits of its financial ability.'[413] Dissatisfied with implementation, in a follow-up order, the Court merely expressed hope about better implementation in the future[414] and did not seek more accountability through continuing mandamus and requests to present plans for compliance. This was despite the government authorities acknowledging the problem of timely access to emergency medical care and even producing relevant policy documents to address it.

[409] Paschim banga Khet Samity v. State of West Bengal (1996) 4 SCC 37; see also Singh, "Enforcing Social Rights through Public Interest Litigation," 112.
[410]Code of Medical Ethics Regulations 2002 drawn by the Medical Council of India also included an exception for emergency, when a physician has the duty to treat the patient.
[411] The Clinical Establishments (Registration and Regulation) Act 2010, section 12 (2)
[412] Bhardwaj, Johari, and Divan, "The Right to Health," 372.
[413] S. Rajashekaran v Union of India (2014) 6 SCC 36, para 31.
[414] S. Rajaseekaran v. Union of India, (2018) 13 SCC 516, para 18.

The right to health was also referenced in cases in which the Court merely enforced existing state duties.[415] Most illustrative examples relate to the reimbursement of government employees' healthcare expenditures. Even when the main question was whether the pay for staying in the hospital ward could be interpreted as an integral part of the treatment and if the actual amount charged was beyond the rate allowed as per the state policy, the Court still framed this as a question of constitutional obligations, denied the relevance of financial burden and, seemingly, to strengthen the symbolic meaning of the right to health, clarifying that by now it was a 'settled law' that the right to health was an integral part of the right to life.[416] The duties in the existing statute could have a constitutional status to the extent that the state had to provide what it had already undertaken, resembling the duty of non-regression under ICESCR;[417] however, this was not explicitly acknowledged in the judgment. Subsequent case law confirmed that the Court would accept a new policy advised by experts[418,] taking away even the guarantees included in the previous versions of the policy, emphasizing that no right was absolute but rather subject to 'permissible reasonable restrictions'.[419] The Court also identified the constitutional basis for consideration of costs, namely, Article 41 of the Constitution, which recognizes the limits of 'economic capacity and development' when providing for the right to public assistance in certain cases (e.g., unemployment, sickness).[420] Notably, in this case, the Court was reluctant to completely denounce the constitutional duty to provide a medical facility by clarifying that 'the State can

[415] The Court enforced conditions of the agreement between charity hospitals and government regarding reservation of a portion of beds for the poor as a condition for allotting land. The Court made extensive rights interpretations among others regarding state duties to provide 'life-saving drugs to have-nots at affordable prices' and duties of medical personnel to treat them when they have a dire health need, see Union of India v. Moolchand Khairati Ram Trust (2018) 8 SCC 321.
[416] State of Punjab v. Mohinder Singh Chawla (1997) 2 SCC 83, para 4
[417] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para 32, 48
[418] State of Punjab v. Ram Lubhaya Bagga (1998) 4 SCC 117, paras, 25-26, 29, 31.
[419] Ibid, para 35.
[420] Ibid, para 32.

neither urge nor say that it has no obligation to provide medical facility. If that were so it would be ex facie violative of Article 21. Under the new policy, medical facility continues to be given [..] but the amount of payment towards reimbursement is regulated.[421] Despite the ambiguity regarding the possibility of revoking medical coverage of government employees entirely if the resource constraints required, it is evident that regressive changes to the policy were acceptable despite the constitutional right to health. The entitlement when that was absent from a policy was easily disregarded in another case primarily discussed under the right to equality arguments (though mentioning the right to health) stating that there was no right to 'free and full medical facilities' and unless unlawful, arbitrary, or unreasonable, no state policy could be questioned. In this manner, the Court aligned with the limited conception of its role as an enforcer of existing obligations.[422]

An important area in which the Court's involvement in counteracting the lackluster attitude of the political branches impacted financial allocations for ordinary health care is access to HIV/AIDS medication. As noted in the Introduction, the HIV/AIDS epidemic was a catalyst for health rights litigation worldwide. India (as South Africa and Colombia) was no exception. However, the Court started to nudge the political branches to initiate a treatment program only once a policy shift was discernible in 2002. The Government formally started a National AIDs Control Program in 1987, which was mainly focused on prevention through punitive/compulsory measures,[423] while sex

[421] Ibid, paras 27-28.

[422] The Court rejected both challenges based on the prohibition of discrimination and the right to health and held that one-time contribution (from Rs.1,800 to Rs.18,000) to be made by ex-military servicemen was not 'excessive, disproportionate or unreasonably high' and 'getting free and full medical facilities' was not part of a fundamental right of ex-servicemen, see Confederation of Ex-Servicemen Assns. v. Union of India, (2006) 8 SCC 399, paras 64, 66-67.

[423] Based on the National AIDS Prevention Bill 1989, 'high risk' people could be subject to compulsory HIV testing and isolation, if found HIV positive, see Evan S. Lieberman, *Boundaries of Contagion: How Ethnic Politics Have Shaped Government Responses to AIDS* (Princeton, N.J: Princeton University Press, 2009). 208.

work, drug use, and homosexuality[424] remained criminalized. Only in 2002 did the government shift to a human rights-based approach, when the National AIDS Prevention and Control Policy (NAPCP) was drafted, and the National AIDS Control Organization (NACO) was established. Although the treatment dimension of the policy was still lacking, unlike in South Africa, drugs were provided to prevent mother-to-child transmission of AIDS.[425] The official justification for the failure to provide a universal treatment program was the cost of universal provision. This was despite India being a major supplier of generic drugs, accounting for 80% of donor-funded AIDS medicine for developing countries by 2004.[426]

Although the first PIL regarding access to HIV/AIDS medication was filed in 1998,[427]the Court started to issue PIL orders only in 2002, when policy shift was already discernible. The ISC nudged the political branches against the background of evolving policy with implementation shortcomings, which did lead to some state action then again subject to judicial scrutiny. The ISC demanded explanations from NACO why the universal treatment program was not launched. Soon, the policy to provide treatment to around 100,000 people in the six high-burden states was launched.[428] In 2005, the new head of NACO, Sujata Rao, engaged with the issue more proactively, followed by increased coverage.[429] Although still only 20% of the adult patients

[424] Eduardo J Gómez and Joseph Harris, "Political Repression, Civil Society and the Politics of Responding to AIDS in the BRICS Nations," *Health Policy and Planning* 31, no. 1 (February 2016): 62.
[425] Amy Waldman, "India Plans Free AIDS Therapy, but Effort Hinges on Price Accord With Drug Makers," *The New York Times*, December 1, 2003, sec. World, https://www.nytimes.com/2003/12/01/world/india-plans-free-aids-therapy-but-effort-hinges-on-price-accord-with-drug-makers.html.
[426] Brenda Waning, Ellen Diedrichsen, and Suerie Moon, "A Lifeline to Treatment: The Role of Indian Generic Manufacturers in Supplying Antiretroviral Medicines to Developing Countries," *Journal of the International AIDS Society* 13 (September 14, 2010): 4.
[427] Sahara House filed PIL in 1998. Two more PILs by Sankalp Trust and Human Rights Law Network were filed in 1999 and 2003, respectively. The PILs were joined together, see Sankalp Rehabilitation Trust v. Union of India 1999, Writ Petition (C) No. 512/1999.
[428] Eduardo J Gómez and Joseph Harris, "Political Repression, Civil Society and the Politics of Responding to AIDS in the BRICS Nations," *Health Policy and Planning* 31, no. 1 (February 2016): 62.
[429] Kavanagh, "Constitutionalizing Health: Rights, Democracy and the Political Economy of Health Policy," 235, 237, 239, 244, 246.

requiring anti-retroviral therapy (ART) therapy received one, by 2008, 172 HIV treatment centers were available, and the treatment program included second-line drugs.[430] In the same year, ART guidelines were developed in the 'Office Memorandum' issued by NACO, which became subject to the same PIL proceedings initiated on this issue. The legal challenge concerned the part of the memorandum which restricted access to treatment if the first-line treatment was not received in health centers registered with NACO. The ISC directed the parties to engage in consultations and produce an agreement. Although NACO was initially reluctant, in the end, an agreement was reached to extend access to all HIV patients regardless of the way the first-line treatment was received, which the Court endorsed in an interim order. The Court approved the plan that universal access to second-line treatment would be provided in a phased manner starting from pilot sites for 3 months, after which a Status Report identifying the needed 'capacity addition to proceed in a planned and phased manner' had to be submitted.[431] Until 2013, when the case was closed, multiple orders were issued, including requests for progress reports and plans.[432] In 2017, the legislature adopted the HIV bill with a robust treatment commitment, which extends care to all people living with HIV.[433]

The Court, in this case, did seem to accelerate the universal rollout of the treatment program by nudging - increasing the pressure on the Government and NACO, as well as by strengthening the latter as a body more favorable towards the rollout of universal treatment. However, the policy change achieved could not be traceable to an authoritative judgment, rather the pressure generated through interim orders. Furthermore, the Court did not generate political attention from scratch but

[430] NACO, *Country Progress Report 2008: India* (NACO, 2010), 23.
[431] Sahara House v. Union of India W.P. (Civil) No. (s) 535 of 1998; Anand Grover, Maitreyi Misra, and Lubhyathi Rangarajan, "Right to Health: Addressing Inequities through Litigation in India," in *The Right to Health at the Public/Private Divide: A Global Comparative Study*, ed. Aeyal Gross and Colleen M. Flood (Cambridge University Press, 2014), 398-399.
[432] Sankalp Rehabilitation Trust v. Union of India 1999, Writ Petition (C) No. 512/1999.
[433] Kavanagh, "Constitutionalizing Health: Rights, Democracy and the Political Economy of Health Policy," 250.

acted upon initial political will, increasing the political cost of inaction through interim court orders. As Kavanagh noted: 'Rather than ordering particular policy, the Court forced government to justify its choices, demanded information, and provided an opportunity for a group with limited political power and clout to demand action.'[434]

The Court's practice of nudging the political branches without imposing binding obligations and breaching the SoP is also evident in the recent decision on access to abortion, in which the ISC went to great lengths in stressing the positive obligations for effective access to abortion, despite the case decided entirely on the right to equality grounds.[435] Anything related to new obligations and costs based on the right to health beyond the non-discrimination claim, for instance, the directions to ensure the availability and affordability of the medical facilities and registered medical practitioners, was characterized by the Court as mere 'recommendations'.[436]

To sum up, the right to health in India is situated between non-justiciability and weak substantive rights.[437] *Samity* was essentially a right-to-life case, set minimal standards regarding emergency health care, and was limited to duties of compensation in a tort-like manner. Although the Court tried to focus attention on structural problems such as a lack of facilities and beds (a problem that the government also acknowledged), jurisdiction was not retained, and the directions remained recommendatory and ineffective. Eighteen years after *Samity*, the Court's scrutiny was even weaker on the same issue, again putting trust in the good faith of the political branches. The judgments that followed merely required the enforcement of existing state duties. Once the

[434] Ibid.
[435] The Court held that prohibiting unmarried or single pregnant women from accessing abortion while allowing married women to access them during the same period would contradict the right to equality, see X v. Principal Secretary. Health and Family Welfare Department, (2022) SCC OnLine SC 1321
[436] Ibid, para 134.
[437] Shankar, *Scaling Justice*, 149.

political decisions changed, the judiciary accepted it without holding it in contradiction with some systemic theory of the right to health. At best, the ISC stepped in to nudge political branches in a certain direction as it was in PIL litigation on access to HIV/AIDs medicine, later approving commitments made by an appropriate government agency itself as a reaction to this nudging. The discussion of the COVID-19-related jurisprudence below will show that no substantive change followed in the theory of the right to health and SoP in a crisis context.

2.3.Nudging for the Right to Health in a Crisis

Unlike regular health challenges in normal times, the pandemic of communicable diseases such as COVID-19 attracts concentrated attention from the public and political branches. This factor is a double-edged sword, on the one hand, entailing prospects of effectiveness and, on the other hand, mistakes, abuses, and centralization of power. Most importantly for this dissertation, as noted, during a crisis such as the COVID-19 pandemic, changes to traditional frameworks, including to SoP, are more likely (see Introduction, Section 3). The section below will show that despite such a potential, the COVID-19 pandemic did not lead to substantive changes in the right to health and SoP theories developed by the ISC. Before embarking on jurisprudence analysis, an overview of the dynamics of pandemic management and the legal framework in which the relevant health rights cases arose is warranted.

Both central and state governments, who share competencies in responding to a pandemic like COVID-19, resorted to legal instruments allowing rule by decree without judicial oversight. The Disaster Management Act (DMA) relied on by the Union government in the absence of an

emergency on public health grounds in the Constitution, and the national public health law[438] allowed rule by decree without prior mandatory confirmation by the legislature. Although, in theory, the decrees could be annulled by agreement of both houses of the legislature, this was not the case as the parliament was not convened for a prolonged period. The pandemic was managed through the Disaster Management Authority (NDMA) chaired by PM Modi. Similarly, state governments relied on an outdated Epidemic Diseases Act of 1897 to enact necessary public health measures without legislative oversight.[439]

Due to a lack of legislative oversight and the crisis context, decisions taken by the central government were not the result of deliberative processes. While some state action showed positive signs of pandemic management, others adopted in non-deliberative processes endangered a vast array of rights, or were not sufficient, among other things, to ensure against the dramatic vulnerability of the healthcare system that works to its full capacity even during normal times. Some rights-friendly state action was discernible in the production of vaccines and the vaccination process,[440] imposition of price caps (e.g. for testing, treatment, hospital beds, and vaccines at private facilities) both at the Union[441] and state levels.[442] On the other hand, invoking DMA on 24 March 2020, the federal government imposed a nationwide strict lockdown, taking effect within

[438] Disaster Management Act (2005), sect. 6, 10, 38, 62, 72.

[439] When it was convened laws were passed without much deliberation, see Thulasi K. Raj, "COVID-19 and the Crisis in Indian Democracy," *Verfassungsblog*, February 26, 2021, https://verfassungsblog.de/covid-19-and-the-crisis-in-indian-democracy/. Stephen Thomson and Eric C Ip, "COVID-19 Emergency Measures and the Impending Authoritarian Pandemic," *Journal of Law and the Biosciences* 7, no. 1 (July 25, 2020): 20-22; Reeta Chowdhari Tremblay and Namitha George, "India: Federalism, Majoritarian Nationalism, and the Vulnerable and Marginalized," in *Covid-19 in Asia*, by Reeta Chowdhari Tremblay and Namitha George (Oxford University Press, 2021), 173–88. Gautam Bhatia, *Unsealed Covers: A Decade of the Constitution, the Courts and the State* (HarperCollins India, 2023), 343.

[440] India surpassed the global average with 54% of the population completely vaccinated by February 2022.

[441] "Government Caps Prices of COVID-19 Vaccines at Private Hospitals," *The Hindu*, June 8, 2021 https://www.thehindu.com/news/national/high-cost-of-vaccination-at-private-hospitals-unacceptable-paul/article34763106.ece.

[442] "'Exorbitant' COVID-19 Treatment Prices Slashed As State Governments Step Up," *IndiaSpend*, August 4, 2020, https://www.indiaspend.com/exorbitant-covid-19-treatment-prices-slashed-as-state-governments-step-up/

four hours,[443] which led to a migration crisis of urban workers compelled to return to places without means of transportation or subsistence. As problems started to deteriorate, namely when the shortage of oxygen, medicine, and other supplies was most acute, the Union government decided to relinquish control to the states. As commentators described it, 'the pendulum moved from outright centralisation to unilateral decentralisation.'[444] Among other things, the Union government delegated the vaccination of the group between 18 to 44 years to states – a decision reversed following the ISC ruling on the issue discussed below.

In the absence of legislative scrutiny, by initiating *suo moto* cases, the Court marked itself as a central actor in the management of the COVID-19 pandemic within the first month of the WHO declaration of a global pandemic.[445] The push to interfere seemed to originate from the active HCs, which led the ISC to state that it would not be 'a silent spectator' and complement the work of the HCs.[446] The ISC was present in managing the pandemic in cases addressing the problems of migrant workers after a short notice lockdown (though only after the state had made some arrangements);[447] workers with reduced labor protection (in the State of Gujarat);[448] prisoners in congested facilities;[449] children in protective homes;[450] or patients in the hospitals.[451] Some of the court orders were aimed at the

[443] Lockdown in India meant 'stay at home' orders, complete ban on transport and flights, closure of schools, non-essential shops and prohibition on assembly and events. Sudden national lockdown had disproportionate effect on the most vulnerable, including around 450 million migrant workers, compelled to walk from urban centers to home states. From April 29, exceptions were made to the lockdown for certain groups, including migrant workers and the restriction of movement was further relaxed in phases from June 2020.

[444] Niranjan Sahoo and Ambar Kumar Ghosh, "The COVID-19 Challenge to Indian Federalism," ORF Occasional Paper No. 322, June 2021, Observer Research Foundation. https://www.orfonline.org/public/uploads/posts/pdf/20230817125735.pdf

[445] Re: Contagion of Covid 19 Virus in Prisons (2020) SCC OnLine SC 344 (23 March, 2020).

[446] Samanwaya Rautray, Swati Mittal, and Raghav Nair, "Supreme Court Says It Can't Be Mute Spectator in National Crisis, Doesn't Intend to Supplant High Court Cases on COVID-19," *The Economic Times*, April 27, 2021, https://economictimes.indiatimes.com/news/india/supreme-court-says-it-cant-be-mute-spectator-in-national-crisis-doesnt-intend-to-supplant-high-court-cases-on-covid-19/articleshow/82272599.cms.

[447] Problems & Miseries of Migrant Labourers (2020) 7 SCC 231 (orders of May 28, June 9 and June 29, 2021)

[448] Gujarat Majdoor Sabha v. State of Gujarat, IVLLJ 257 SC (2020).

[449] Re: Contagion of Covid 19 Virus in Prisons, 2020 SCC OnLine SC 344 (23 March, 2020).

[450] Re: Contagion of Covid 19 Virus in Children Protection Homes (2020) 15 SCC 280.

[451] The Court ordered creation of help desks in hospitals and ordered that free-help lines were run to collect grievances, see Re: Proper Treatment of Covid-19 Patients & Dignified Handling of Dead Bodies in the Hospitals (2021) 2 SCC 519 (December 18, 2020).

implementation of existing guidelines (e.g. on discharge policies, supply of PPE)[452] or the reflection of government commissioner expert opinions in them (e.g. reasonable rates of Covid facilities/tests).[453]

Despite this activist posture, the cases discussing the right to health were ordinarily dealt with in programmatic orders and/or did not overstep the SoP boundaries. In a suo moto case, the ISC even explicitly referred to the dialogic/bounded deliberative justice framework, implying the Court's role in facilitating a 'dialogue of [..] the UOI, the States and this Court' by demanding justifications from the political branches and without usurping their role.[454] Indeed, both before and after laying this theoretical ground, the ISC held political branches accountable by requesting clarifications, suggesting policies, issuing general directives, requiring plans, and striking down aspects of policy based on the narrow rationality standard. The Court orders did not differ depending on whether the right to health was explicitly referenced or not. The weak directions, including the submission of plans addressing specified issues without set content, may have ultimately affected the decision-making process. However, the final say was left to the political branches. For instance, the Court issued general directions/recommendations to increase testing,[455] domestic production, and stock of PPE, import,[456] or the supply of oxygen from outside India.[457] Some of the recommendations were presented as a mere possibility that the Central Government could consider, for instance, constituting a special team to prosecute those who sell medicine at exorbitant prices or are involved in black marketing, stressing that it was up to the Government to decide.[458] The Court also discussed the possibility of invoking the

[452]Jerryl Banait v. Union of India, 2020 SC 357.
[453]Re: Proper Treatment of Covid-19 Patients & Dignified Handling of Dead Bodies in the Hospitals (2021) 2 SCC 519 (December 18, 2020).
[454] Re: Distribution of Essential Supplies and Services During Pandemic, 2021 SC 355 (April 30, 2020), para 35.
[455] Re: Proper Treatment of Covid-19 Patients & Dignified Handling of Dead Bodies in the Hospitals (2021) 2 SCC 519 (December 18, 2020).
[456] Jerryl Banait v. Union of India, 2020 SC 357
[457] Ibid, para 31 (3).
[458] Re: Distribution of Essential Supplies and Services During Pandemic, 2021 SC 355 (April 30, 2020). para 61

Patents Act 1970 and the Drugs Price Control Order 2013 for granting compulsory licenses and regulating drug prices, respectively.[459] The Court also ordered to devise plans, for instance, a uniform national policy on admission to hospitals in the exercise of its statutory powers under the DMA, specifying the issues that had to be addressed in the policy. Occasionally, the ISC revoked rules in accordance with the rationality standard, for instance, when arrival in a government-run ambulance or possession of a valid ID card was required for hospital admission.[460] The ISC also requested a plan on how the capital's demand for oxygen would be met, specifying issues it had to cover and making a suggestion to consider a successful Mumbai model.[461] An insistence on judicial restraint was also evident in an unreported ruling of May 21, in which a two-judge bench disapproved of the Allahabad HC's order requiring that each of the 97,000 villages be provided with two ambulances with Intensive Care Unit facilities. According to the ISC, courts should not issue orders that would not be 'humanely impossible' and cannot be implemented.[462] Posing the question of how far courts can enter the issues exclusively in the executive domain, the Court stated that HC orders should be treated as advice rather than directives to the state Government.[463]

The Court again showed restraint when deciding the petition requesting the regulation of COVID-19 treatment prices. Reminding the political branches of existing powers under DMA, the ISC ordered the political branches of the center to exchange information with the states and devise a

[459] Ibid, para 42, 51.
[460] Ibid, para 23 (1) (II), (III).
[461] Union of India v. Rakesh Malhotra, 2021 SC 391, para 23.
[462] "Supreme Court Stays Allahabad HC's 'Ram Bharose' Covid Order, Says 'Not Implementable,'" Hindustan Times, May 21, 2021, https://www.hindustantimes.com/india-news/supreme-court-stays-allahabad-high-court-s-ram-bharose-covid-order-101621612584654.html. Dhananjay Mahapatra, "High Courts Must Not Pass Unrealistic Orders: Supreme Court," *The Economic Times,* May 22, 2021, https://economictimes.indiatimes.com/news/india/high-courts-must-not-pass-unrealistic-orders-supreme-%20court/articleshow/82851614.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.
[463] "Can Courts Venture into Executive Domain on COVID-19 Management and How Far, SC to Examine," *The Economic Times,* July 14, 2021, https://economictimes.indiatimes.com/news/india/can-courts-venture-into-executive-domain-on-covid-19-management-and-how-far-sc-to-examine/articleshow/84407445.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

plan focused on the marginalized sections of society. The decision included a lengthy consideration of the provisions in the National Health Bill, 2009, which 'did not see the light of the day', implying that it would have helped solve the present problems.[464]

The same judicial restraint is to be read from the judicial flexibility towards own decisions – reversals when prior orders prove unsustainable and/or political branches do not go along with them. This was the case when the ISC initially found *prima facie* substance in the petition to make COVID-19 testing free[465] but reversed the position once confronted with the appeal from the private labs. Both orders were made without explicitly discussing relevant constitutional standards. It is noteworthy that the first order did not emerge in a vacuum, as a similar initiative of the central government was announced on March 10, 2020.[466] However, without much ado, when faced with opposition from the private labs, the Court stated that 'sufficient cause' had been made to modify its order. Noting that 'framing of the scheme and its implementation are in the Government domain, who are the best experts in such matters', the Court only suggested that Government considers if 'any other categories of persons belonging to economically weaker sections of the society' beyond those already covered by the government scheme can benefit from free testing. Although private labs could continue to charge fees as before, the Court stated that the central government 'may issue' necessary guidelines for the reimbursement of free testing performed by

[464] Sachin Jain v. Union of India, 2020 SC 1085.

[465] MZM Nomani and Faisal Sherwani, "Legal Control of COVID-19 Pandemic & National Lockdown in India," *Journal of Cardiovascular Disease Research* 11, no. 4 (2020): 32–35.

[466] Gautam Bhatia, "Coronavirus and the Constitution – XI: The Supreme Court's Free Testing Order," *Indian Constitutional Law and Philosophy*, April 9, 2020, https://indconlawphil.wordpress.com/2020/04/09/coronavirus-and-the-constitution-xi-the-supreme-courts-free-testing-order/. Gautam Bhatia, "Coronavirus and the Constitution – XVI: The Supreme Court's Free Testing Order – A Response (3) [Guest Post]," *Indian Constitutional Law and Philosophy*, April 11, 2020, https://indconlawphil.wordpress.com/2020/04/11/coronavirus-and-the-constitution-xvi-the-supreme-courts-free-testing-order-a-response-3-guest-post/. "How the Supreme Court's Order on Free COVID-19 Testing Can Be Implemented," The Wire, accessed March 16, 2024, https://thewire.in/law/supreme-court-free-covid-19-tests-implementation. Arghya Sengupta, "Good Intentions Gone Awry: Supreme Court Wades into Policy Questions by Ordering Free Covid-19 Tests," *The Times of India*, accessed March 16, 2024, https://timesofindia.indiatimes.com/blogs/toi-edit-page/good-intentions-gone-awry-supreme-court-wades-into-policy-questions-by-ordering-free-covid-19-tests/.

private labs.[467] As Bhatia emphasized, the Court did not provide substantiation for its 'flip-flops' and did not even scrutinize a factual claim that the test price had been determined through consultation with experts, which was not evidentially supported in the reports submitted by the Government.[468] This case further confirms the ISC's practice of nudging the political branches with the possibility of backtracking rather than providing principled and final resolutions, which is made easier through the flexibility of interim orders characteristic of PIL.

The weakness of the apex court's scrutiny is best captured in the decision concerning the New Liberalized Vaccine Policy when the ISC was faced with an unfavorable Union position towards its judgment. According to the new policy, the procurement of vaccines for the 18-44 age group was delegated to states, while the price charged for vaccine procurement by states would be more than double the amount charged to the Union with no guarantee that vaccines would be provided free of charge to the relevant age group in respective states. Apart from 25% of vaccines procured by states, the other 25% would be procured and distributed by private hospitals. The government had insisted on this policy despite prior criticism from the opposition[469] or the ISC expressed in an earlier interim order.[470] In the follow-up order, the ISC was again concerned, for instance, that the state would have to pay more than the Union for the same quantity of vaccines, that the rationale of incentivizing production behind the chosen policy could not be realized[471] that

[467] Shashank Deo Sudhi v. Union of India (2020) 5 SCC 134

[468] Bhatia, *Unsealed Covers*, 347.

[469] The President of the Congress Party had sent a letter to the Prime-Minister asking to reverse the policy, "Vaccine Policy Discriminatory, Reverse It: Sonia Gandhi to PM Modi," Business Standard, April 22, 2021, https://www.business-standard.com/article/current-affairs/vaccine-policy-discriminatory-reverse-it-sonia-gandhi-to-pm-modi-121042200598_1.html.

[470] Re: Distribution of Essential Supplies and Services During Pandemic, 2021 SC 355 (April 30, 2020).

[471] The Court was concerned that in a competition for a scarce resource state governments would be in a much worse negotiating position than the Union, while two conditions for negotiation with the two manufacturers - price and quantity - were preset by the Central Government that would erase the incentives for increased production, see Re: Distribution of Essential Supplies & Services during Pandemic (2021) 7 SCC 772 (May 31, 2020), paras 9, 29, 32, 33.

unavailability of resources was not proven.[472] Eventually, the Court declared the New Liberalized Vaccine Policy *prima facie* irrational and arbitrary. The right to life encompassing the right to health was mentioned by passing and was not elaborated on. The Court primarily based its conclusions on the fact that with the mutation of the virus, the 18-44 age group was also in serious need of vaccines, and the policy did not prioritize the more vulnerable, even within that group.[473] The reasoning did imply that the current form of the policy was not constitutionally acceptable. However, even the statement about its irrational and arbitrary nature was subject to *prima facie* qualification. This led the Court to order a revisitation of the policy rather than a declaration of it as void. The attachment of *prima facie* qualification to a case meeting even the weak rational basis test seems odd. This resembles the judicial power in Canada and the UK, where final judicial decisions can be overruled/ignored by the firm position of the political branches, often associated with the theory of dialogic review (see Chapter 1).[474] Indeed, the Court, in this order, reiterated its dialogic/deliberative approach to judicial review.[475] Given the weakness of the final direction to merely revise the policy (rather than make it void), which was declared *prima facie* irrational and arbitrary, the judicial role conception as part of the SoP doctrine remained limited and even fell short of the general position.

Despite the weakness of the review, the Government reversed the new policy and returned to a centralized procurement of vaccinations a week after the Court order. The PM now shifted the blame on opposition-ruled states as drivers for the now discarded decentralized policy.[476] This

[472] For instance, the Court asked why the earmarked funds could not be utilized for vaccinating persons in the aged group 18-44, see Re: Distribution of Essential Supplies & Services during Pandemic (2021) 7 SCC 772 (May 31, 2020).
[473] Re: Distribution of Essential Supplies & Services during Pandemic (2021) 7 SCC 772 (May 31, 2020), para 22.
[474] Supra note 104-105.
[475] Re: Distribution of Essential Supplies & Services during Pandemic (2021) 7 SCC 772 (May 31, 2020), paras 15, 19.
[476] The Union Government would purchase 75% of vaccines. However, what remained unchanged was the quota for the private sector, namely the 25% of all vaccine, H. Sharma, "After Adverse Reaction, a Change in Dose: Free Covid Vaccines for All, Only

exchange indicates that the Court decision had increased the political cost of maintaining the policy to the extent that the Government wanted to disassociate itself from it, while prior objections from the opposition had not been sufficient for such a change.

Exceptionally, on the face of it, the Court engaged in a strong form review. However, as in general SoP and social rights cases, this was done only when state authorities had made appropriate assurances. For instance, without referring to the right to health, the ISC directed the Central Government to solve the deficit in the supply of oxygen in the National Capital Territory of Delhi (NCT) within 2 days, and to create a decentralized emergency stock of oxygen within the next 4 days, to be refilled daily in collaboration with the States. These orders followed respective assurances made in the government affidavits. The Central Government admitted that the allocation remained the same despite the rising demand and gave assurances that the supply would align with the demand and the issue would be solved completely 'in a spirit of co-operation'.[477] When the Government raised the issue of limited supply later, the Court referred back to previous affidavits confirming the root problem was deficiencies in distribution, rather than the scarcity of oxygen itself.[478] Thus, a 'strong form' review was exercised by the ISC in the context of government assurances made within the flexible interim order proceedings aligning with the general logic of weak review in India.

To sum up, despite the activist posture during the COVID-19 pandemic (e.g. ISC initiated cases and retained jurisdiction over them), in principle, judicial review over health rights converged in normal times and crises. The Court issued non-binding orders (to revisit the policy) when the

Centre to Procure," *The Indian Express* (blog), June 8, 2021, https://indianexpress.com/article/india/pm-narendra-modi-address-free-jabs-centre-to-procure-covid-vaccines-7348171/.

[477] Re: Distribution of Essential Supplies and Services During Pandemic, 2021 SC 355 (April 30, 2020), paras 19-21.

[478] Ibid, para 32

government was committed to a policy even as the rationality test and the right to equality also applied. In contrast, categorical orders issued were either non-final (modified if objected to) or preceded by acquired political commitments. In this manner, the right to health was brought from the backdoor through nudges (for a definition, see Chapter 1, Section 5) and was not authoritatively demanded because of the right to health.[479] Thus, the SoP remained intact through health rights even in a public health emergency context.

2.4. Right to Health in HCs: Outliers?

This section shows that there is no alternative theory of SoP and the right to health on the HC level, as potential divergences remained exceptions and/or were justified on grounds beyond social rights.

The Delhi HC came closest to diverging from the SoP theory of the ISC when it granted individual access to an orphan drug in the *Ahmed* case. The Court ordered immediate financing of the expensive medicine for the petitioner's rare Gaucher disease without prior legislative regulation of that matter.[480] When reaching this conclusion, the Dehli HC referred to the state's non-derogable duty and held that the presence of a regularly updated policy for essential medicine was insufficient; the exorbitant price for an orphan drug alone was a violation; and scolded the Government for failing to address the issue systematically. While the structural problems were discussed at length, only an individual remedy was issued, counterintuitively, finding more SoP

[479] In a brief overview of the judicial involvement in the COVID-19 pandemic in suo moto cases, Ajoy Karpuram relates the developments to the phenomenon of 'nudging' introduced by Thaler and Sunstein, see Ajoy Karpuram, "Executive Silence and the Unconventional Role of the Judiciary," Supreme Court Observer, June 6, 2021, https://www.scobserver.in/journal/executive-silence-and-the-unconventional-role-of-the-judiciary/

[480] The Court stated that 'no Government can say that it will not treat patients with chronic and rare diseases due to financial constraint. It would be as absurd as saying that the Government will provide free treatment to poor patients only for stomach upset and not for cancer/HIV/or those who suffer head injuries in an accident!'

problems with structural orders than the individual enforcement of the right to health. In the Court's words, '[k]eeping in view the concept of separation of powers [..], this Court cannot direct Parliament to enact a Central legislation on Right to Public Health or with regard to rare diseases or orphan drugs, even though the same may be eminently desirable.'[481] The fact that the case concerned an orphan drug capable of prolonging life - cannot be ignored when qualifying the case as an outlier. The specific situation of those subject to rare diseases is widely recognized, [482] often discussed under the so-called 'rule of rescue' which calls for a commitment not to abandon individuals needing highly specialized rare treatments (see Introduction, Section 3).[483]

That fact that *Ahmed* remains an exception was also visible in the subsequent jurisprudence of the Delhi HC, which reverted to judicial restraint. This litigation concerned the rejection of insurance for rare genetic diseases by the Employee State Insurance Corporation based on eligibility criteria unrelated to health needs, to which the Court reacted by nudging the political branches (e.g. by requesting a government meeting). In these proceedings, the Delhi HC issued categorical interim orders only once the political branches had made some commitments (even if brought about under court pressure) and, where possible, applied the 'liberal' interpretation of the statutes.[484] The Court nudged the political branches in certain directions without directly implicating resource allocations. For instance, it stated that the unspent budget allocated in previous years for treating rare diseases is to be spent both for funding treatments and Research and Development (R&D) activities.[485] These nudges ultimately led to a Draft National Policy for Rare Diseases, based on

[481] Mohd. Ahmed v. Union of India, (2014) 6 HCC (Del) 118, para 44.
[482] Regulation (EC) No 141/2000 of the European Parliament and of the Council of 16 December 1999 on Orphan Medicinal Products," 018 OJ L (1999).
Regulation (EC) No 141/2000 of the European Parliament and the Council of 16 December 1999 on orphan medicinal products.
[483] Supra note 36.
[484] According to the Court, eligibility criteria introduced by Employee State Insurance (ESI) Corporation conflicted with ESI Act, life-saving treatment for rare diseases could not be held unreasonable by ESI corporation, and no minimum term of service could be held as impediment to access such benefits.
[485] Baby Devananda D. v. Employees State Insurance Corporation, 2017 Del 12779

which more categorical orders followed, for instance, on the establishment of a Rare Disease Committee determining the terms for its operation. Unlike *Ahmed*, direct individual remedies were not given, and petitioners were directed to address the Rare Diseases Committee to process their claims.[486]

The HC of Madhya Pradesh similarly approached the financing of rare diseases. In that case, the HC only ordered the timely finalization of a policy already being formulated and disproved the access criterion of 'Below Poverty Line' (BPL), which could be interpreted as a right to equality issue.[487] As for the HC outliers during the COVID-19 pandemic, Bombay HC came closest when it ordered budget allocation by entitling asymptomatic frontline doctors to periodic RT-PCR testing. However, this case could also fall under the right to equality and was an exceptional case considering the obligation of frontline doctors to serve under the constant threat of contracting the virus, hence, an unequal position imposed on them vis-à-vis those not facing that threat.[488]

2.5. Conclusion

The prevalent SoP doctrine in India prevented a radical development and enforcement of social rights and the right to health, in particular. Largely aligning with the limited conceptualization of a judicial role within general SoP doctrine, adjudication standards of the ISC are even weaker in social rights cases than others, including those concerning the more technocratic (less distributive) positive duties of the state. The adjudication standards are weak to the extent that constitutional social rights, as opposed to statutory rights, are barely justiciable.

[486] Arnesh Shaw v. Union of India, 2021 Del 1331
[487] Prajwal Shrikhande Vs. State of M.P. and others Writ Petition No. 18974/2018 [June 22, 2020].
[488] Citizen Forum For Equality v. State of Maharashtra, 2020 Bom 695; The Court called 'ridiculous' the state argument that testing of frontline workers in the pandemic would be indiscriminate use of testing capacity.

Despite a broad approach to its *ratione materiae* jurisdiction and a few distinct areas in which the ISC emerged as a 'commander' (e.g. judicial self-appointment), the Court reviewed the political branches' action/inaction mostly in terms of existing statutory obligations or assurances/commitments, often coaxed within the flexible PIL proceedings (itself instituted in line with the political will of the day). Flexible interim orders, continuing mandamus, and outsourced expert opinions, often including government officials, did the lion's share of work in coaxing the political commitments and/or legitimizing court orders. In the absence of existing duties or some form of political commitments, the ISC limited itself to non-binding directions, in the Court's words, aimed at 'prodding' the political branches. Occasionally, the ISC extended legislative guarantees, arguing that such interpretations are indispensable to the aims of legislation resembling the correction of a 'blind spot' (see Chapter 1, Section 5). However, unlike the examples given by Dixon,[489] the correction of 'blind spots' by the ISC found its legitimacy in the existing legislative framework, resonating with the type of judicial review in India, for which the pre-existence of the legislation or political commitment is decisive. In exceptional cases, the ISC stepped in with judicially formulated rules, giving political branches the freedom to override them, putting the measure back within the limits of SoP and dialogic justice (see Chapter 1, Section 3).[490]

This is in line with what happened with social rights cases, without much elaboration of their genuine fundamental nature (except for the right to housing in *Olga Tellis*) with somewhat less intensity and frequency of categorical orders than in cases concerning more technocratic dilemmas.

[489] Supra note 155.
[490] Shylashri Shankar, "The Judiciary, Policy, and Politics in India," in *The Judicialization of Politics in Asia* (Routledge, 2012), 58.

Means-end analysis, as present in civil and political rights review, did not migrate to social rights, except a very narrow procedural requirement of notification in *Olga Tellis*. This attested to the weak status of these rights not subject to standards beyond the narrow *Wednesbury* rationality review. This situates social rights between non-justiciability and weak substantive rights without a major 'turn' (at least doctrinal and consistent[491]) often observed and criticized.[492] Indeed, courts institutionally predisposed to do so (e.g. due to fragmented bench structure, fast turnover of judges, less attachment to precedent, ideological exposure of judges) are more malleable to new (often non-poor) framers of PIL petitions.[493] In view of the hollow doctrinal ground for social rights coupled with the polyvocality of the apex Court, occasional deviations in rights language and orders should not strike as odd.

Health rights, both on the ISC and HC levels, confirmed this conclusion on social rights. The only potential outlier *Ahmed* case was extraordinary on facts with Delhi HC soon reverting to the general modus operandi of weak nudging. As social rights, right to health was also conditional on the existing entitlements or political acquiescence/commitments often made under the pressure of court proceedings. In the absence of commitments from the political branches, the ISC merely issued recommendations or reversed its position. In this manner, seemingly categorical/managerial orders codifying already achieved political acquiescence/assurances co-exist with soft remedies when the political branches are opposed at

[491] Sudhir Krishnaswamy and Madhav Khosla, "Social Justice and the Supreme Court" in *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India*, ed. Mayur Suresh and Siddharth Narrain, (Orient Blackswan, 2014), 112.
[492] For a review of the relevant literature see Arun K. Thiruvengadam. "Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India" in *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India*, ed. Mayur Suresh and Siddharth Narrain (Orient Blackswan, 2014), 519-524. Prashant Bhushan, "Supreme Court and PIL: Changing Perspectives under Liberalisation," *Economic and Political Weekly* 39, no. 18 (2004): 1770–74. Varun Gauri, "Public Interest Litigation in India: Overreaching or Underachieving?" *World Bank Policy Research Working Paper* No. 5109 (2009): 13.
[493] Fredman, *Human Rights Transformed*, 137-141.

the other end of the continuum. By deploying stronger scrutiny only in the absence of explicit objection from the political branches, the ISC mitigates damage to its legitimacy while making the most out of the political costs of inaction. In this manner, the ISC partners with the political branches, exercising a more strategic rather than a principled review. Still, as best illustrated through the COVID-19 health rights jurisprudence, dialogic review in India had the capacity of nudging the political branches, coaxing the political commitments/assurances to be acted upon later, even if at the expense of the distinct judicial function of conclusively deciding cases based on binding judicially manageable standards.

This argument sits uneasily with the scholarship portraying the ISC jurisprudence as the textbook example of judicial activism[494] (not an uncontested[495] or uniform notion[496] itself), indicating the belief that the apex Court transforms the distribution of powers.[497] Some even characterize PIL cases as 'command-and-control' jurisprudence.[498] Challenging this narrative, this Chapter agrees

[494]Cassels, "Judicial Activism and Public Interest Litigation in India," 495. Arvind Verma, "Taking Justice Outside the Courts: Judicial Activism in India," *The Howard Journal of Criminal Justice* 40, no. 2 (2001): 148–65. S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 2nd edition (Oxford: Oxford University Press, 2003), 251, 278-282. Tehmtan Rustomji Andhyarujina, "The Unique Judicial Activism of the Supreme Court of India," *Law Quarterly Review* 130 (2014): 53–67. Bhagwati, "Judicial Activism and Public Interest Litigation," 569. Mehta, Pratap Bhanu. "India's Unlikely Democracy: The Rise of Judicial Sovereignty." Journal of Democracy 18, no. 2 (2007):73; Venkat Iyer, "The Supreme Court of India," in *Judicial Activism in Common Law Supreme Courts*, ed. Brice Dickson (Oxford University Press, 2007), 131.

[495] Activism is sometimes described in quantitative terms, namely that the more courts find government actions unconstitutional, the more activist they are, see Shankar, "India's Judiciary,"166. .

[496]As Khosla notes 'decisions may exhibit activism by some standards and restraint by others' see Madhav Khosla, "Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate," *Hastings Int'l & Comp. L. Rev.* 32, no. 1 (January 1, 2009): 55.

[497] Christine M. Forster and Vedna Jivan, "Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience," *Asian Journal of Comparative Law* 3 (January 2008): 4.

[498] Arun K. Thiruvengadam. "Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India" in *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India*, ed. Mayur Suresh and Siddharth Narrain (Orient Blackswan, 2014), 525, 527.

with scholars arguing that the ISC is prone to acting strategically[499] as an 'embedded negotiator'[500] without strong adherence to principles and RoL with its legitimacy derived from the 'ability to satisfy different agendas and to intervene through affirmance of the prevailing gestalt […].'[501] As the recent work by Fischer also observes, judicial power leans towards some nudging - 'the realm of influence, shaping the preferences of other actors through noncoercive judicialization of political discourses.'[502] Friedman and Maiorano similarly note that the Court's judgments often seem more intrusive than they are because they entail ordering the government to do what it is already committed to doing but has not done.'[503] Similar observations are made by Khosla, Shankar, Bhatia, Young,[504] Cassels,[505] Singh,[506] Ahmad & Haitan,[507] Gauri & Brinks[508] specifically in the social rights context. According to Shankar, the ISC negotiates 'with the laws, political configurations, institutional, and societal concerns to construct judgments […] perceived as legitimate by these elements'[509] – an approach that is unchanged in the health rights context.[510] Khosla also refers to prior legal instruments that the Court is enforcing under social rights, elevating them to a constitutional status.[511] Reflecting on the COVID-19 jurisprudence, Bhatia

[499] Manoj Mate, "Public Interest Litigation and the Transformation of the Supreme Court of India," in *Consequential Courts*, ed. Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (Cambridge: Cambridge University Press, 2013), 272, 285.
Deva, "Public Interest Litigation in India," 37. Chintan Chandrachud, "Balancing Decision-Making amongst Courts and Legislatures," in *Balanced Constitutionalism: Courts and Legislatures in India and the United Kingdom*, ed. Chintan Chandrachud (Oxford University Press, 2017), 29.
[500] Shankar, *Scaling Justice*, 117, 145-146, 149, 154, 166. Shankar, "India's Judiciary," 173.See also Mehta, "The Indian Supreme Court and the Art of Democratic Positioning," 258.
[501] Madhav Khosla and Ananth Padmanabhan. "The Supreme Court." In *Rethinking Public Institutions in India*, ed. by Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav (Oxford University Press, 2017), 109-110.
[502] Fischer, "The Judicialisation of Politics in India," 234.
[503] Friedman and Maiorano, "The Limits of Prescription," 367.
[504] Young, *Constituting Economic and Social Rights*, 201.
[505] Cassels, "Judicial Activism and Public Interest Litigation in India," 512-513.
[506] Singh, "Enforcing Social Rights through Public Interest Litigation," 102-103, 119-122.
[507] Farrah Ahmed and Tarunabh Khaitan, "Constitutional Avoidance in Social Rights Adjudication," *Oxford Journal of Legal Studies* 35, no. 3 (September 2015): 607–25.
[508] Gauri and Brinks. "The Impact of Legal Strategies for Claiming Economic and Social Rights," 99-100.
[509] Shankar, *Scaling Justice*, 166; for a similar argument in the health rights context
[510] Shankar, "India's Judiciary,"171.
[511] Khosla, "Making Social Rights Conditional," 739-765.

observes that 'it was the (often failed) attempts to actually enforce [socio-economic] rights' in this public health emergency that confirmed there is no consistent standard for recognizing and enforcing these rights in India.[512] Apart from situating the story of social rights within the broader SoP doctrine, this Chapter adds to these accounts by showing that apart from the statutory duties, the ISC derives protection for social rights based on uncodified present-day political will, sometimes coaxed through nudging.

This interpretation of jurisprudence makes frameworks of 'quasi-weak-form review'[513] and dialogic/deliberative[514] justice[515] most appropriate to the Indian case; however, this PIL-led dialogic justice is distinct in India as judicial review falls short of integrating distrustful dimensions of SoP as conceptualized in Chapter 1 of this dissertation, especially as the ISC departs from the judicial function of delivering authoritative, principled, and final judgements.

Notably, this shortfall does not make the judicial role negligible, especially as PIL, through the flexibility of interim orders, evolved into a tool for nudging political branches and laying grounds for more intrusive and effective interventions with attenuated SoP tensions. The potential for nudging in India was most evident in the robust court-led monitoring of the implementation of existing duties (and their extended version) in the *Right to Food litigation*, which brought far-reaching material improvement to the enjoyment of this right across the country. However, the consequences in this or other cases are achieved against the background of the gradually declining

[512] Bhatia, *Unsealed Covers*, 347.
[513] Tushnet and Dixon, "Weak-Form Review and Its Constitutional Relatives," 108. Shankar, "India's Judiciary," 166.
[514] The deliberative justice framework has also been referenced in the context of bringing the voices of the disadvantaged through PIL jurisprudence, see Chakraborty, "Judiciary in India," 125-147. Holladay, "Public Interest Litigation in India as a Paradigm for Developing Nations," 572. Bhagwati, "Judicial Activism and Public Interest Litigation," 570.
[515] Abeyratne and Misri, "Separation of Powers and the Potential for Constitutional Dialogue in India," 363-386.

judicial function of conclusively deciding cases with binding judicially manageable standards. The normative dimension of the argument will be elaborated on in a comparative setting in the Conclusion of the dissertation.

Chapter 3. Elyian Reasonableness in South Africa

This Chapter will take the SoP doctrine of the South African Constitutional Court (SACC) as a starting point for discussing social and health rights jurisprudence. Part I will examine the SoP doctrine, including general social rights adjudication standards based on the jurisprudence of the SACC (Section 1.4 and 1.5.2). To understand the context of SoP jurisprudence, Part I will also consider the relevant organizing principle(s) of the Constitution (Section 1.1), institutional arrangement, democratic system (Section 1.2), evolving relations between the political branches and the apex Court (Section 1.3) that account for some of the divergencies among the jurisdictions. To understand the context of general social rights jurisprudence, Part I will also touch upon the general political posture in relation to social rights policies and the trajectory of such policies themselves (Section 1.5.1). In Part II, the SoP and social rights doctrine will be examined through the right to health jurisprudence both in the SACC (Section 2.2) and HCs (Section 2.3), assessing convergencies and divergencies between them. Apart from explicit health rights cases, Part II will also overview the cases in which the SACC uses the right to health as a secondary argument. The analysis of health rights jurisprudence is preceded and situated in the population health, healthcare, and constitutional, legislative, and policy frameworks, which provides a picture of the democratic processes parallel to health jurisprudence (section 2.1). Unlike in the previous Chapter, no COVID-related cases will be included, as the SACC decided none.

By formulating the SoP doctrine and general social rights adjudication standards in Part I and health rights jurisprudence in Part II, the conclusion will answer the following overarching research question for South Africa – *To what extent is SoP doctrine transformed through health (and social) rights jurisprudence?* – and the three subquestions: *How do the SACC and HCs*

position themselves vis-à-vis political branches when enforcing the right to health? How similar or different is the apex court's approach to other social rights? How does the apex court's treatment of health and other social rights correspond to the SoP doctrine in other areas of jurisprudence? Ultimately, the descriptive analysis in this Chapter, coupled with those in the other jurisdiction Chapters, will produce a continuum of the intensity of review among the jurisdictions alongside drawing typological and normative conclusions through the prism of SoP as conceptualized in Chapter 1.

Part I: SoP doctrine of the SACC

1.1. Transformative Culture of Justification

The Constitution of South Africa is organized around the principle of 'culture of justification' – a framework proposed by Mureinik prior to the transition[516] from the apartheid regime.[517] The first manifestation of the culture of justification was the novel practice of exercising judicial review over the Final Constitution itself in terms of its compliance with the principles agreed upon in the Interim Constitution. The framework of the 'culture of justification' was to end the apartheid regime's 'culture of authority', as well as the judiciary's impotence facing it.[518] Finding refuge in Dworkin's 'law as integrity', Mureinik argued that fundamental common law principles of administrative law, including the idea of law as justification, legitimized court action against oppressive interpretations of law unless explicitly permitted. Mureinik believed that political costs

[516] Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights," *South African Journal on Human Rights* 10, no. 1 (January 1, 1994): 31-48.

[517] A regime of state-sponsored racial segregation in South Africa from 1948 to the early 1990s, in which the black majority population (until 1984 coloreds and Indians as well) was disenfranchised. Among notorious policies of that time was the land takings policy, which designated only 7% of arable land for black South Africans and left the rest, fertile land for the white population.

[518] Hugh Corder, "Judicial Review of Parliamentary Actions in South Africa: A Nuanced Interpretation of the Separation of Powers," in *Accountable Government in Africa*, ed. Danwood M. Chirwa and Lia Nijzink (United Nations University Press, 2013), 86–87.

for the regime that still wanted to be seen as a rule-of-law state would be too high for such judicial orders to be overridden.[519] In post-apartheid South Africa, the culture of justification was institutionally strengthened with a written Constitution, which provided for rights, including social rights (despite disagreement among scholars and politicians during the constitution-making process).[520] The 'culture of justification' itself is codified in various provisions of the Constitution, for instance, the right to just administrative action,[521] substantive principles such as government accountability, responsiveness, and openness, as well as standards on public involvement in the legislative processes.[522] These features led to a characterization of the system as transformative constitutionalism[523] - a term also picked up by the Justices of the Court.[524] Informed by the culture of justification, at minimum, transformative constitutionalism was to entail legal accountability of the political branches and institutions responsible for producing the substantive aspiration of the new constitutional order.[525] In the literature, the principle of culture of justification was extended

[519] Dyzenhaus, "Law as Justification" 11–37.

[520] Davis, "The Case against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles," 475–90. see Edward Cameron, "A South African perspective on the judicial development of socio-economic rights" in *Reasoning Rights: Comparative Judicial Engagement*, ed. Liora Lazarus, Christopher McCrudden, and Nigel Bowles (Hart Publishing, 2014): 320, fn. 4; James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge University Press, 2016): 243- 244.

[521] Section 33 of the Constitution.

[522] Sections 72(1)(a) and 118(1)(a) of the Constitution

[523] Under this term, Klare referred to 'an enterprise of inducing large-scale social change through nonviolent political processes grounded in law', see Karl E. Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14, no. 1 (1998): 150. The idea of transformative constitutionalism has been used as a guidepost for evaluating and criticizing socio-economic rights jurisprudence in South Africa, see Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta, 2010). Sanele Sibanda, "Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty," *Stellenbosch Law Review* 22, no. 3 (January 2011): 482–500.

[524] Dikgang Moseneke, "Transformative Adjudication," *South African Journal on Human Rights* 18, no. 3 (January 2002): 315-19. Pius Langa, "Transformative Constitutionalism," *Stellenbosch Law Review* 17, no. 3 (2006): 351–60.

[525] Solange Rosa, "Transformative Constitutionalism in a Democratic Developmental State," *Stellenbosch Law Review* 22, no. 3 (January 2011): 456.

to judicial power, obliging it to justify the exercise of its powers, including reluctance to interfere with political branches' actions/inactions.[526]

1.2. Institutional Setting for the SACC in a Dominant Party Democracy

The institutional arrangement in South Africa entails elements of presidential and parliamentary[527] systems and a federation without qualifying as a full-fledged one.[528] The national executive[529] and legislature[530] have extensive powers to interfere or overtake functional areas. On the other hand, Members of the Executive Council (MECs) are accountable only on the provincial level, namely, to the Premiers of the respective Provinces.[531] The mandatory nature of transfers to provinces also increases the autonomy of the provinces. In principle, an equity-based formula that the mandatory financial transfers are subject to is favorable to the equitable realization of social rights across provinces.[532]

The President, who is both the head of the national executive (unilaterally appoints/dismisses Ministers[533]) and leads the party, is elected from among the members of the National Assembly (NA). The number of terms for the President is limited.[534] However, as in other parliamentary

[526] Mureinik, "A Bridge to Where?," 40-41. Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (Pretoria University Law Press, 2009): 88. Marius Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights," *South African Journal on Human Rights* 20, no. 3 (2004): 417.
[527] Majority of cabinet members are also Parliament members.
[528] See Section 76 of the Constitution, see also Sanele Sibanda, "Parliament and the Separation of Powers – A Critical Analysis in Relation to Single-party Domination," in *The Quest for Constitutionalism: South Africa since 1994*, ed. Hugh Corder, Veronica Federico, and Romano Orrù (Ashgate, 2014): 39.
[529] Section 100 of the Constitution.
[530] Section 44 of the Constitution.
[531] Sections 132, 133 (1) and (2) of the Constitution.
[532] Lisa Forman and Jerome A. Singh, "The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa," in *The Right to Health at the Public/Private Divide*, ed. Colleen M. Flood and Aeyal Gross (Cambridge University Press, 2014), 296. Bongani M. Mayosi and Solomon R. Benatar, "Health and Health Care in South Africa — 20 Years after Mandela," *New England Journal of Medicine* 371, no. 14 (October 2, 2014): 1344-1346
[533] Section 91 of the Constitution.
[534] Section 88 (2) of the Constitution.

systems, the same party can head the cabinet continuously, which has been the case for the African National Congress (ANC). The ANC has ruled South Africa since the 1994 transition (though without a two-thirds majority currently).[535] As voting along racial lines persists in favor of ANC benefiting from the advantages of a long-term consecutive rule, alternation of power in South Africa is more unlikely than usual. The largest opposition party, the Democratic Alliance (DA), has yet only challenged the ANC on the local level and only since 2009.[536]

The institutional reality of one-party dominance weakens the NA as a check on executive power[537] and, in practice, even subjects the executive to party control. Closed-list Proportional Representation (PR) and the rule that MPs lose office if expelled from the elected party[538] strengthens the ANC's control over individual parliamentarians.[539] The fact that only the executive can initiate money bills (e.g. on imposition of taxes) also weakens the legislative power in the specific context of resource distribution policymaking.[540] On a practical level, cadre deployment[541] and/or democratic centralism entrenching ANC power at all levels of government[542] add up to the party control over the executive and legislative branches. This also leads to what Issacharoff calls

[535] While definitions differ as to what constitutes a dominant party democracy, with 6th reelection of ANC presidential candidate - Cyril Ramaphosa - in 2019, South Africa certainly belongs to one, see Sujit Choudhry, "'He Had a Mandate'; the South African Constitutional Court and the African National Congress in a Dominant Party Democracy," *Constitutional Court Review* 2, no. 1 (January 2009): 19-22. Martin Loughlin, "The Contemporary Crisis of Constitutional Democracy," *Oxford Journal of Legal Studies* 39, no. 2 (June 1, 2019): 437, 446;

[536] Roger Southall and John Daniel, "The South African Election of 2009," *Africa Spectrum 44*, no. 2 (August 2009): 122. Roger Southall "The Contradictions of Party Dominance in South Africa" in *The Quest for Constitutionalism: South Africa since 1994*, ed. Hugh Corder, Veronica Federico, and Romano Orrù (Ashgate, 2014), 162, 165.

[537] Sanele Sibanda, "Parliament and the Separation of Powers," 43; Jeremy Seekings and Nicoli Nattrass, *Policy, Politics and Poverty in South Africa* (Palgrave Macmillan, 2015): 197-198.

[538] Sections 47(3)(c), 106(3)(c), 47(4) and 106(4) of the Constitution.

[539] Choudhry, "'He Had a Mandate'" 40.

[540] Sections 55, 68, 77 of the Constitution

[541] Cadre-deployment is a practice of using non-merit-based appointments as a political tool of control.

[542] Francois Venter, "State Capture, Corruption, and Constitutionalism in South Africa" in *Corruption and Constitutionalism in Africa: Revisiting Control Measures and Strategies*, ed. Charles Manga Fombad and Nico Steytler (Oxford University Press, 2020), 79-80; Chitja Twala, "The African National Congress (ANC) and the Cadre Deployment Policy in the Postapartheid South Africa: A Product of Democratic Centralisation or a Recipe for a Constitutional Crisis?" *Journal of Social Sciences* 41, no. 2 (November 1, 2014): 159–65.

the 'three "Cs" of consolidated power' – 'clientelism, cronyism, and corruption'.[543] Corruption scandals have unfolded in the public's eye, implicating the highest-ranking officials, including President Zuma (with a record number of 783 corruption charges),[544] who has responded with attempts to influence the independence of investigatory bodies.[545]

What sets South Africa apart from other jurisdictions in terms of institutional arrangements is the constitutional status[546] of institutions supporting constitutional democracy (hereafter Chapter 9 institutions).[547] Institutionally strongest among these institutions - the Public Protector (PP) and the Auditor General (AG)[548] - do serve as an additional check on executive power. For instance, PP had prepared scathing reports on the noted corruption scandals,[549] which also became subject

[543] Samuel Issacharoff, "The Democratic Risk to Democratic Transitions," *Constitutional Court Review* 5, no. 1 (January 2013): 22. Nico Steytler "The 'Financial Constitution' and the Prevention and Combating of Corruption: A Comparative Study of Nigeria, South Africa, and Kenya" in *Corruption and Constitutionalism in Africa: Revisiting Control Measures and Strategies*, ed. Charles Manga Fombad and Nico Steytler (Oxford University Press, 2020), 402.

[544] He was implicated in criminal allegations since 1995 beginning with the trial of Shabik Shaik, a businessman, whose convictions also implied Zuma's involvement in fraud and corruption about the 1999 lucrative state procurement of arms from foreign providers. Most notorious is the Nkandla scandal, concerning improper public spending the President Zuma's private residence. In 2014, see Venter, "State Capture, Corruption, and Constitutionalism in South Africa" 78-80. Adam Kassner, "Diggin' Deep into Gold Fields: South Africa's Unrealized Black Economic Empowerment in the Shadows of Executive Discretion," *Cornell International Law Journal* 48, no. 3 (Fall 2015): 684.

[545] Mark Kende, "Enforcing the South African Constitution: The Fight for Judicial Independence and Separation of Powers", *Transnational Law & Contemporary Problems* 23 (Spring 2014): 39.

[546] The SACC has interpreted that these institutions fall outside normal chain of executive accountability, see Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC), para 29, 31.

[547] The independent institutions created by chapter 9 are the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General, and the Electoral Commission. Chapter 10 creates the Public Service Commission, and chapter 13 creates the Financial and Fiscal Commission and the South African Reserve Bank. Although not directly stated as independent, the Constitution in Chapter 8 creates the Judicial Service Commission and a National Prosecuting Authority (NAC). It is implied that they enjoy independence from the government as well.

[548] Qualified majority (60% of votes) is required for the appointment of Public Protector (PP) and Auditor General (AG). For dismissal, the Constitution requires a two-thirds majority resolution by the National Assembly following a committee finding of one of only three grounds for removal - 'misconduct, incapacity or incompetence' for Public Protector and Auditor-General, see Sections 193(5)(b) and 194 of the Constitution.

[549] The public protector, an anti-corruption body, ruled that $23m of public money had been improperly spent on the President's rural home in Nkandla in KwaZulu-Natal province. Public Protector report in 2016 described private mingling in state affairs as 'state capture', including interference with appointments of relevant Ministers to secure deals favoring the business interests of the influential Gupta Family, see Steytler "The 'Financial Constitution' and the Prevention and Combating of Corruption," 407, 408.

to judicial consideration,[550] sometimes shielded by the SACC from invalidation.[551] However, even the office of PP could not retain a similar role with all appointees.[552] The South African Human Rights Commission (SAHRC) is even weaker,[553] confirmed through its ineffectiveness in supervising the implementation of social rights cases decided by the SACC.[554] The office has fared better with documenting rights violations (e.g. access to health care,[555] mental health services,[556] or emergency medical care[557]). As seen in Part II, apart from Chapter 9 institutions, some statutory bodies such as the Competition Commission and Competition Tribunal also contribute to checking and nudging political branches. For instance, although still unimplemented, in 2013-2019, the Competition Commission conducted a 'Health Market Inquiry,' a comprehensive study of the rising costs of private health care, exploring space for curbing anti-competitive practices.[558]

[550] Pierre de Vos, "Balancing independence and accountability: The role of Chapter 9 institutions in South Africa's constitutional democracy" in *Accountable Government in Africa: Perspectives from Public Law and Political Studies*, ed. Danwood Mzikenge Chirwa and Lia Nijzink (United Nations University Press, 2012), 166, 168-169, 171. Stu Woolman, "A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect That Brought down a President," *Constitutional Court Review* 8, no. 1 (August 2016): 155–92,

[551] SACC barred the NA from invalidating the PP'S report and remedial action, see Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 580 (CC), 98-99.

[552] The PP, whose fitness was also questioned by the SACC, was suspended from office based on the NA decision confirmed by President in 2022, Sandiso Bazana and Tayra Reddy, "A Critical Appraisal of the Recruitment and Selection Process of the Public Protector in South Africa," *SA Journal of Human Resource Management* 19 (January 22, 2021). Marianne Merten, "Suspended Public Protector Legal Action Ended, Impeachment Inquiry Starts," Daily Maverick, July 7, 2022, https://www.dailymaverick.co.za/article/2022-07-07-suspended-public-protector-legal-action-ended-impeachment-inquiry-starts/

[553] See section 184 (2) of the Constitution.

[554] Jonathan Berger, "Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education," in *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, ed. Daniel M. Brinks and Varun Gauri (Cambridge University Press, 2008), 73, 77.

[555] SAHRC, *Public Inquiry: Access to Health Care Services* (2007) http://www.sahrc.org.za/home/21/files/Health%20Report.pdf

[556] SAHRC, *Report of the National Investigative Hearing into the Status of Mental Health Care in South Africa* (2017) https://www.sahrc.org.za/home/21/files/SAHRC%20Mental%20Health%20Report%20Final%2025032019.pdf.

[557] SAHRC, *Access to Emergency Medical Services in the Eastern Cape: Hearing Report* (2015) https://www.sahrc.org.za/home/21/files/SAHRC%20Report%20on%20Access%20to%20Emergency%20Medical%20Services%20in%20the%20Eastern%20Cape....pdf

[558] Competition Commission of South Africa, *Health Market Inquiry into the Private Healthcare Sector, Final Findings and Recommendations Report* (September 2019) https://www.compcom.co.za/wp-content/uploads/2020/01/Final-Findings-and-recommendations-report-Health-Market-Inquiry.pdf; G. C. Solanki et al., "The Competition Commission Health Market Inquiry Report: An Overview and Key Imperatives," *South African Medical Journal = Suid-Afrikaanse Tydskrif Vir Geneeskunde* 110, no. 2 (January 29, 2020): 88–91.

In this institutional arrangement, the strong institutional standing of the judicial branch is to ensure accountability of the political branches and restore balance between the legislative and executive branches. Although there is a theoretical possibility of capturing the Judicial Service Commission (JSC) by political branches,[559] up until today, the SACC remains independent,[560] which is also evident in the jurisprudence confronting the co-equal branches discussed in Section 4. The powers afforded to the independent judicial branch are vast. The SACC can review all state action, including through direct petition[561] and broad remedial powers.[562] Since 2012, the SACC has also turned into an apex court of general jurisdiction, although in practice, it had already exercised that function through the broad construction of what falls under constitutional matters.[563] Lower courts also enjoy general constitutional jurisdiction over fundamental rights cases.[564]

In contrast to the ISC, at least 8 Justices hear the cases in the SACC,[565] which must contribute to the more consistent approach of this Court. The consistency is also more feasible due to the low output of the SACC (lowest among the jurisdictions in this dissertation), especially in social rights

[559] The president forms the judiciary together with JSC, the majority of whose members can be from the ruling party, see Section 178 (1) of the Constitution.

[560] James Fowkes, "Constitutional Review in South Africa: Features, Changes, and Controversies" in *Constitutional Adjudication in Africa*, ed. Charles Manga Fombad (Oxford University Press, 2017): 166, 167. Judith February and Gary Pienaar, "Twenty years of constitutional democracy" in *State of the Nation: South Africa, 1994-2014: A Twenty-Year Review of Freedom and Democracy*, ed. Thenjiwe Meyiwa et al. (HSRC Press, 2014): 40. Kende, "Enforcing the South African Constitution," 36. Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press, 2013): 189-190. Theunis Roux, "The Constitutional Court's 2018 Term : Lawfare or Window on the Struggle for Democratic Social Transformation?," *Constitutional Court Review* 10, no. 1 (January 2020): 36. Evans Sakyi Boadu, "Evaluating the Commitment of South Africa to the Principles of Separation of Powers," in *Democracy and Political Governance in South Africa: The African Peer Review Mechanism*, ed. Isioma Ile and Omololu Fagbadebo (Springer International Publishing, 2023), 40, 51-52.

[561] Judicial review is mandatory in certain circumstances see sections 167(4) I and Section 167 (5) of the Constitution.

[562] See sections 167, 172(1) and 38 of the Constitution.

[563] Seventeenth Amendment of the Constitution.

[564] Sections 167, 168, 172 (2) of the Constitution, see Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC), paras 18, 26 [hereafter *Doctors for Life*].

[565] Section 167 (2) of the Constitution.

cases ranging from zero to 20% of all SACC cases heard annually - around 25 in the first decade and 30 by 2020.[566]

1.3. Consolidation Dynamics of the SACC Power

The power of the SACC has been affected by the evolving relations between the political and judicial branches on the ground. This relation has undergone phases demarcating shifts from initial partnership to more confrontation and back to more partnership (1994-2002; 2002-2008; 2008-2018; 2018 to now[567]), eventually leading to the relative consolidation of the judicial power.

In the first phase until 2002, the judiciary had unequivocal support from the political branches. This was expected considering most justices appointed by the first two Presidents - Mandela and Mbeki - were affiliated with ANC, the anti-apartheid movement and/or transition in some way.[568] The second phase from 2002 marks the first shift towards confrontation with the SACC related to the *Treatment Action Campaign* case counteracting the HIV denialism of President Mbeki (see Part II, Section 2.2.).[569] In the third phase, since 2008, the judiciary became more explicitly vulnerable to challenge, with allegations of pressure on the SACC[570] followed by the Court's

[566] February and Pienaar, "Twenty years of constitutional democracy," 31; Berger, "Litigating for Social Justice in Post-Apartheid South Africa," 70. Whitney K. Taylor, "On the Social Construction of Legal Grievances: Evidence From Colombia and South Africa," *Comparative Political Studies* 53, no. 8 (July 2020): 1334. Heinz Klug, "Constitutional Authority and Judicial Pragmatism: Politics and Law in the Evolution of South Africa's Constitutional Court," in *Consequential Courts*, ed. Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (Cambridge University Press, 2013), 94.

[567] Roux and Dixon single out only two phases from 1995-2007 and after: 'the first, during which the Court tried to enlist the ANC as a partner in constitutional implementation, and the second, in which the Court has shifted to a more active role in constraining the ANC as the dominant political party while building pluralism' see Rosalind Dixon and Theunis Roux, "Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa," in *From Parchment to Practice*, ed. Tom Ginsburg and Aziz Z. Huq (Cambridge University Press, 2020), 55, 58, 61-62.

[568] David Dyzenhaus, "The African National Congress and the Birth of Constitutionalism," *International Journal of Constitutional Law* 18, no. 1 (May 21, 2020): 290–91. Rosalind Dixon, "Constitutional Design Two Ways: Constitutional Drafters as Judges," *Virginia Journal of International Law* 57, no. 1 (2018 2017): 1–44. Stephen Ellmann, "The Struggle for the Rule of Law in South Africa," *NYLS Law Review* 60, no. 1 (January 1, 2016): 63-64; Klug, "Constitutional Authority and Judicial Pragmatism," 1-5-106;

[569] Ellman also identifies the case as the turning point into more confrontation relations of the Court and elected branches see Ellmann, "The Struggle for the Rule of Law in South Africa," 71-72;

[570] In 2008, two Court Justices disclosed that they were approached by the HC judge Hlophe seeking favorable decisions for the then deputy President Zuma in pending cases.

submission of the complaint with the Judicial Services Commission.[571] In 2008, the ANC Secretary General referred to judges as counterrevolutionaries having reversed gains of transformation through its precedents.[572] Criticism of the Court acquired new force during Zuma's presidency following the SACC's critical judgments.[573] In 2011, the Government announced its plan to assess the impact of jurisprudence on social transformation. In contrast to Mbeki, President Zuma referred to hurdles in the Constitution[574] in a more populist setting[575] and went as far as discussing the revision of the apex Court's powers.[576] A research project was commissioned to assess the impact of the SACC and SCA decisions 'on the lived experiences of all South Africans'[577] claiming this in no way aimed to attack the judiciary.[578] The report, finalized in 2015, merely confirmed that these courts are 'mostly transformational' and that the primary

[571] For an overview of legal proceedings surrounding the controversy, see Kende, "Enforcing the South African Constitution," 41-42; Mark Kende, "Corruption Cases and Separation of Powers in the South African Courts and U.S. Supreme Court," *New York Law School Law Review* 60, no. 1 (2015-2016): 194- 195; Wessel le Roux, "Descriptive overview of the South African Constitution and Constitutional Court" in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India, and South Africa*, ed. Oscar Vilhena Vieira, Upendra Baxi, and Frans Viljoen (Pretoria University Law Press 2013), 153.

[572] Jackie Dugard, "Courts and Structural Poverty in South Africa: To What Extent Has the Constitutional Court Expanded Access and Remedies to the Poor?," in *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, ed. Daniel Bonilla Maldonado (Cambridge University Press, 2013), 297–298, fn. 15-16. Dennis Davis, "Twenty Years of Constitutional Democracy: A Preliminary Reflection," *NYLS Law Review* 60, no. 1 (January 1, 2016), 44. Ellmann, "The Struggle for the Rule of Law in South Africa," 98.

[573] The SACC counteracted the president's evident attempts to undermine the independence of investigative bodies looking into cases implicating him in Glenister v The President of the Republic of South Africa 2011 (3) SA 347 (CC); the Court blocked Zuma's wish to extend the term of the Chief Justice Ngcobo, who initially accepted the offer but later after the judgment, withdrew the acceptance in Justice Alliance of South Africa v President of Republic of South Africa and Others 2011 (5) SA 388 (CC). for more on this stream of jurisprudence, Rosaan Krüger "The Ebb and Flow of the Separation of Powers in South African Constitutional Law – the Glenister Litigation Campaign," *VRÜ Verfassung Und Recht in Übersee* 48, no. 1 (2015): 52-61; Ellmann, "The Struggle for the Rule of Law in South Africa," 85-90, 92-95; Issacharoff, "The Democratic Risk to Democratic Transitions," 1–31; Kende, "Corruption Cases and Separation of Powers in the South African Courts and U.S. Supreme Court," 190 – 193. Le Roux, "Descriptive overview of the South African Constitution and Constitutional Court," 149

[574] Pierre de Vos, "Changing the Constitution? Probably Not," Constitutionally Speaking, January 12, 2014, https://constitutionallyspeaking.co.za/changing-the-constitution-probably-not/.

[575] Kende, "Enforcing the South African Constitution," 37, 44-46.

[576] Roux, *The Politics of Principle*, 392, fn. 7. February and Pienaar, "Twenty years of constitutional democracy" 34.

[577] "Fort Hare Assigned Review of Highest Courts," *HSRC*, accessed November 28, 2022, https://hsrc.ac.za/press-releases/dces/hsrc-fort-hare-assigned-review-of-highest-courts/

[578] "The Constitutional Justice Report: Judging the Judges? Part I - Context and Main Findings," Helen Suzman Foundation, accessed November 28, 2022, https://hsf.org.za/publications/hsf-briefs/the-constitutional-justice-report-judging-the-judges-part-i-context-and-main-findings

responsibility lies with the elected branches.[579] As the cases regarding the attempts to consolidate executive power, for instance, attacks on the independence of investigative bodies (see cases in Section 1.4 and others[580]), came before the SACC, tensions between the judicial and political branches intensified. The SACC went as far as explicitly accusing President Zuma of buying the National Director of Public Prosecutions (NDDP) out of office, stating he was 'bent on getting rid of" NDDP by 'whatever means he could muster.'[581] Statements of politicians against the judiciary and sometimes individual judges have followed this jurisprudence.[582] In the current fourth phase starting from 2018 with Ramaphosa becoming the President, the collaborative attitude towards the judiciary rekindled,[583] strengthening the SACC's role in mediating conflicts between the political branches,[584] hence, serving the consolidation of the judicial power.

In contrast to India, the path from partnership to confrontation and back towards consolidation of the judicial power has not included radical breaks in the political system. Instead, the SACC reacted to gradually increasing risks of aggrandizing power and unaccountable government in a dominant party democracy, which must have contributed to the relatively more consistent

[579] The Department of Justice, *Final Report: Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society* (2005) https://www.justice.gov.za/reportfiles/2017-CJPreport-Nov2015-FinalAnnexure.pdf

[580] Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC); Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 580 (CC); Economic Freedom Fighters v. Speaker of the National Assembly 2018 (2) SA 571 (CC).

[581] Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others 2018 (2) SACR 442 (CC), para 25.

[582] Hugh Corder and Cora Hoexter, "'Lawfare' in South Africa and Its Effects on the Judiciary," *African Journal of Legal Studies* 10, no. 2–3 (December 7, 2017): 124-125.

[583] "Ramaphosa Suspends Judge President Hlophe," The Mail & Guardian, December 14, 2022, https://mg.co.za/news/2022-12-14-ramaphosa-suspends-hlophe/.

[584] The President resorted to the SACC himself challenging an independent advisory panel report commissioned by the Parliament on a corruption scandal that had led to the initiation of his impeachment proceedings, see Queenin Masuabi, "President Ramaphosa Takes Phala Phala Panel Fight to ConCourt,", Daily Maverick, December 5, 2022, https://www.dailymaverick.co.za/article/2022-12-05-phala-phala-panel-misconceived-its-mandate-and-misjudged-the-information-president-ramaphosa-takes-fight-to-concourt/..

evolution of the SACC jurisprudence. The section below will locate the dynamic judicial power within the general SoP doctrine of the SACC.

1.4. SoP Doctrine: Judicial Review as Scaffolding

SoP is an explicitly justiciable principle in the South African constitutional system.[585] Dubbed a 'distinctively' South African model, the SACC interpreted SoP as context-specific in the service of accountability, responsiveness, and openness of government. The checks and balances – an indispensable aspect of SoP – are to both prevent the formation of an excessively powerful despotic government and to serve an 'energetic and effective, yet answerable, executive.'[586]

As in India, such a broad conceptualization of SoP results in the rejection of rigid separation and political question doctrine.[587] Although the presumption against interfering with the 'pre-eminent domains' of the branches is recognized,[588] the power to decide whether a function is a pre-eminent domain of a branch remains with the judicial branch,[589] is narrowly construed,[590] and does not *per*

[585] Sebastian Seedorf and Sanele Sibanda, "Separation of Powers" in *Constitutional Law of South Africa*, ed. Stuart Woolman, 2. ed (Juta 2008), 12-37.
[586] Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC), para 112; De Lange v Smuts NO and Others 1998 (3) SA 785 (CC), para 60.
[587] President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC), para 16-28
[588] Tim F. Hodgson, "The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution," *South African Journal on Human Rights* 34, no. 1 (January 2, 2018): 77. Firoz Cachalia, "Separation of Powers, Active Liberty and the Allocation of Public Resources: The E-Tolling Case," *South African Law Journal* 132, no. 2 (2015): 300
[589] National Treasury v Opposition to Urban Tolling Alliance flag 2012 (6) SA 223 (CC), para 67, see also *Doctors for Life*, para 24.
[590] Seedorf and Sibanda, "Separation of Powers." 12-39; 12-41; 12-46, 12-49; Chuks Okpaluba and Mtendeweka Mhango, "Between Separation of Powers and Justiciability: Rationalising the Constitutional Court's Judgement in the Gauteng E-Tolling Litigation in South Africa," *Law, Democracy & Development* 21, no. 1 (September 14, 2017): 1, 5; Cachalia, "Separation of Powers, Active Liberty and the Allocation of Public Resources." 285, 311. Mtendeweka Mhango, "Is It Time For a Coherent Political Question Doctrine in South Africa? Lessons from the United States," *African Journal of Legal Studies* 7, no. 4 (February 23, 2014): 457, 463.

se exclude constitutional review if the presumption is refuted.[591] Indeed, according to the SACC, respect (as a better alternative to deference)[592] to the political branches does not amount to exemption from review.[593]

Operationalizing this broad take of judicial power, both the rationality and reasonableness standards developed by the SACC incorporate the means-end analysis and scrutiny of the decision-making process. The higher standard of reasonableness formally applied to administrative action[594] more explicitly incorporated these elements in accordance with the Promotion of Administrative Justice Act (PAJA)[595] and jurisprudence.[596] However, incrementally, a minimum standard of rationality applied to political branches out of respect for their co-equal status[597] also acquired these dimensions.[598] In this manner, the reasonableness and rationality tests converge and surpass the narrow *Wednesbury* review from English common law[599] or similar interpretations of PAJA.[600] The convergence of rationality and reasonableness tests was acknowledged by the SACC when stating that an irrational decision in an administrative law setting could not 'mutate into a rational decision' just because the decision was made by an executive instead.[601] Hoexter is right to

[591] *Doctors for Life*, para 199.
[592] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC) [hereafter *Bato Star*], para 46.
[593] *Bato Star*, para 48. *Doctors for Life*, para 200.
[594] Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd, 2006 2 SA 311 (CC) para 108 [hereafter *New Clicks*]
[595] Section 6 (2) (c) (e) of Promotion of Administrative Justice Act 2000 (SA) [hereafter PAJA],
[596] *Bato Star*, paras 45-46; see *New Clicks*, para 614.
[597] Pharmaceutical Manufacturers Association of South Africa 2000 (2) SA 674 (CC), paras 85, 90.
[598] Lauren Gildenhuys, "Esoteric Decision-Making: Judicial Responses to the Judicialisation of Politics, the Constitutional Court and EFF II," *South African Journal on Human Rights* 36, no. 4 (October 1, 2020): 338–61.Cora Hoexter "A Rainbow of One Colour? Judicial Review on Substantive Grounds in South African Law" in *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow*, ed. Hanna Wilberg and Mark Elliott (Hart Publishing, 2015), 165, 175, 180, 184. Hanna Wilberg, "Judicial Review of Administrative Reasoning Processes," in *The Oxford Handbook of Comparative Administrative Law*, ed. Peter Cane et al. (Oxford University Press, 2020), 869.
[599] Associated Provincial Picture Houses v Wednesbury Corporation [1947] EWCA Civ 1.
[600] See Section 6 (2) (h) of PAJA 2000.
[601] Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC), para 44 [hereafter *Democratic Alliance*].

describe this development as 'further smudging' of the 'already blurred line between constitutional and administrative law'.[602]

The means-end analysis was discernible in early uses of the rationality standard by the SACC. However, the evolution of the rationality test became most evident in cases decided during the peak of confrontation between the judicial and political branches (see Section 1.3). In an early case, scrutinizing the pardoning policy adopted by President Mbeki based on the rationality test, the SACC derived the victims' right to be heard before making the pardoning decisions from the policy objectives of national-building and reconciliation. Such a conclusion was helped by a prior Truth and Reconciliation Commission (TRC) process, which the Court believed had already defined these objectives in such a way as to include the victim's right to be heard.[603] This did not mean that such a hearing would be mandatory for all executive decisions.[604] However, it was mandatory in this case, given the specific ends of nation-building and reconciliation as defined in the TRC process. This rationality test displayed something akin to means-end analysis, at least, applicable in the particular case.[605] Giving rationality even more substance during the peak of confrontations, the SACC invalidated an executive decision - appointment of NDDP in *Democratic Alliance* case, as the decision-making process did not duly consider that the appointee had given false testimony to a commission studying the fitness of the previous Director. This way, the SACC extended rationality review to the decision-making process, which was to inform the

[602] Cora Hoexter and Glenn Penfold, *Administrative Law in South Africa* (Claremont: Juta, 2021), 356. See also Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 2001), 32.
[603] Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC), paras 61, 65, 66, 68, 70-72, 75-76. More recently, the SACC has indicated that procedural fairness could be a separate requirement alongside legality, see Minister of Defence and Military Veterans v Motau 2014 (5) SA 69 (CC), paras 81-83.
[604] Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa 2013 (7) BCLR 762 (CC).
[605] Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC), para 55.

rationality of the final decision itself.[606] Interestingly, in this case, SoP objections were dispelled by merely noting that the test applied was the weakest[607] without reflecting on the substance it had, in fact, acquired. Nevertheless, the SACC still emphasizes the need for judicial restraint on policy-laden and polycentric issues[608] and ordinarily, cases regarding complex policies do result in the SACC's deference both to administrative and executive action.[609]

As for the judicial power over action/inaction by the legislative branch, the SACC has entered its most pre-eminent domain. For instance, the SACC invalidated the Parliamentary rules for violating the MPs' right to file a motion of no confidence in the President, which implied a positive duty of formulating new rules by the Parliament.[610] Similarly, the SACC directly ordered the legislative body to institute rules for impeachment proceedings against the President.[611] Besides, the SACC required public participation in law-making processes based on a means-end test.[612] The SACC justifies its intervention in these pre-eminent legislative domains by the need to protect checks and balances[613] as direct mandates in the Constitution (even when informed by international law[614]), provided that the precise solution is reserved for the legislature.[615] ,

[606] *Democratic Alliance*, para 37 '[w]e must […] determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.' Lauren Kohn, "The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?," *South African Law Journal* 130, no. 4 (January 2013): 833–835.Cora Hoexter, "Administrative Justice in Kenya: Learning from South Africa's Mistakes," *Journal of African Law* 62, no. 1 (February 2018): 124.
[607] *Democratic Alliance*, para 42.
[608] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC), para 63.
[609] *Bato Star*, para 68-72.
[610] Mazibuko v Sisulu and Another 2013 (6) SA 249 (CC).
[611] Economic Freedom Fighters and Others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)
[612] *Doctors for Life*, para 115; Matatiele v President of the Republic of South Africa 2007 (6) SA 477 (CC), para 63.
[613] Mazibuko v Sisulu and Another 2013 (6) SA 249 (CC), para 21, Economic Freedom Fighters and Others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC), para 133.
[614] Glenister v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC), para 75.
[615] *Doctors for Life*, para 37-38; Mazibuko v Sisulu and Another 2013 (6) SA 249 (CC), paras 134, 136, Economic Freedom Fighters and Others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC) paras 75, 217, 220.

To sum up, the converging rationality and reasonableness standards in South Africa have evolved in reaction to the increasing challenges posed to the constitutional democracy,[616] (identifiable) flaws in the political process, and/or the likelihood of self-correction through a political process. However, this was done with a certain amount of minimalism[617] on a case-by-case, trial-and-error basis[618] instead of grand theorizing[619] - characteristic of a judicial function more broadly in the service of consistent judging. Not only did the SACC avoid deciding cases on broad grounds, but it refused to decide them altogether when the issues seemed likely to be resolved in the political process.[620] The same approach to SoP and judicial powers applied to social and health rights jurisprudence discussed below.

1.5. Social Rights Policy and Doctrine

In this Section, social rights jurisprudence will be assessed against the background of poverty and inequality in South Africa - the factors affecting the political attitude towards social rights protection and the resulting social policies.

[616] Choudhry, "'He Had a Mandate'" 1–86; Issacharoff, "The Democratic Risk to Democratic Transitions," 6-7; Stephen Gardbaum, "Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa," *Constitutional Court Review* 9 (2019): 1-18, see also Corder, "Judicial Review of Parliamentary Actions in South Africa," 85–104.
[617] Zantsi v Council of State, Ciskei 1995 (4) SA 615 (CC), paras 2-7.
[618] Woolman, *The Selfless Constitution*, 115-116, 122-124.
[619] Iain Currie, "Judicious Avoidance," *South African Journal on Human Rights* 15, no. 2 (January 1, 1999): 138, 157–58. Mhango, "Is It Time for a Coherent Political Question Doctrine in South Africa?," 457, 463;
[620] The SACC did not grant leave to appeal an HC decision, which required justifications from the President when dismissing Ministers in a case concerning a late-night reshuffle of the cabinet as President Zuma had already resigned by the time the CC had to decide the case, see President of the Republic of South Africa v Democratic Alliance and Others 2020 (1) SA 428 (CC).

1.5.1.Social Rights Policy

As in India, poverty and inequality are prevailing in the post-apartheid South Africa, with even a higher inequality rate than in India. This is despite South Africa being an upper middle-income economy for most of the period (except 2000-2003) since the transition (and before).[621] Inequality has even slightly worsened since the transition (from a GINI coefficient of 59.3%[622] to 63% by 2014).[623] Unemployment (with 33.6% in 2021[624]) and inequality remain one of the most acute in the world. According to MPI,[625] poverty has decreased from 37% in 1993 to 7% in 2016.[626] However, when measured with income levels at 2.15$ and 6.85$ a day, the poverty ratio stood at much higher indicators of 20.5%[627] and 62%[628] in 2014, indicating the population's high vulnerability to poverty.

As a leader in the anti-apartheid and anti-inequality movement, the ANC government is at least superficially committed to rights and redistributive policies - a sentiment present across the wider political spectrum.[629] Indeed, as noted, the ANC had even questioned the sufficient transformative

[621] "WDI - Classifying Countries by Income," World Bank, September 9, 2019 https://datatopics.worldbank.org/world-development-indicators/stories/the-classification-of-countries-by-income.html.
[622] Rachel B. Riedl, "Africa's Democratic Outliers: Success amid Challenges in Benin and South Africa," in *Democracy in Hard Places*, ed. Scott Mainwaring and Tarek Masoud (Oxford University Press, 2022), 103.
[623] "Gini index - South Africa, India, Colombia," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SI.POV.GINI?locations=ZA-IN-CO
[624] "Unemployment, total (% of total labor force) (modeled ILO estimate) - South Africa," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?locations=ZA
[625] The discrepancy between the two measures of poverty is related to the counting of access to public services under MPI unlike income-based poverty measures, see Tina Fransman and Derek Yu, "Multidimensional Poverty in South Africa in 2001–16," *Development Southern Africa* 36, no. 1 (January 2, 2019): 50–79. Arden Finn, Murray Leibbrandt, and Ingrid Woolard, "What Happened to Multidimensional Poverty in South Africa between 1993 and 2010?," *SALDRU Working Paper* no. 99 (2013).
[626] "Multidimensional poverty headcount ratio (% of total population) - South Africa," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/ SI.POV.MDIM?locations=ZA.
[627] "Poverty headcount ratio at $2.15 a day (2017 PPP) (% of population) - South Africa," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SI.POV.DDAY?locations=ZA
[628] "Poverty headcount ratio at $6.85 a day (2017 PPP) (% of population) - South Africa," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SI.POV.UMIC?locations=ZA
[629] Friedman and Maiorano, "The Limits of Prescription," 359.

nature of the SACC jurisprudence. Certain positive impact of court decisions, even when decided against petitioners, must also point to the high political cost of denying some state action in eliminating poverty and inequality.[630]

The consensus on the need to proactively address poverty and inequality in South Africa has not disappeared even during shifts in economic policy, such as that of Mbeki's government (criticized even within alliance partners[631]) moving away from Mandela's redistributive focus in the 1990s.[632] Indeed, the unconditional child support grant was expanded precisely during Mbeki's presidency.[633] Anti-poverty policies continued with Zuma; particularly pronounced were steps taken to address health challenges led by his Minister of Health (see Part II, Section 2.2).[634] The welfare and austerity logic[635] now co-exist in President Ramaphosa's policies, especially those that dealt with the COVID-19 pandemic.[636]

Nevertheless, social assistance programs have implementation, non-comprehensiveness, and sufficiency problems. Corruption and incompetence problems exacerbated by one-party

[630] Malcolm Langford, "The Impact of Public Interest Litigation: The Case of Socio-Economic Rights," *Australian Journal of Human Rights* 27, no. 3 (September 2, 2021): 505–31.
[631] For a brief overview of the policy directions since 1994 see "South Africa's Key Economic Policies Changes (1994 - 2013)," South African History Online, accessed March 6, 2024, https://www.sahistory.org.za/article/south-africas-key-economic-policies-changes-1994-2013.
[632] Adam Habib, "The Politics of Economic Policy-Making: Substantive Uncertainty, Political Leverage, and Human Development," *Transformation: Critical Perspectives on Southern Africa* 56, no. 1 (2004): 90–103.
[633]Sharon Groenmeyer, "The Political Dynamics of the Adoption and Extension of Child Support Grants," *Transformation: Critical Perspectives on Southern Africa* 91, no. 1 (2016): 144.
[634] James Manor and Jane Duckett, "The Significance of Political Leaders for Social Policy Expansion in Brazil, China, India, and South Africa," *Commonwealth & Comparative Politics* 55, no. 3 (July 3, 2017): 303–27. Bongani M Mayosi et al., "Health in South Africa: Changes and Challenges since 2009," *The Lancet* 380, no. 9858 (December 2012): 2029–43.
[635] Sandra Liebenberg, "Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-Economic Rights Doctrine of Non-Retrogression," *South African Journal on Human Rights* 37, no. 2 (April 3, 2021): 184–185.
[636] "In the COVID-19 Era, Healthcare Should Be Universal and Free," Chatham House, May 11, 2020, https://www.chathamhouse.org/2020/05/covid-19-era-healthcare-should-be-universal-and-free. Sharifah Sekalala et al., "Health and Human Rights Are Inextricably Linked in the COVID-19 Response," *BMJ Global Health* 5, no. 9 (September 2020): 1-7.

dominance do not leave the realization of social rights intact.[637] As estimated, due to corruption, 20 billion rand (up to 3 billion USD) is lost on healthcare yearly.[638] Besides, the Social Relief of Distress Grant is the only general support available without demonstration of special needs, and even that is only given for three months with the possibility of a one-time extension.[639] Housing policy is also fragmented as it focuses on investing in building new homes rather than upgrading existing informal settlements. This solution was time-consuming, led to long waiting lines and relocation from urban areas to peripheries.[640] This lack of short-term solutions and a more balanced approach did not escape the attention of the SACC in the *Grootboom* case discussed below.

1.5.2.Social Rights Doctrine: Thickening Reasonableness

Aligned with the minimalism of the SACC, the life of social rights adjudication in the First Certification judgment began with the least controversial argument that at least negative aspects of socio-economic rights were justiciable.[641] This minimalism and awareness of SoP concerns have stayed as the SACC continued to refer to scarce resources, hence feasibility problems, lack of democratic legitimacy, and competence of the judicial branch in social rights cases.[642] Due to

[637] Ray, *Engaging with Social Rights*, 366. Adam Kassner, "Diggin' Deep into Gold Fields: South Africa's Unrealized Black Economic Empowerment in the Shadows of Executive Discretion," *Cornell International Law Journal* 48, no. 3 (Fall 2015): 667-696

[638] "State Capture Threatens the Right to Health," Spotlight, November 30, 2017, https://www.spotlightnsp.co.za/2017/11/30/state-capture-threatens-right-health/.

[639] "Social Relief of Distress," South African Government, accessed March 14, 2023, https://www.gov.za/services/social-benefits/social-relief-distress

[640] Benjamin Bradlow, Joel Bolnick, and Clifford Shearing, "Housing, Institutions, Money: The Failures and Promise of Human Settlements Policy and Practice in South Africa," *Environment and Urbanization* 23, no. 1 (April 2011), 267-275.

[641] When reviewing the draft constitution, the Court explained that budgetary implications were a corollary of enforcing civil and political rights as well, Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC).

[642] Soobramoney v Minister of Health, KwaZulu-Natal 1998 1 SA 765 (CC) [hereafter *Soobramoney*] 11, 29-30, 58; Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 [hereafter *Grootboom*], para 41; Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC) [hereafter *Treatment Action Campaign*], paras 37, 96-97, 112; Mazibuko and Others v City of Johannesburg and Others (2010) (4) SA 1 (CC) [hereafter *Mazibuko*], para 62.

the SoP concerns precisely, the SACC has rejected individual enforcement of social rights[643] and refrained from (though did not rule out[644]) developing a minimum core doctrine in view of the widespread, systemic access problems. [645]

Despite this minimalism, incrementally, the SACC developed the rationality standard into a thicker version of the reasonableness test. In the first-ever social rights case *Soobramoney*, the SACC applying the rationality review stressed the difficult trade-offs involved in health care and explained that judicial granting of expensive procedures could divert scarce medical resources without the mandate to prejudice claims of others in this manner (see also Section 2.2).[646] In 3 years, in the *Grootboom* case, the SACC converted rationality to reasonableness review with equality concerns setting the stage (more than the essentiality of needs).[647] Without defining the most optimal policy, the SACC in *Grootboom* excluded a particular option – total inaction in terms of giving due priority to the more vulnerable in the same group (of the homeless) and rejected a purely statistical approach to housing policies.[648] In another case, *Khosa*, also essentially decided on the right equality grounds (right to social security was also invoked), the SACC went as far as considering the required resources for including permanent residents negligible. [649]

[643] *Grootboom*, para 95.
[644] For an argument that the Court in Treatment Action Campaign left the room for direct enforcement of SE rights, see Jonathan Klaaren, "A Remedial Interpretation of the Treatment Action Campaign Decision," *South African Journal on Human Rights* 19, no. 3 (January 2003): 455, 466-467.
[645] *Soobramoney*, paras 8, 24, 27-28, 31. *Grootboom*, para 93, Mazibuko, para 81. Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others 2010 (4) BCLR 312 (CC) [hereafter *Nokotyana*], City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) [hereafter *Blue Moonlight*], para 2.
[646] *Soobramoney*, para 58.
[647] Liebengerg argues that the essentiality is decisive, see Sandra Liebenberg, "Reasonableness Review," in *The Oxford Handbook of Economic and Social Rights*, ed. Malcolm Langford and Katharine Young (Oxford University Press 2023).
[648] *Grootboom*, paras 41, 53.
[649] Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development 2004 (6) SA 505 (CC) [hereafter *Khosa*]; Seekings and Nattrass, *Policy, Politics and Poverty in South Africa*, 200.

Grootboom's reasonableness became a defining moment for the judicial approach to social rights in South Africa. In parallel to a strengthening grassroots movement against evictions[650] and aligned with the SACC's early openness to negative claims of social rights, the judiciary strengthened standards on the right to housing. The Court set the standard that eviction only takes place with the provision of alternative accommodation, even in the case of private-sector evictions,[651] and started using meaningful engagement orders requiring the participation of the affected communities in the decision-making process about alternative housing.[652] In these housing rights cases, the SACC retained the ultimate authority to assess whether the engagement was meaningful, and hence, the reasonableness test was satisfied.[653] Meanwhile, the meaningful engagement doctrine spread to other rights, for instance, the right to education.[654]

The reasonableness standard developing since *Grootboom* now requires that the policy is comprehensive, balanced (include short, medium, and long-term elements), flexible (not 'set in

[650] Langford, "The Impact of Public Interest Litigation," 519-522; David Hausman, "When and Why the South African Government Disobeys Constitutional Court Orders," *Stanford Journal of International Law* 48, no. 2 (2012): 444–445. Steven Friedman, "Enabling Agency: The Constitutional Court and Social Policy," *Transformation: Critical Perspectives on Southern Africa* 91, no. 1 (2016): 21, 34-35. Lauren Paremoer and Courtney Jung. "The Role of Social and Economic Rights in Supporting Opposition in Postapartheid South Africa," in *After Apartheid: Reinventing South Africa?* ed. Ian Shapiro and Kahreen Tebeau (University of Virginia Press, 2011), 213.

[651] Except in special circumstances such as a deliberative invasion of housing or land, see *Blue Moonlight.*

[652] The requirement of meaningful engagement originated in a case raising the issue of a trade-off between the safety and availability of housing and was based on Art. 26(3) of the Constitution requiring that all relevant circumstances be considered before eviction, coupled with the right to dignity in the Constitution, see Occupiers of 51 Olivia Road v. City of Johannesburg 2008 (3) SA 208 (CC); see also Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes 2010 (3) SA 454 (CC) [Joe Slovo I]; Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others 2011 (7) BCLR 723 (CC) [Joe Slovo II]; Schubart Park Residents' Association v. City of Tshwane Metropolitan Municipality 2013 (1) SA 323 (CC).

[653] James Fowkes "Analysis: Latest Developments in the South African Court's Most Expansive Socio-Economic Rights Doctrine — The Need for Meaningful Engagement about Meaningful Engagement," IACL-IADC Blog, accessed November 28, 2022, https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-latest-developments-in-the-south-african-courts-most-expansive-socio-economic-rights-doctrine-the-need-for-meaningful-engagement-about-meaningful-engagement.

[654] Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 (8) BCLR 761 (CC); Head of Department of Education, Free State Province v. Welkom High School 2014 (2) SA 228 (CC); MEC for Education v. Governing Body of the Rivonia Primary School 2013 (6) SA 582 (CC), see Sandra Liebenberg, "Remedial Principles and Meaningful Engagement in Education Rights Disputes," *Potchefstroom Electronic Law Journal* 19 (May 17, 2017): 1–43. Woolman, *The Selfless Constitution*, 321, 325-231, 410 and Chapter 8.

stone and never revisited'),[655] supported by appropriate budget[656] and human resources. The standard also regulates the distribution of responsibility among the national and provincial governments. Namely, the standard stipulates that policies need to be well-coordinated with the 'overall responsibility' for fulfilling constitutional obligations resting with the national government, including duties of adequate planning, monitoring, and budgetary support of provincial governments.[657] Apart from the framework standards on the policy content, the SACC defined the parameters of the policy-making process, namely, that it must abide by transparency standards, both about the process and the rationale behind the policy, and engage the public to some degree[658] unless the measures are administratively unsustainable.[659] As noted in Chapter 1, this new procedural fairness with meaningful engagement is rooted in administrative law,[660] adding the third dimension of community participation to the purely institutional context of inter-branch relations.[661]

As the SACC implied itself[662] and scholars, including critics of the Court[663] recognized, minimum core is implicitly present in jurisprudence. Indeed, despite its rejection, in substance, the prioritization characteristic of minimum core doctrine was possible under a flexible reasonableness

[655] *Mazibuko*, para 162.
[656] See *Blue Moonlight*, para 74: 'This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations.'
[657] *Grootboom*, paras 66-68.
[658] Treatment Action Campaign, para 123. *Mazibuko*, para 161. *Blue Moonlight*, para 74; For a summary, see Sandra Liebenberg, "Direct Constitutional Protection of Economic, Social and Cultural Rights in South Africa," in *The Protection of Economic, Social and Cultural Rights in Africa*, ed. Danwood Mzikenge Chirwa and Lilian Chenwi (Cambridge University Press, 2016), 315.
[659] *Mazibuko*, para 122.
[660] Van der Berg, "Meaningful Engagement,"376–98.
[661] Danie Brand, "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa," *Stellenbosch Law Review* 22, no. 3 (January 2011): 614–38. Theunis Roux, "," *Democratization* 10, no. 4 (November 2003): 96.
[662] Treatment Action Campaign, para, 34.
[663] Bilchitz acknowledged its implicit presence in jurisprudence, see Bilchitz, "Giving Socio-Economic Rights Teeth," 498;

standard.[664] However, even if given more weight in social rights cases,[665] this was not substantively new but embedded in the thick rationality and reasonableness standards discussed above. Notably, the administrative standard of reasonableness is thick even when social rights do not apply, but other positive duties based on the Constitution or law are engaged.[666] This is not to say that reasonableness in social rights has not pushed new developments. At a minimum, social rights cases emphasized that total state inaction on social rights may not be a permissible option and elaborated ways in which this can be judicially substantiated.[667]

Decided 9 years after the *Grootboom* case when the housing rights and meaningful engagement standards were already formulated, the *Mazibuko* case[668] is often interpreted as a retreat. However, in essence, despite certain shortcomings in its reasoning, in principle, *Mazibuko* did not conflict with an incremental, thick conception of the reasonableness standard. Against the background of the government's responsive attitude, which improved the water provision after litigation in lower courts,[669] the SACC tolerated certain problematic features of the policy, namely, that the

[664] On implicit combination of minimum core and reasonableness, see Joie Chowdhury, "Unpacking the Minimum Core and Reasonableness Standards," in *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing, 2020), 272-273; Lisa Forman, "Ensuring Reasonable Health: Health Rights, the Judiciary, and South African HIV/AIDS Policy," *The Journal of Law, Medicine & Ethics: A Journal of the American Society of Law, Medicine & Ethics* 33, no. 4 (2005): 719. Katharine G. Young, "Proportionality, Reasonableness, and Economic and Social Rights," in *Proportionality: New Frontiers, New Challenges*, ed. Mark Tushnet and Vicki C. Jackson, Comparative Constitutional Law and Policy (Cambridge: Cambridge University Press, 2017), 256.

[665] Carol Steinberg argues that The heavier weighting of the values of human dignity and equality and the closer scrutiny of whether government programmes have been sufficiently attentive to these values distinguishes reasonableness review in the context of socio-economic rights jurisprudence from a purely administrative law model of review, see Carol Steinberg, "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence," *South African Law Journal* 123, no. 2 (January 2006): 254, 277, 281.

[666] Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 2 SA 359 (CC), paras 86-88; Geo Quinot and Sandra Liebenberg, "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa," *Stellenbosch Law Review* 22, no. 3 (January 2011): 647-648.

[667] *Mazibuko*, para 67; Quinot and Liebenberg, "Narrowing the Band," 644.

[668] Applicants challenged the City of Johannesburg's Free Basic Water policy, in terms of its sufficiency as it provided only 6 kiloliters of free water monthly to all households in Johannesburg despite its size.

[669]The Court emphasized that the policy was modified to include an additional amount of free water for households registered as indigent, *Mazibuko*, paras 94–97, 162-164. Jackie Dugard, "Testing the Transformative Premise of the South African Constitutional Court: A Comparison of High Courts, Supreme Court of Appeal and Constitutional Court Socio-Economic Rights Decisions, 1994–2015," *The International Journal of Human Rights* 20, no. 8 (November 16, 2016): 1152.

municipality overlooked the disproportionately larger households of the poor by determining the amount of water provision based on the average household size. The SACC held such an approach was inevitable with universal policies as alternatives would be too burdensome and costly pointing to the evidence submitted by the city. Contradicting its restraint from value judgments, the SACC commented that the eventually provided amount of water seemed adequate even in the applicants' case, while it was generous for 80% of the households.[670] This blanket reasoning satisfied with the statistical progress seems insufficient even for the thick reasonableness of administrative[671] and constitutional law origin under *Bato Star* and *Grootboom,* respectively.[672] However, such an interpretation can still be reconciled with the rest of jurisprudence if the self-correction capacity of democratic processes, evident in the revision of policy during litigation, is taken into account. *Mazibuko* was no doctrinal retreat also because the SACC continued to revoke decisions of the political branches,[673] and even strengthened remedies (see below). As in *Mazibuko*, in *Nokotyana,* the Court remained loyal to the regular democratic process and merely required compliance with the existing deadline for delivering the decision on upgrading an informal settlement in accordance with the National Housing Code.[674]

Gradually, as more social policies were adopted on a subconstitutional level, the SACC emphasized that social rights acquired content through them.[675] Signs of tying orders to evolving

[670] *Mazibuko*, para 89
[671] Quinot and Liebenberg, "Narrowing the Band," 659.
[672] Lucy A. Williams, "The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study," *Constitutional Court Review* 3, no. 1 (January 2010): 141–99.
[673] Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others 2010 (2) BCLR 99 (CC); Friedman, "Enabling Agency," 22–23.
[674] See Nokotyana: 'The delay by the Province is the most immediate reason for the dilemma and desperate plight of the residents. As long as the status of the Settlement is in limbo, little can be done to improve their situation regarding sanitation, sufficient lighting to enhance community safety and access by emergency vehicles, as well as a range of other services.'
[675] *Mazibuko*, paras 46-48

political commitments were discernible already in *Grootboom*, which, alongside a declaration of a violation, ended with a judicially endorsed agreement between the parties that basic housing, sanitation, and access to water would be provided. The Court later enforced the agreement by making concrete orders (e.g., to construct 20 toilets and taps; to provide waterproof building materials for building shacks), also requiring written reports about compliance.[676]

Alongside review standards, the SACC incrementally also strengthened remedies, though, yet only applied to cases concerning the non-observance of existing statutory guarantees. As with merits, the SACC's approach to structural interdict[677] was informed by means-end analysis, including the self-correction capacity of democratic processes. It is true that cases giving constitutional status to existing statutory guarantees do not raise SoP issues as such, at least, until the retrogressive measures take away these guarantees. However, SoP concerns still arise when the Court uses structural interdicts to ensure the enforcement of these standards. Up to now, the SACC has used such orders when chronic and systemic dysfunctions of public administration are established, ranging from recalcitrance and utter indifference to bad faith. This dysfunction is sometimes proven through individual court remedies left unimplemented. The prime example is the saga of social grant maladministration cases, in which the SACC emphasized the problems of credibility, bad faith, and recalcitrance, as well as the gravity of the situation, amounting to a 'national crisis'

[676] Kameshni Pillay, "Implementation of Grootboom: Implications for the Enforcement of Socio--Economic Rights," *Law, Democracy & Development* 6, no. 2 (2002): 255–77. Hausman, "When and Why the South African Government Disobeys Constitutional Court Orders," 444. "Report on a Fact-Finding Mission to the Wallacedene Informal Settlement, Kraaifontein, in the Western Cape", the Select Committee on Public Services, June 14, 2005 https://static.pmg.org.za/docs/2005/comreports/050629scpservicereport.htm

[677] For the discussion and other notable recent cases with intrusive orders, see Helen Taylor, "Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation," *Constitutional Court Review* 9, no. 1 (December 2019): 247–81. Gaurav Mukherjee and Juha Tuovinen, "Designing Remedies for a Recalcitrant Administration," *South African Journal on Human Rights* 36, no. 4 (October 1, 2020): 386–409; David Dyzenhaus, "The Pasts and Future of the Rule of Law in South Africa," in *After Apartheid: Reinventing South Africa?*, ed. Ian Shapiro and Kahreen Tebeau (University of Virginia Press, 2011), 254-255. Michael Cosser, Narnia Bohler-Muller, Gary Pienaar, "Separation of Powers and the Dangers of Judicial Underreach" in *Making Institutions Work in South Africa,* ed. Daniel Plaatjies (HSRC Press, 2020).

affecting the most vulnerable segments of society. The SACC's final order - commissioning an independent panel of experts to oversee implementation - did not shy away from embarrassing the political branches once all democratic, including legal means, had been exhausted.[678]

Finally, even more than in the case of the ISC, one cannot but wonder why the SACC jurisprudence on social rights (especially beyond housing rights[679]) is so scarce despite a strong constitutional court, explicit justiciability of social rights, evolving standard of reasonableness, and prevailing poverty and inequality. As noted, in general, the SACC has a low annual output, from which social rights decisions constitute up to 20%.[680] A few systemic reasons can be stipulated: 1) Legal representation is a requirement for litigation in South Africa. Although legal aid is available for the indigent, including in human rights-related cases, often even the distance to access appropriate institutions is an obstacle.[681] Hence, most social rights cases are litigated by organized actors such as NGOs or communities united around a particular problem.[682] 2) Incentives for individual litigation are lacking as the social rights judgments rarely produce individual and immediate remedies.[683] 3) In theory, the SACC has broad powers not to discuss a case on appeal (the

[678] In 2013, the court first declared the contract with the independent contractor invalid, although with a suspended declaration, ordering the minister of social development, that alternative arrangements for the payment of social grants be made. The CC retained jurisdiction and also set out steps that had to be taken by the Ministry, see AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency 2014 (4) SA 179 (CC); In defiance of this decision instead the contract was renewed. In the following case, in which the SACC established an expert panel for supervision of implementation, the Court commented that the minister was 'apparently' informed only in October 2016 that SASSA would not be able to take over, which indicated its explicit distrust of the authorities, Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC) [hereafter *Black Sash I*], para 21.

[679] Taylor argues that the reason for outstanding presence of housing cases, is judges' more frequent exposure to the housing problem both in the lived experiences and courtrooms (as all evictions go through courts), also their perception that this entails particular problems to dignity, see Taylor, "On the Social Construction of Legal Grievances,"1326–1356.

[680] Ibid, 1334.

[681] As studies show, even in a relatively better-off province such as Gauteng, over 60% of people find it difficult to access the institutions, where they can lodge complaints about violation of their rights. Moreover, legal representations costs might still not be affordable to those above the indigence threshold in the working or middle classes, see David Bilchitz, "Expanding Access to Justice for Socio-Economic Rights Complaints in South Africa: Which Direction Should We Head In?," *Völkerrechtsblog* (July 24, 2017).

[682] Taylor, "On the Social Construction of Legal Grievances," 1336.

[683] Dugard, "Courts and Structural Poverty in South Africa," 293–328; Berger, "Litigating for Social Justice in Post-Apartheid South Africa," 82.

formulation being 'may decide') or not to accept direct applications and appeals based on a subjective standard of their importance and urgency.[684] 4). Attributable to the acceptance of the state's proactive role in providing social goods, the government often agrees with lower court decisions instead of appealing them.[685] Among the cases that never came before the SACC[686] is the one decided by the SCA and HC, which left ambiguity as to whether there was an immediate obligation[687] to provide textbooks at public schools as part of an unqualified right to basic education as well as the right to equality,[688] or the duty hinged on the existing policy in that regard.[689] Additional reasons for the scarcity of health rights cases will be discussed separately (section 2.1).

To sum up, social rights adjudication aligned with the general SoP doctrine and its rationale in South Africa without introducing substantive changes. However, it did refine SoP, among other things, by demonstrating how unconstitutional inaction and resource scarcity arguments can be judicially scrutinized, and the self-correction capacity of democratic processes can be counted in

[684] Art. 167 (3) (ii) and Art. 167 (6) of the Constitution. Kate Hofmeyr, *Rules and Procedure in Constitutional Matters* in *Constitutional Law of South Africa*, ed. Stuart Woolman, 2nd edn. (Juta 2008): 5-23-5-25.

[685] Komape v Minister of Basic Education[2019] ZASCA 192; Although initially, the Limpopo Education department refused to comply stating it did not have sufficient budget and would not be able to fulfil the right before 2030, soon, President himself responded by instructing the Ministry of Basic Education to address the challenges, see "Improving School Infrastructure High on Govt's Agenda," Suid-Kaap Forum, January 17 2020 https://www.suidkaapforum.com/News/Article/National/improving-school-infrastructure-high-on-govt-s-agenda-202001170914;

[686] Residents of Bon Vista Mansions v Southern Metropolitan. Local Council 2002 (6) BCLR 625 (W); Tripartite Steering Committe and Another v Minister of Basic Education and Others 2015 (5) SA 107 (ECG); Equal Education and Another v Minister of Basic Education and Others 2019 (1) SA 421 (ECB); Centre for Child Law and Others v Minister of Basic Education and Others 2020 (3) SA 141 (ECG); Equal Education and Others v Minister of Basic Education and Others 2021 (1) SA 198 (GP).

[687] Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA); Liebenberg, "Remedial Principles and Meaningful Engagement in Education Rights Disputes," 38, fn. 168. Ann Skelton and Serges D. Kamga, "Broken Promises: Constitutional Litigation for Free Primary Education in Swaziland," *Journal of African Law* 61, no. 3 (October 2017): 339-340. Mark Heywood, "Economic Policy and the Socio-Economic Rights in the South African Constitution, 1996–2021: Why Don't They Talk to Each Other?," *Constitutional Court Review* 11, no. 1 (December 2021): 350.

[688] Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 (8) BCLR 761 (CC).

[689] SCA's argument that it was 'merely seeking to hold the government to its own standard' under the existing policy since 2014 which informed the content of the right raised a question of whether the entrenchment of a duty under the right to education hinged on the fact that the same obligations were already existing on a policy level or were binding regardless, see Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA), para 42. Faranaaz Veriava, "The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism," *South African Journal on Human Rights* 32, no. 2 (May 3, 2016): 337.

the means-end analysis. Together with the standards on the practice of structural interdicts, Mazibuko, rather than a reversal, was another manifestation that the self-correction capacity of the democratic processes matters for the means-end analysis of the reasonableness test in South Africa.

Part II: Right to Health through the Prism of SoP

2.1. Population Health, Health Care and Legislative/Policy Framework

Life expectancy in South Africa stood at 66 in 2019 before the COVID-19 pandemic led to a drop of four years - the lowest indicator among the three countries studied in this dissertation.[690] The major causes of death in South Africa are HIV[691] and tuberculosis (TB) epidemics, often as an HIV/TB co-infection.[692] Other Notable health challenges are non-communicable, chronic diseases, mental health disorders, injury and violence, and maternal, neonatal, and child mortality.[693] HIV epidemics placed South Africa among a dozen countries with regressive general[694] and maternal mortality[695] rates since the 1990s.[696] Certain progress was achieved in reducing infant mortality.[697]

[690] "Life expectancy at birth, total (years) - India, South Africa, Colombia," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=IN-ZA-CO.

[691] Almost half of the deaths in South Africa were due to HIV, see Jonathan M. Berger and Amy Kapczynski, "The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa," in *Human Rights Advocacy Stories*, ed. Deena Hurwitz and Margaret L. Satterthwaite (Foundation Press, 2009), 6.

[692] Marius Pieterse, *Can Rights Cure?: The Impact of Human Rights Litigation on South Africa's Health System* (Pretoria University Law Press 2014), 5-6.

[693] Mayosi et al., "Health in South Africa: Changes and Challenges since 2009," 2029–43.

[694] Life expectancy has fallen from 63 in 1994 to 54 in 2004 to gradually rise to 64 in 2020 one year higher than the previous peak of 63 in 1991, "Life expectancy at birth, total (years) - India, South Africa, Colombia," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=IN-ZA-CO.

[695] maternal deaths per 100,000 live births increased from 41 in 1994 to 157 in 2009 to fall again to 78 in 2015, "Maternal mortality ratio (national estimate, per 100,000 live births) - South Africa," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SH.STA.MMRT.NE?locations=ZA

[696] Mayosi et al., "Health in South Africa: Changes and Challenges since 2009," 2029–43.

[697] Infant mortality decreased with 46 per 1000 live births in 1994 to 26 in 2021, Mortality rate, infant (per 1,000 live births) - South Africa," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SP.DYN.IMRT.IN?locations=ZA.

Health disparities cut across population groups, most prominently along racial lines,[698] and different provinces[699] despite equity-based formulae of central transfers to them.[700]

These health challenges are met by the highly fragmented, mixed public-private health care system inherited from apartheid South Africa.[701] The public health care system is tax-financed and free.[702] Government investments in health care are rising (currently 5.35% of GDP)[703] in line with the WHO recommendation, while OOP in public and private healthcare systems is also low - 5.36%[704] compared to the global average of around 18%.[705] Nevertheless, problems of quality, geographical accessibility, medical personnel shortages,[706] medicine stockouts, and long waiting lines (e.g.

[698] Charles Ngwena, Rebecca Cook, and Ebenezer Durojaye, "The Right to Health in Post-Apartheid Era South Africa," in *Advancing the Human Right to Health*, ed. José M. Zuniga, Stephen P. Marks, and Lawrence O. Gostin (Oxford University Press, 2013), 131.

[699] Rich provinces like Gauteng and the Western Cape spend much more on health care than poor provinces such as Limpopo, Mpumalanga and the Eastern Cape, SAHRC, *The Right to Health Care* (5th Economic and Social Rights Report Series 2002–2003) www.sahrc.org.za/home/21/files/Reports/5th_esr_health.pdf; For example, TB cure rate was around 80% in 2007 in Western Cape whereas, on average, in KwaZulu- Natal, the cure rates were between 40 per cent and 60 per cent, Nelson K Sewankambo and Achilles Katamba, "Health Systems in Africa: Learning from South Africa," *The Lancet* 374, no. 9694 (September 2009): 957–59.

[700] Forman and Singh, "The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa," 296. Mayosi and Benatar, "Health and Health Care in South Africa — 20 Years after Mandela," 1344-1346.

[701] Forman and Singh, "The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa," 288–292. Ngwena, Cook, and Durojaye, "The Right to Health in Post-Apartheid Era South Africa," 131.

[702] fees charged for some services based on means test are also marginal, see Forman and Singh, "The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa," 294-295.

[703] "Domestic general government health expenditure (% of GDP) - South Africa, India, Colombia," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SH.XPD.GHED.GD.ZS?locations=ZA-IN-CO.

[704] "Out-of-pocket expenditure (% of current health expenditure) - Colombia, India, South Africa," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SH.XPD.OOPC.CH.ZS?locations=CO-IN-ZA.

[705] Sharma, "Health Care for India's 500 Million" 3.

[706] In general, there were from 0.7 in 2007 to 0.8 physicians in 2019 per 1000 population below WHO average of 1.0, "Physicians (per 1,000 people) - South Africa," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SH.MED.PHYS.ZS?locations=ZA;

years for cancer treatment radiotherapy[707])[708] remain with the public health care system.[709] From 2004 to 2014, the general willingness of medical aid scheme users to turn to the public health care system decreased by 44%.[710] This is contrasted with a well-functioning private healthcare system, with 70% of doctors (as of 2014) [711] catering only to the remaining 16% of the insured population.[712] The private health system is the choice of the government itself when funding the Government Employees Medical Scheme (GEMS).[713]

In 2009, with a committed Health Minister in Zuma's administration, the state actively pursued the implementation of the single-payer tax-based UHC - National Health System (NHS) with the participation of private and public hospitals.[714] The NHI is still pending[715] and is not expected to

[707] Ndivhuwo Mukwevho, "SA Activists Intensify Fight for Cancer Patient Rights," Health-e News, November 2, 2022, https://health-e.org.za/2022/11/02/sa-activists-intensify-fight-for-cancer-patient-rights/.

[708] Anneleen, "Critical Health Perspectives: National Health Insurance in South Africa – Issue 1: A Brief History and Critical Analysis"; Forman and Singh, "The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa," 292-294; Janet Michel et al., "Universal Health Coverage Financing in South Africa: Wishes vs Reality," *Journal of Global Health Reports* 4 (July 21, 2020): 2. Mayosi and Benatar, "Health and Health Care in South Africa — 20 Years after Mandela," 1346. Coovadia et al., "The Health and Health System of South Africa: Historical Roots of Current Public Health Challenges," 817–34.. Frenz and Vega, "Universal health coverage with equity; Harris et al., "Inequities in Access to Health Care in South Africa," S102–23.

[709] Anneleen, "Critical Health Perspectives: National Health Insurance in South Africa – Issue 1: A Brief History and Critical Analysis," Peoples' Health Movement South Africa, accessed March 3, 2024, https://www.phm-sa.org/critical-health-perspectives/. Forman and Singh, "The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa," 292-294. Michel et al., "Universal Health Coverage Financing in South Africa: Wishes vs Reality," 2. Mayosi and Benatar, "Health and Health Care in South Africa — 20 Years after Mandela," 1346; Hoosen Coovadia et al., "The Health and Health System of South Africa: Historical Roots of Current Public Health Challenges," *The Lancet* 374, no. 9692 (September 2009): 817–34.. Frenz, Patricia and Jeanette Vega, "Universal health coverage with equity: what we know, don't know and need to know," *First Global Symposium on Health Systems Research Background Paper* (November 16-19, 2010) https://www.healthsystemsresearch.org/hsr2010/images/stories/9coverage_with_equity.pdf; Bronwyn Harris et al., "Inequities in Access to Health Care in South Africa," *Journal of Public Health Policy* 32, no. S1 (June 2011): S102–23.

[710] Kehinde Omotoso and Steven F. Koch, "South African Trends in Medical Aid Coverage and Stated Healthcare-Seeking Preferences: 2004–14," *Development Southern Africa* 34, no. 5 (September 3, 2017): 575–92.

[711] Mayosi and Benatar, "Health and Health Care in South Africa — 20 Years after Mandela," 1344-1346

[712] "South Africa: Share of Medical Aid Scheme Members, by Population Group," Statista, accessed December 20, 2022, https://www.statista.com/statistics/1115752/share-of-medical-aid-scheme-members-in-south-africa-by-population-group/.

[713] Mayosi and Benatar, "Health and Health Care in South Africa — 20 Years after Mandela," 1344-1346

[714]Jackie Dugard et al. *Socio-Economic Rights—Progressive Realization?* (Foundation for Human Rights 2016), 400-401, 429. Mayosi et al., "Health in South Africa: Changes and Challenges since 2009," 2029–43. "Media Statement by Minister of Health: Release of Green Paper on National Health Insurance," South African Government, accessed November 28, 2022, https://www.gov.za/media-statement-minister-health-release-green-paper-national-health-insurance.

[715] Anneleen, "Critical Health Perspectives: National Health Insurance in South Africa – Issue 1: A Brief History and Critical Analysis".

be finalized until 2026.[716] Despite adequate government investment in health care, the growth of private and the lagging of public health care systems are path-dependent, creating significant obstacles to the successful implementation of NHI.

Under the Constitution, health care, including epidemic situations, falls within the functional areas of concurrent national and provincial legislative competencies.[717] Political branches have taken a proactive role in health issues by incrementally building the legislative and policy frameworks.[718] The national government formulates policies, issues appropriate guidelines, and provides funding, while provincial governments, alongside devising complementary policies, manage the budgets (80% of which come from unconditional grants[719]) and directly provide health services. These have made positive precedents possible in provinces such as the Western Cape;[720] among those was the successful program on the prevention of mother-to-child transmission of AIDS, which, as will be discussed below, was used by SACC in its argumentation against the infeasibility of more effective state action.[721] However, most provincial departments are sites of poor financial management,[722] which is more complicated to address from the center as MECs for health are accountable to provincial Premiers and legislatures only.

[716] Michel et al., "Universal Health Coverage Financing in South Africa: Wishes vs Reality," 6.
[717] Schedule 4, Part A of the Constitution.
[718] Adam Habib, "The Politics of Economic Policy-Making: Substantive Uncertainty, Political Leverage, and Human Development," in *Democratising Development* (Brill Nijhoff, 2005), 40-41.
[719] Dugard et al. *Socio-Economic Rights—Progressive Realization?*, 430-431; Forman and Singh, "The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa," 292–294.
[720] Mayosi and Benatar, "Health and Health Care in South Africa — 20 Years after Mandela," 1348-1349.
[721] *Treatment Action Campaign*; Nico Steytler, "Federal Homogeneity from the Bottom up: Provincial Shaping of National HIV/AIDS Policy in South Africa," *Publius* 33, no. 1 (2003): 59–74.
[722] Beth Engelbrecht and Nicholas Crisp, "Improving the Performance of the Health System : Perspectives on a National Health Insurance," *South African Health Review* 2010, no. 1 (January 2010): 199.

Health policies in South Africa are embedded in the right to health discourse. The early ANC government explicitly defined equity-driven healthcare priorities,[723] and the National Health Act 2003 provided an explicit rights-based framework for the healthcare system. The Act focused on primary health care and vulnerable populations and envisaged free health services to pregnant and lactating women and children below 6 years of age, as well as free primary health care to people with occupational diseases.[724] The Act also makes abortion services free of charge in the public health sector. Alongside concrete healthcare services, the Act includes measures for the accountability of public healthcare establishments and the participation of the local community.[725] It also regulates private insurance. Most importantly, the Act defines minimum benefits for the insured and prohibits reliance on current health conditions for determining membership contributions.[726] The issues of access to medicine are also regulated. Among other regulations, the relevant Act institutes price control mechanisms, and establishes single professional dispensing fees for pharmacies, to be reviewed periodically by a Pricing Committee.[727]

This Act became the subject of two high-profile cases before the SACC. In one of the cases[728] against price control mechanisms, the SACC came to play the role of supporting political branches in initiating rights-friendly policies and checking against their omissions - 'blind spots'. The law

[723] Ngwena, Cook, and Durojaye, "The Right to Health in Post-Apartheid Era South Africa," 137; Forman and Singh, "The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa," 298-301.
[724] Forman and Singh, "The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa," 297.
[725] Ngwena, Cook, and Durojaye, "The Right to Health in Post-Apartheid Era South Africa," 138.
[726] Medical Schemes Act 1998 (SA).
[727] Medicines and Related Substances Control Amendment Act 1997 (SA). Law was modelled on a sample draft prepared by World Intellectual Property Organization (WIPO).
[728] The one initiated by pharmaceutical companies in 1999 seeking protection for their patent rights was dropped due to hostile publicity and solidarity protests worldwide, see Matthew M. Kavanagh, "The Right to Health: Institutional Effects of Constitutional Provisions on Health Outcomes," *Studies in Comparative International Development* 51, no. 3 (September 1, 2016): 350-351. Courtenay Sprague and Stu Woolman, "Moral Luck: Exploiting South Africa's Policy Environment to Produce a Sustainable National Antiretroviral Treatment Programme," *South African Journal on Human Rights* 22, no. 3 (January 2006): 361–364.

was upheld for the most part, except for the dispensing fee against the body of evidence that it could threaten the viability of the pharmacies and, in that manner, also harm health rights.[729] The SACC similarly supported political branches alongside checking against 'blind spots' in another case, in which it accepted the general policy decision to establish a fund for compensation of road accident victims while striking down the tariff as insufficient for care in the private health sector, where such care was available.[730]

The state continued to play a proactive role in the realization of the right to health by adopting other laws and regulations.[731] Moving towards NHI, legislative changes in 2013 created the Office of Health Standards Compliance (OHSC), with the Health Ombud office under it responsible for protecting healthcare users.[732] In 2020, legislation established a body to facilitate evidence-based policymaking by coordinating disease and injury surveillance.[733] The NHI plan envisages the establishment of a health technology assessment (HTA) body for health rationing,[734] which could increase litigation on health rights.

[729] *New Clicks*; Dyzenhaus, "The Pasts and Future of the Rule of Law in South Africa," 247.
[730] Law Society v Minister for Transport 2011 (1) SA 400 (CC).
[731] Mental Health Care Act of 2002 (SA); Patients' Rights Charter 1997 (SA); Correctional Services Act of 1998 (SA); Nursing Act 2005 (SA); Pharmacy Amendment Act 2000 (SA); National Core Standards for Quality and Safe Health Care 2008 (SA). In 2017, regulations concerning standards and accountability on emergency health care provision both in private and public sectors were adopted. Sasha Stevenson, "Legislative Framework and Right to Health" in *The South Africa health reforms: 2015 – 2020. The Road Ahead*, ed. Malebona Precious Matsoso, Lindi Makubalo, Usuf Chikte, Yogan Pillay, and Robert Fryatt (Trackstar Trading 111 (Pty) 2022): 273, 275. Dugard et al. *Socio-Economic Rights—Progressive Realization?*,391-399, 428. Ngwena, Cook, and Durojaye, "The Right to Health in Post-Apartheid Era South Africa," 137-139. Mayosi and Benatar, "Health and Health Care in South Africa — 20 Years after Mandela," 1347-1349.
[732] Ebenezer Durojaye and Daphine Kabagambe Agaba, "Contribution of the Health Ombud to Accountability: The Life Esidimeni Tragedy in South Africa," *Health and Human Rights Journal* 20, no. 2 (December, 2018), 162.
[733] Stevenson, "Legislative Framework and Right to Health," 273, 275.
[734] Michael J DiStefano, Safura Abdool Karim, and Carleigh B Krubiner, "Integrating Health Technology Assessment and the Right to Health: A Qualitative Content Analysis of Procedural Values in South African Judicial Decisions," *Health Policy and Planning* 37, no. 5 (May 12, 2022): 646.

More than the mere presence of laws and policies are indeed required to protect the right to health. However, rights-supporting legislation is still not without effect. It is also helpful in attenuating the SoP tensions for court decisions. On the other hand, the fact that the political branches are proactive in formulating health policies shows that the democratic process is well-functioning or at least has the capacity for self-correction – a significant observation for the right to health jurisprudence discussed below.

Finally, a few remarks on the scarcity of health rights cases in South Africa are warranted. Health rights lawsuits per population are as rare in South Africa as in India.[735] Together with the reasons already listed in relation to social rights, the rarity of explicit health rights lawsuits can be attributed to the relative responsiveness of the democratic system in this area, at least since the *Treatment Action Campaign* case (see below).[736] This attitude of the political branches was also visible in the recent arbitration proceedings, which followed the provincial government's acknowledgment of the responsibility for the death of 144 patients due to the premature closing of a mental hospital before deinstitutionalized facilities were available. The arbitration proceedings resulting in individual and structural orders[737] were preceded by a health ombud inquiry and recommendations on the matter. Following such publicity, three senior officials responsible for the relevant decisions resigned.[738] Attesting to a similar responsiveness of the democratic system in this area, threats of litigation have led to settlements and changes, though often delayed, such as the opening of a

[735] Andia and Lamprea, "Is the Judicialization of Health Care Bad for Equity?" 61.
[736] Interview with Sasha Stevension, head of SECTION27 (12.12.2022).
[737] The decision granted damages and directed the provincial government to introduce systemic changes in the delivery of mental health care and to report to the health ombud within six months, see THE ARBITRATION AWARD in Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project v. National Minister of Health of the Republic of South Africa and Others before Justice Dikgang Moseneke (March 19, 2018).
[738] Durojaye and Agaba, "Contribution of the Health Ombud to Accountability," 164. "Life Esidimeni," *SECTION27*, accessed December 20, 2022, https://section27.org.za/life-esidimeni/; Stevenson, "Legislative Framework and Right to Health" 277.

permanent new clinic in 2019 to remedy the situation after the abrupt closing of the clinic in 2012.[739] Besides the relative responsiveness of the democratic system in this area, the rarity of healthcare decisions is also attributable to the difficulty of judicializing major problems of the free public healthcare system, such as quality, geographic accessibility, medical personnel shortages, medicine stockouts, and long waiting lines.

2.2. Policing the Democratic Process on Health Rights?

Unlike in India and Colombia, the right to have access to health care services is expressly protected as a fundamental, justiciable right under the Constitution with a separate provision prohibiting denial of emergency medical treatment.[740] The Constitution separately envisions the children's right to basic health care services and inmates' access to adequate health care.[741]

The right to health permeates jurisprudence in general beyond those cases specifically based on the above constitutional provisions. For instance, the right to health informed the standards adopted in delictual liability cases. In a case concerning an inmate who had contracted tuberculosis in prison where contraction was likely due to systemic problems (e.g. 200% occupancy, poor ventilation) and the continued reliance on the self-reporting system by the prison authorities, the SACC dropped the but-for-causation requirement.[742] This case is exceptional in terms of the

[739] Zizo Zali, "Village Clinic: The Seven-Year Fight for a Permanent Clinic Ends," Health24, accessed December 19, 2022, https://www.news24.com/health24/news/public-health/village-clinic-the-seven-year-fight-for-a-permanent-clinic-ends-20190918; Buziwe Nocuze, "Patients Wait in Line from 5am at Lusikisiki Clinic," GroundUp News, August 30, 2016, https://www.groundup.org.za/article/patients-wait-line-500-am-lusikisiki-clinic/.

[740] Section 27 of the Constitution.

[741] Section 35 (2) (3) of the Constitution

[742] Threat of potential legal claims about damages did push the authorities indirectly to make comprehensive policy reforms in preventing TB in prisons. Apart from the remedy in the form of damages, the Court proceedings led to accessibility to the facility and relevant information about the prison conditions. New guidelines were issued by the National Department of Health regarding TB control, and there was an increase in spending on medical care, such as TB screening which brought leverage to health actors in a policy area dominated by corrections authorities, Lee v Minister of Correctional Services 2013 (1) SACR 213 (CC), para 8,

particular vulnerability and dependence of inmates under the control of the state, which is a factor for courts even less sensitive to social rights, such as the ECtHR.[743] The SACC emphasized the health rights implications in another delictual liability case concerning medical negligence in providing timely emergency care. The SACC accepted the opinion of the applicant's expert as reasonable despite not being generally supported in the field (although not rejected either) and applied a flexible causation test, satisfied if there was a 64% chance of full recovery with the timely performance of the procedure.[744] Interpretations relating to the standard of emergency care and resource scarcity from this case, implicitly also building the right to health doctrine, will be discussed below, together with explicit health rights cases.

Explicit health rights cases decided by the SACC - *Soobramoney* and *Treatment Action Campaign* - evidence the ascendance of the weak rationality standard to thick reasonableness with means-end analysis strengthened or weakened according to the self-correction capacity of democratic processes. *Soobramoney* was decided against the patient with a chronic disease who was requesting dialysis treatment for prolonging life. As noted, in this case, the SACC agreed with the provincial administration about the limitations of judicial authority in health rationing decisions holding it would be 'slow to interfere' given that the provincial government's justifications were made in 'good faith' and rational.[745] The Court's elaboration on the restrictiveness of the reasonableness review, namely, on the total irrelevance of 'whether other more desirable or

101, 110, 114, 165; Emily N. Keehn and Ariane Nevin, "Health, Human Rights, and the Transformation of Punishment," *Health and Human Rights* 20, no. 1 (June 2018): 219. Kavanagh, "Constitutionalizing Health: Rights, Democracy and the Political Economy of Health Policy," 177-188.

[743] Machina v. the Republic of Moldova, no. 69086/14, 17 January 2023, paras 40, 44-45. Cf Shchebetov v. Russia, no. 21731/02, 10 April 2012

[744] The majority judgment found that the failure to deviate from the provincial health department protocols applicable in emergency situations was in violation of section 27(3) of the Constitution. Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape 2016 (1) SA 325 (CC) [hereafter *Oppelt*].

[745] *Soobramoney*, paras 29, 58-59.

favorable measures could have been adopted, or public money could have been better spent,[746] seemed unwarranted, especially in view of its minimalist, incremental approach. The review was also narrow in the sense that the SACC did not consider continuous conditions such as that of the applicant an emergency to invoke a specific constitutional standard on denial of emergency medical care (which would not automatically mean entitlement according to own interpretation of section 27(3) as that regulating denial of only 'available' care[747]).[748] Neither did the SACC see a right-to-life issue in this case[749] that could help differentiate life-saving treatments from 'life-prolonging'[750] ones and carve out space for more scrutiny in the former case. Considering that *Soobramoney* was decided in the first years of the ANC government when the trust between the Court and the political branches was at its highest, a stance about the 'good faith' of a doctor's decision (also the president of the national society of specialists in the field of renal medicine) was not unexpected.[751] However, even as the ultimate result was wrongly criticized[752] from the perspective of SoP as conceptualized in Chapter 1 of the dissertation, the Court's reasoning in this case was indeed unnecessarily restrictive and cursory missing the opportunity to set out a promising framework for future cases.[753] Since *Soobramoney*, court scrutiny of resource constraint

[746] Ibid, 41.
[747] Ibid, 20. McLean, Constitutional Deference, Courts and Socio-Economic Rights in South Africa, 123.
[748] *Soobramoney*, paras 20-21, 51.
[749] Melanie Murcott, "The Role of Administrative Law in Enforcing Socio-Economic Rights: Revisiting Joseph," South African Journal on Human Rights 29, no. 3 (January 2013): 490.
[750] *Soobramoney*, para 52.
[751] James Fowkes, "A Hole Where Ely Could Be: Democracy and Trust in South Africa," *International Journal of Constitutional Law* 19, no. 2 (April 1, 2021): 488. Craig Scott and Philip Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy acnd Grootboom's Promise," *South African Journal of Human Rights 16* (January 1, 2000*):* 243-268. Keith Syrett, *Law, Legitimacy and the Rationing of Healthcare: A Contextual and Comparative Perspective* (Cambridge University Press, 2007), 213-214.
[752] David Bilchitz, "Towards a Defensible Relationship between the Content of Socioeconomic Rights and the Separation of Powers: Conflation or Separation?," in The Evolution of the Separation of Powers, ed. David Bilchitz and David Landau (Edward Elgar Publishing, 2018), 57–84.
[753] Carol C. Ngang, "Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take 'Other Measures,'" African Human Rights Law Journal 14, no. 2 (2014): 666. Danie Brand "The Proceduralisation of South African Socio-economic Rights Jurisprudence, or 'What are Socio-economic Rights For?'" in Rights and Democracy in a Transformative Constitution, ed. Henk Botha et al. (Sun Press, 2003), 36-37. McLean,

arguments became more searching in a delictual liability case *Oppelt* discussed above. In this case, the SACC rejected the government's formal argument regarding restricted resources[754] as both appropriate equipment and personnel were available in a hospital a few kilometers away, and 'uncontroverted evidence' showed the procedure in question was inexpensive and of short duration. This displayed the incrementally expanding interpretation of the constitutional standard of 'available resources'.[755]

Rationality finally turned into the thick reasonableness test in the *Treatment Action Campaign* case, in which any delay in abandoning HIV denialism and implementing a universal nationwide mother-to-child transmission prevention program (PMTCT) could lead to mass loss of lives.[756] Mbeki's government rejected universal PMTCT (starting from July 2001) beyond the pilot program, not forthcoming at least for the coming two years, arguing that HIV did not cause AIDS and that ARV treatment promoted by greedy pharmaceutical companies was not proven safe. Based on such denialism, the Mbeki government also declined the offer of a free five-year supply of ARV drugs. [757] This was despite the situation becoming alarming (26% of pregnant women had HIV[758]) and scientific evidence demonstrating that treatment was safe and effective[759] both on

Constitutional Deference, Courts and Socio-Economic Rights in South Africa, 123-124. Dennis Davis, "Adjudicating the Socioeconomic Rights in the South African Constitution: Towards 'Deference Lite'?," *South African Journal on Human Rights* 22, no. 2 (January 21, 2006): 306.

[754] As the CC itself recounted in *Oppelt*, para 15: '[t]he respondent points out that it has vast public responsibilities and limited resources. It should not be expected to focus, for a certain time each year (the rugby season), on an extremely limited number of patients – rugby players who suffer a specific form of spinal injury – and provide for them a highly specialised service protocol [..]'.

[755] *Oppelt*, para 63; In contrast, the minority judgment emphasized the resource scarcity situation on the specific day and found that emergency medical treatment given was appropriate "in light of the desperate situation of resource scarcity and pressure on the medical personnel […]', para 103, also paras 101-102.

[756] Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC) [hereafter *Treatment Action Campaign*].

[757] Berger and Kapczynski, "The Story of the TAC Case," 11-13.

[758] Peter Barron et al., "Eliminating Mother-to-Child HIV Transmission in South Africa," *Bulletin of the World Health Organization* 91, no. 1 (January 1, 2013): 71.

[759] Three separate drug efficacy trials showing that giving a single dose of antiretroviral medicine to the mother and newborn reduced the risk of transmission of HIV by nearly 50%, see Neff, "From Equal Protection to the Right to Health," 168.

international and domestic levels. In 1999, the WHO included the ARV treatment under the Model List of Essential Drugs, and in 2001, it specifically recommended the administration of ARV treatment to pregnant women and newborn children. Soon, the Medicines Control Council of South Africa and local drug trial results also joined in confirming the safety and efficacy of the drug.[760] Meanwhile, two pilot sites per province reached only 10% of the pregnant women in need.

Most importantly, by the time the case came before the SACC, all conceivable democratic pressure had been exhausted. TAC held official meetings, took legal action, obtained a 5-year free supply of drugs through threats of legal action,[761] and held protests, marches, and disobedience campaigns. Although cooperation with Mandela's government seemed more promising, this changed with Mbeki's rigid views. Even if not often expressed publicly,[762] this position was not without opposition among ANC ranks, including from provinces.[763] Alongside Nelson Mandela,[764] two ANC MPs, SACP, and COSATU joined opposition.[765] The consensus was building about the drug's safety among healthcare practitioners as well, who claimed that the ban went against their ethical duties towards patients. South African media was also overwhelmingly critical.[766]

[760] Fowkes, *Building the Constitution,* 276. Berger and Kapczynski, "The Story of the TAC Case," 12. Jonathan Klaaren, "Regulatory Politics in South Africa 25 Years After Apartheid," *Journal of Asian and African Studies* 56, no. 1 (February 2021): 79–91.

[761] Mark Heywood, "South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health," *Journal of Human Rights Practice* 1, no. 1 (March 1, 2009): 25-25.

[762] Seekings and Nattrass, *Policy, Politics and Poverty in South Africa,*198

[763] Steven Friedman, *Power in Action: Democracy, Citizenship, and Social Justice* (Wits University Press, 2018), Chapter 8.

[764] The international AIDS conference ended with an appeal from Nelson Mandela for a nationwide PMTCT program, see Kavanagh, "Constitutionalizing Health," 159; Fowkes, *Building the Constitution,* 273.

[765] Tom Lodge, "The ANC and the Development of Party Politics in Modern South Africa," *The Journal of Modern African Studies* 42, no. 2 (2004): 206-207.

[766] Forman and Singh, "The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa," 309.

As the prospects of success through just democratic pressure proved low, activists turned to legal action, which led to victories both before the HC of the Transvaal Provincial Division and the SACC.[767] In December 2001, the HC found the restriction of the program to pilot sites and the absence of a timeframe for universal PMTCT unreasonable. In the Court's view, universal PMTCT was 'an ineluctable obligation'. The HC maintained supervisory jurisdiction and ordered reporting by March 2002, arguing that the resources would have to be found progressively, which could only affect the pace of the program's extension. The judgment also noted the underspending by the provincial health department of their HIV/AIDS budgets and the program's feasibility in the Western Cape, which indicated the program was within available resources of other provinces as well.[768] When the government appealed the decision, the SACC upheld the applicants' claim for immediate implementation, arguing the harm would be irreparable otherwise, with ten children needlessly contracting HIV daily.[769]

This first legal victory before the HC strengthened some latent opposition to government policy in provinces such as the Western Cape, KwaZulu-Natal, and Gauteng,[770] which then helped attenuate SoP concerns before the SACC. Cabinet statements started to show signs of retreat in April 2002, now mentioning the plan for a universal PMTCT and access to treatment for rape victims, for which guidelines and protocols were distributed to provinces.[771] Still, the growing resistance did not break Mbeki's denialism, publicly reaffirming that he would not be 'terrorized' into adopting

[767] The night before the hearing in the HC, 600 TAC supporters stood outside the courthouse, while 5000 marched on the first day of the hearing before the CC, see Berger and Kapczynski, "The Story of the TAC Case," 16-17.
[768] Treatment Action Campaign v. Minister of Health (No. 1) 2002(4) BCLR 356 (T).
[769] Berger and Kapczynski, "The Story of the TAC Case," 17.
[770] Western Cape had the ambitious plan to reach 90% of the population in need in 2002, and 100% by 2003. The Premier of KwaZulu-Natal from IFP went public with his opposition to ANC and intention to implement a universal PMTCT supporting doctors who had already defied the national policy. Gauteng province added 12 pilot sites covering most major hospitals, see Steytler, "Federal Homogeneity from the Bottom Up." Berger and Kapczynski, "The Story of the TAC Case," 16-17.
[771] Pierre De Vos, "So Much to Do, so Little Done: The Right of Access to Anti-Retroviral Drugs Post-Grootboom," *Law, Democracy & Development* 7, no. 1 (2003): 94.

harmful policies.[772] The Justice Minister even discussed the provinces' 'right' to ignore the Pretoria HC's execution order.[773] While the SACC case was still pending, the Minister confirmed to a journalist that judgment would not be complied with. Still, when the decision was issued against the government, both the Health Minister and the Minister of Justice denied any intention to circumvent the Court's authority.[774]

In its reasoning, the SACC rejected the SoP argument, including the one made against its institutional power to issue a mandatory order.[775] The SACC found that the restriction of access to ART beyond pilot sites was unreasonable, and the Constitution itself mandated judicial interference. The SACC stated that the unaffordability of the program had not been proven, and its decision merely had budgetary implications rather than aiming for the rearrangement of budgets.[776]

Even if not always clear and read between the lines, the above conclusions were helped by attenuating factors to SoP and disbalance between the harm to it and the health risks for the population. The SoP concerns were less in this case than they would be in the abstract as 1) the state action of limiting the possibility of distributing drugs could be presented in its negative dimension as a state interference. Indeed, mentioning the 'ideal' of a 'comprehensive program', the SACC restricted the case to the question 'whether it was reasonable to exclude the use of nevirapine for the treatment of mother-to-child transmission at those public hospitals and clinics

[772] Kavanagh, "Constitutionalizing Health,"143-148, 159, 163-168; Mark Heywood and Tim F. Hodgson "HIV and the Constitution: Campaigning for Constitutionalism and the Keeping of Constitutional Promises" in *The Quest for Constitutionalism: South Africa since 1994*, ed. Hugh Corder, Veronica Federico, and Romano Orrù, (Ashgate, 2014), 113; Pieterse, *Can Rights Cure?*, 68. George J. Annas, "The Right to Health and the Nevirapine Case in South Africa," *New England Journal of Medicine* 348, no. 8 (February 20, 2003): 753.
[773] Paremoer and Jung. "The Role of Social and Economic Rights in Supporting Opposition in Postapartheid South Africa," 220; Friedman, "Enabling Agency," 22.
[774] James Fowkes, Fowkes, *Building the Constitution*, 276- 277, 281-282.
[775] *Treatment Action Campaign*, paras 22, 96-97.
[776]Ibid, paras 38, 99

where testing and counseling [were] available.'[777] 2) The decision also implicated the right to equality as the vulnerable applicants - pregnant women and children – were disfavored vis-à-vis those who could afford access in the private sector,[778] also as the treatment was available at some public health care (pilot) centers but not others.[779] 3) The political branches had themselves recognized HIV epidemics as an 'incomprehensible calamity' that took millions of lives in its official HIV/AIDS & STD strategic plan.[780] 4) The launch of the program accessible to 10% of those in need could be seen as an acknowledgment that the drug was safe, and access to ARV was an adequate response.[781] 5) Moreover, as the safety of medicine is an expert rather than a political assessment, the competence of political branches had similar problems as the SACC, which could reference a favorable expert opinion of the Medicines Control Council.[782] 6) The lack of arguments about the infeasibility and unaffordability of PMTCT further mitigated SoP concerns. A five-year supply of medicine was available free of charge, leaving only regular counseling and administrative costs to be covered, which, according to the SACC, would not be a particularly 'complex task'.[783] The cost-saving effect of preventing a disease with opportunistic infections was also used as an argument.[784] Evidence about the program's feasibility in three of the nine provinces within the same budget also helped.[785] 7) The evidence of the program's implementation on the provincial level also added to the SACC's contention that the government policy itself (as a

[777] Ibid, para 50.
[778] Ibid, paras 70, 79. 116, 117, 120.
[779] Reynaud Daniels and Jason Brickhill, "The Counter-Majoritarian Difficulty and the South African Constitutional Court," *Penn State International Law Review* 25, no. 2 (September 1, 2006): 399.
[780] *Treatment Action Campaign*, paras 93-94
[781] Ibid, para 62.
[782] Ibid, para 61; Paremoer and Jung. "The Role of Social and Economic Rights in Supporting Opposition in Postapartheid South Africa," 219.
[783] Treatment Action Campaign, para 95, see also para 73.
[784] Ibid, paras 91, 116.
[785] Ibid, 123-132; Nico Steytler, "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government," in Courts in Federal Countries: Federalists or Unitarists?, ed. Nicholas Aroney and John Kincaid (University of Toronto Press, 2018), 328–66.

collective of national and provincial ones) was evolving.[786] Furthermore, the evidence presented by the government showed that the allocated budgets had already increased, and policy was expanding by including more sites in provinces.[787] Besides the factors attenuating SoP concerns, the anticipated enormous and irreversible harm added to judicial impatience towards the self-correction capacity of the democratic processes, in this way engaging in means-end analysis. [788]

The SACC's reasonableness review, in this case, approached SoP not as an abstract question but rather as the one that needed to be determined for the factual circumstances of the case with means-end analysis sensitive to the self-correction capacity of democratic processes on that particular problem. The arguments of unreasonableness,[789] whose independent significance had not been elaborated even in later jurisprudence,[790] simultaneously stood for the defective political process, in particular, the rigid indifference to all sides of criticism and counterarguments, including internationally and domestically recognized scientific evidence. The political process concerns of the Court are best discernible in the statement that the Court's role was to 'guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness'[791] and that 'the rigidity of government's approach […] affected its policy as a whole'.'[792] McLean makes a plausible argument that without the denialist element, the incrementalism of the policy with the prospect of universal roll-out would have deserved more deference under the

[786] Steytler, "Federal Homogeneity from the Bottom up," 71, 73.
[787] *Treatment Action Campaign*, para 132. Christopher Mbazira, "From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Socio-Economic Rights Litigation in South Africa," *South African Journal on Human Rights* 24, no. 1 (January 2008): 1–28.
[788] *Treatment Action Campaign*, para 59.
[789] Mclean makes an argument that CC's interpretation indicated that *Treatment Action Campaign* case even qualified as Wednesbury-unreasonable, see McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*, 130,
[790] Nathaniel Bruhn, "Litigating against an Epidemic: HIV/AIDS and the Promise of Socioeconomic Rights in South Africa," *Michigan Journal of Race and Law* 17, no. 1 (September 1, 2011): 181–215.
[791] *Treatment Action Campaign*, para 36.
[792] Ibid, para 95.

reasonableness test.[793] The emphasis on the flawed democratic process and how it had tainted the policy in the *Treatment Action Campaign* resembles the reasoning used in a decision invalidating the Presidential appointment of NDDP in *Democratic Alliance* (see Section 1.4).[794] For such a reading of the case, it is crucial that the SACC was asked to intervene when the social movement behind the case had exhausted all democratic and legal avenues in good faith and that all the deficiencies, inconsistencies, and irrationalities of the political process had come to light by the time the case was to be decided.[795]

As for the remedy, reluctant to leave the fate of the policy to the same defective political process, the SACC used the mandatory order (often criticized for not being accompanied by a supervisory jurisdiction[796]). The SACC instructed the political branches that alongside removing restrictions reasonable measures had to be taken expeditiously and without delay to extend the provision and build capacity outside the facilities where the program was already present.[797] As a token of respect for the co-equal branch authority, the SACC noted that the order did not remove the possibility of modifying the means of complying with the Constitution if equally appropriate or better methods for the prevention of mother-to-child transmission of HIV became available.[798] In a somewhat inconsistent approach, the Court held the mandatory nature of the order necessary and compatible with SoP due to the lack of diligence, while it refused to engage in supervision due to trust placed in political branches that they 'always respected and executed orders of this Court'.[799] For Berger

[793] McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*, 131.
[794] Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC).
[795] Berger and Kapczynski, "The Story of the TAC Case," 1-30; Paremoer and Jung. "The Role of Social and Economic Rights in Supporting Opposition in Postapartheid South Africa," 220.
[796] Berger and Kapczynski, "The Story of the TAC Case," 1-30 (arguing that the Court overestimated the power and capacity of Treatment Action Campaign in ensuring implementation); David Bilchitz, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence," *South African Journal on Human Rights* 19, no. 1 (January 1, 2003): 23.
[797] *Treatment Action Campaign*, paras 95, 106, 130, 133, 135, 139.
[798] Ibid, para 129.
[799] Ibid, paras 112, 129.

and Kapczynski, this was 'a performative statement, to produce the compliance that the Court desired' delegating supervision over the enforcement of the decision to the TAC whose power it may have overstated.[800] This can be explained by the strategic need to appear not utterly indifferent to SoP considerations and increase the political cost of delegitimizing the Court decision on that ground. In defense of the Court's ambiguous approach, the political branches did send confusing messages. As noted, alongside recalcitrant statements, the political branches had also shown signs of collaboration by increasing funding during litigation – in other words, some self–correction capacity of the democratic processes.

The chronicle of implementation confirms that the SACC decision did unblock the political channels, however, the final transformation was only achieved with a marked change in the attitude of the political branches. The court judgment increased the Cabinet's collective authority, empowered dissenting politicians and provinces even within ANC.[801] Immediately after the decision was made, the state announced that PMTCT guidelines were distributed to provinces, and training was already underway to gradually broaden access to nevirapine. However, resistance was not completely broken in relation to general HIV/AIDS healthcare. Only in 2003 did the government issue the Operational Plan for Comprehensive HIV and AIDS Care, Management, and Treatment. A day after case files were communicated to the Minister's office in a case to be submitted by TAC to the Pretoria HC, the government announced the decision to use the interim, accelerated legal avenue of procuring the ART medicine.[802] This serves as another indication of the health authorities' changing behavior and willingness to settle cases outside courts, as

[800] Berger and Kapczynski, "The Story of the TAC Case," 20.
[801] Butler, "The Negative and Positive Impacts of HIV/AIDS on Democracy in South Africa," 12, 17, 21-22; Steven Friedman, *Power in Action: Democracy, Citizenship and Social Justice* (Wits University Press, 2018), Chapter 8.
[802] Berger, "Litigating for Social Justice in Post-Apartheid South Africa," 55.

referenced in the explanation for the scarcity of case law on health rights (see Section 2.1). In 2004, universal ARV treatment was launched. Meanwhile, TAC kept threatening to take legal action to compel implementation.[803] TAC also obtained legal victories against pharmaceutical companies before the Competition Commission, which achieved voluntary licenses and enabled the production of generic drugs at much lower prices. The competition commission remained a venue for reaching settlements on voluntary licenses with other generic companies[804] and new HIV medicines.[805]

Nevertheless, progress toward universal access to HIV/AIDS care and PMTCT[806] was slow before the demise of Mbeki in 2006[807] and eventually, the appointment of a new Minister[808] in 2009, who, unlike his predecessors, had a proactive and evidence-based approach to HIV/AIDS care.[809] By 2011, 52% of all in need received ARV treatment; by 2012, 96% of women were covered under

[803]Neff, "From Equal Protection to the Right to Health," 170-171. Berger and Kapczynski, "The Story of the TAC Case," 23, 28.

[804] In *Hazel Tau* decided by the Competition Commission in 2003, TAC representing persons living with HIV argued that by abusing their dominance in the market and charging excessive prices for ARVs (prices were 3 to 10 times higher than for equivalent generics), as well as refusing to issue voluntary license in exchange for a reasonable royalty, pharmaceutical companies violated competition laws, as well as harmed health rights. In the course of the proceedings, the companies admitted that the ARV medicine was unaffordable for at least 80% of all South Africans. Competition Commission referred the case to the Competition Tribunal to issue respective orders, including to the one that would allow production of generic medicines in exchange for a reasonable royalty. Hazel Tau & others v. GlaxoSmithKline, Boehringer Ingelheim & others, 2002 (South African Competition Commission Case No. 2002Sep226); Gunther Teubner, "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors," *The Modern Law Review* 69, no. 3 (2006): 327–46. Shirin Syed, "Incorporation of Competition-Related TRIPS Flexibilities in the Domestic Law: A Case Study of India," *The Journal of World Intellectual Property* 23, no. 1–2 (2020): 11. Duncan Matthews and Olga Gurgula, "Patent Strategies and Competition Law in the Pharmaceutical Sector: Implications for Access to Medicines" *European Intellectual Property Review* 38, no. 11, (2016): 661 – 667.

[805] World Trade Organization, World Intellectual Property Organization, and World Health Organization, *Promoting Access to Medical Technologies and Innovation: Intersections between Public Health, Intellectual Property and Trade* (World Health Organization, 2020), 273.

[806] By 2005 around 15% and by 2007 around 30% of women in need were estimated to receive treatment, see Joint United Nations Programme on HIV/AIDS, *2006 Report on the Global AIDS Epidemic* (UNAIDS, 2006), 455. Berger and Kapczynski, "The Story of the TAC Case," 1-30

[807] Steven Friedman, *Power in Action: Democracy, Citizenship and Social Justice*, Chapter 8.

[808] National strategic plan was introduced for HIV, sexually transmitted infections, and tuberculosis for 2012–16.

[809] The budget almost doubled for tackling HIV and HIV/TB epidemics, to overcome shortage of personnel, nurses, community health workers, and pharmacy assistants were trained to administer treatment, perform tests, and dispense ART, respectively. In 2010, an intensive national HIV testing campaign was also launched.

PMTCT.[810] The lifelong ARV program in South Africa is now the largest in the world.[811] Since then, South Africa has boasted about innovative methods of fighting the disease, such as same-day ART initiation[812] and the provision of ARVs through ATM-like dispensing machines.[813]

To sum up, the reasonableness test applied in the *Treatment Action Campaign* case was thicker due to the non-abstract application of SoP objections, integration of means-end analysis sensitive to both the expected scale and reversibility of the harm to the right and the self-correction capacity of the democratic processes. A similar reading of the case is implicit in the literature. For Neff the decision aimed at 'changing entrenched institutional behavior'.[814] Yamin compares *Soobramoney* and *Mazibuko* to *the Treatment Action Campaign,* stating that there were 'genuine democratic possibilities' in the first two that were absent in the latter.[815] Pieterse and Forman observe that '[the case] broke a political deadlock',[816] when political debates had consistently failed [..].'[817] Cachalia observes that repoliticisation was indeed achieved with the case.[818] Dixon uses the decision as an empirical basis to argue for the judicial role against burdens of inertia.[819] Indeed, most of all, the case stood out with the extremely low self-correction capacity of the democratic processes, which the means-end analysis of the thick reasonableness could be sensitive to. The

[810] Mayosi et al., "Health in South Africa: Changes and Challenges since 2009," 2029–43. Patrick Lumumba Osewe and Yogan Pillay, "Expanding HIV/AIDS Treatment" in *Making It Happen: Selected Case Studies of Institutional Reforms in South Africa*, ed. Asad Alam, Renosi Mokate, and Kathrin A. Plangemann (The World Bank, 2016), 109-110.
[811] Kavanagh, "Constitutionalizing Health," 150, 171-173; Heywood and Hodgson "HIV and the Constitution: Campaigning for Constitutionalism and the Keeping of Constitutional Promises," 117-118. Butler, "The Negative and Positive Impacts of HIV/AIDS on Democracy in South Africa," 17-18. Syrett, *Law, Legitimacy and the Rationing of Healthcare*, 226.
[812] Rivka R. Lilian et al., "Same-Day Antiretroviral Therapy Initiation for HIV-Infected Adults in South Africa: Analysis of Routine Data," *PLoS ONE* 15, no. 1 (January 14, 2020): 1-13.
[813] Kavanagh, "Constitutionalizing Health,"175.
[814] Neff, "From Equal Protection to the Right to Health," 171
[815] Alicia Ely Yamin, "Power, Suffering, and Courts: Reflections on Promoting Health Rights through Judicialization," in *Litigating Health Rights*, ed. Alicia Ely Yamin and Siri Gloppen, Can Courts Bring More Justice to Health? (Harvard University Press, 2011), 333–72.
[816] Pieterse, *Can Rights Cure?*, 70, 86.
[817] Forman, "Ensuring Reasonable Health," 719
[818] Firoz Cachalia, "Separation of Powers, Active Liberty and the Allocation of Public Resources: The E-Tolling Case," South African Law Journal 132, no. 2 (2015): 304, 310.
[819] Dixon, "Creating Dialogue about Socioeconomic Rights" 402 – 403.

burden of inertia, in this case, was exceptional considering the political cost of admitting the irreversible fatal consequences that HIV denialism had led to (around 3.8 million 'person-years' and 300,000 persons' lives[820]).[821] Roux even argued that in this case '[w]ith ANC government sliding toward an embarrassing political defeat, the Court's decision could even be said to have rescued it by providing an "objective" legal basis for the reversal of its policies'.[822] Judicial review, in this case, was helped through the existence of independent regulatory bodies such as the Medicines Control Council, whose expert conclusions against government denialism attenuated SoP concerns.[823] The SACC had benefitted from the work of such an internal actor for exemplifying the failures of democratic processes, while, paradoxically, their existence in the first place is a sign of a relatively healthy democracy that tolerates independent regulatory institutions.

2.3. Right to Health in HCs: Outliers?

This section will show that there are no outlier cases in the HCs of South Africa presenting an alternative theory of the right to health or SoP. The reasonableness developed by the HCs is even thinner than the one applied by the apex Court. The potential outlier HC cases discussed in this section also related to the HIV epidemic but now in the prison context, where the rate of fatalities was even more alarming.[824]

[820] Pride Chigwedere et al., "Estimating the Lost Benefits of Antiretroviral Drug Use in South Africa," *JAIDS Journal of Acquired Immune Deficiency Syndromes* 49, no. 4 (December 1, 2008): 410–15.
[821] Anthony Butler, "The Negative and Positive Impacts of HIV/AIDS on Democracy in South Africa," *Journal of Contemporary African Studies* 23, no. 1 (January 2005): 10.
[822] Theunis Roux, "Principle and Pragmatism on the Constitutional Court of South Africa," *International Journal of Constitutional Law* 7, no. 1 (January 1, 2009): 124–125.
[823] Jonathan Klaaren, "Regulatory Politics in South Africa 25 Years After Apartheid," *Journal of Asian and African Studies* 56, no. 1 (February 2021): 79–91.
[824] By 2004, around 90% of deaths in prison were estimated to be caused by HIV/AIDS, see Emily Nagisa Keehn and Ariane Nevin, "Health, Human Rights, and the Transformation of Punishment," *Health and Human Rights 20*, no. 1 (June 2018): 218.

In the same year when a deferential decision was issued in *Soobramoney* by the SACC, the HC of Cape of Good Hope Provincial Division granted free access to antiretroviral drugs to two HIV patients (out of four) when it was still not available in state hospitals outside prisons.[825] The two applicants receiving favorable judgment differed from the other two, as the treatment was priorly prescribed to them only to be denied later with reference to restricted resources. The HC's reasoning was more nuanced than a blanket rejection of resource scarcity arguments due to the absolute nature of the prisoner's right to adequate medical services,[826] as cost-effectiveness considerations were integrated under the 'adequacy' standard.[827] In an interesting move, the HC questioned the decision of the prison authorities, indicating two fallacies in their reasoning: 1) that persons inside and outside prisons were entitled equally in terms of access to ARV treatment instead of higher standards for the former due to the particular dependence in situations of incarceration and more exposure to disease and 2) that antiretroviral medicine was not cost-effective vis-à-vis treating opportunistic infections in contradiction with expert consensus on this matter.[828] In this manner, the HC relied on the narrow rationality test that would require consideration of all relevant factors. What is often missed from the accounts of this case[829] is what the HC DID NOT do: namely, it did not institute an overarching standard that would similarly entitle fellow prisoners with identical health needs. Instead, an attenuating factor for SoP objections - prescription by doctors under the control of political branches - came to define the

[825] Van Biljon and others v Minister of Correctional Services and others 1997 (4) SA 441 (C) [hereafter *Van Biljon*]
[826] Section 35(2) (e),
[827] The Court stated: 'In determining what is "adequate", regard must be had to, inter alia, what the State can afford. If the prison authorities should, therefore, make out a case that as a result of budgetary constraints, they cannot afford a particular form of medical treatment or that the provision of such medical treatment would place an unwarranted burden on the State, the Court may very well decide that the less effective medical treatment which is affordable to the State must in the circumstances be accepted as "sufficient" or "adequate medical treatment', Van Biljon, para 49.
[828] The Court stated it stood to 'reason that the postponement of the costly treatment for opportunistic infections must result in some cost-saving even if such saving does not exceed the cost of prophylactic anti-viral treatment, as appears to be suggested by the results of international research.', Ibid, para 57.
[829] McLean, Constitutional Deference, Courts and Socio-Economic Rights in South Africa, 123-124.

entitlements. Hence, the judgment displayed an application of a thin rationality test merely linking the order to decisions already made in the democratic process. Attention to the political process and the self-correction capacity of the political process as in the *Treatment Action Campaign* is also visible when the HC notes the good faith of authorities ('respondents' attitude to HIV infected prisoners has thus far not been unsympathetic'), stating there was 'no reason to believe that their future decisions regarding the medical treatment of HIV positive prisoners such as third and fourth applicants will not be influenced by the reasoning which - hopefully - transpires from this judgment.'[830] Failing to live up to this trust, despite rising HIV-related deaths, the decision did not lead to a broader impact beyond the two applicants.[831]

The traditional SoP boundaries were also maintained in another case on prisoners' access to ARV treatment, now decided by the HC of Durban and Coast Local Division in 2006. In this case, the HC granted access to medicine to all Westville prisoners qualified for treatment (even without prescription) and retained jurisdiction, requesting the submission of a plan.[832] By that time, following the *Treatment Action Campaign* case, the National Treatment Plan for HIV/AIDS was already rolled out, and the Operational Plan and Guidelines[833] had addressed, though, by passing, issues of access to ARV treatment in prisons. Most importantly, unlike *Van Biljoen*, prisoner authorities in this case were not raising the argument of limited resources, and the HC portrayed the case as being about whether compliance was satisfactory when resources were available.[834] Enabled by existing policy and the absence of arguments about limited resources, the HC portrayed the decision as one about removing impediments and avoiding unnecessary delays in prisoners'

[830] Van Biljon, para 62.
[831] Emily Nagisa Keehn and Ariane Nevin, "Health, Human Rights, and the Transformation of Punishment," *Health and Human Rights* 20, no. 1 (June 2018): 217.
[832] EN and Others v Government of the Republic of South Africa and Others 2006 (6) SA 543 (D) [hereafter *Westville*].
[833] Operational Plan on Comprehensive Care and Treatment for HIV and AIDS was adopted in 2003.
[834] Westville, para 25.

access to ARV treatment in accordance with the existing policy and capacity.[835] After the initial period of recalcitrance, such as the unsuccessful appeal of the interim execution order, the plan submitted before the Court showed the first steps of cooperation.[836] As Keehn and Nevin summarize, 'it took three years and two more court orders to secure full roll-out of ART in Westville.'[837]

2.4. Conclusion

The prevalent SoP doctrine in South Africa prevented a radical development and enforcement of social rights, and right to health, in particular. Instead, judicial review on social rights in South Africa closely aligned with the general logic of the locally applicable SoP doctrine – means-end reasonableness sensitive to the self-correction capacity of the political branches with a particular weight of equality analysis. Through such a standard, the SACC was more concerned with the transformation of institutions responsible for producing the material outcomes rather than the outcomes as such, aligning with 'culture of justification' underpinning the Constitution and jurisprudence and narrow interpretations of transformative constitutionalism in the literature.[838]

The social rights jurisprudence refined the reasonableness test in South Africa by demonstrating various ways in which unconstitutional inaction can be addressed, namely, how particular circumstances of the case can mitigate SoP tensions as opposed to its abstract consideration, how resource constraint, feasibility, and competence claims can be rebutted given necessary evidence,

[835] Ibid, para 18: "I accept without hesitation that the Court cannot prescribe treatment. […] My understanding of the relief claimed, and what the applicants seek to do, is to remove impediments and to fast track the procedures because it is a matter of urgency that the [..] applicants and other similarly situated prisoners be assessed for ARV treatment in accordance with the Operational Plan and Guidelines.'

[836] Hugh Corder, Veronica Federico, and Romano Orrù, eds., *The Quest for Constitutionalism: South Africa since 1994* (Ashgate, 2014): 118-119.

[837] Emily Nagisa Keehn and Ariane Nevin, "Health, Human Rights, and the Transformation of Punishment," *Health and Human Rights* 20, no. 1 (June 2018): 218.

[838] Rosa, "Transformative Constitutionalism in a Democratic Developmental State," 456.

and how the self-correction capacity of the democratic processes can be captured and counted in the means-end analysis or the remedial level. *Mazibuko,* rather than a reversal, was another manifestation that the reasonableness standard in South Africa alongside means-end analysis is informed by the self-correction capacity of the political branches. Notably, the SACC did not merely rule on the problems of democratic processes but sought ways to improve them, be it through the support of social movements[839] or the strengthening of minority voices among the political branches.

Health rights, both on the SACC and HC levels, aligned with the adjudication standards on social rights, with a weaker review at the HC level. The *Treatment Action Campaign* precisely responded to judicially manageable failures of the democratic process such as the use of erroneous evidence in the decision-making process, and by supporting dissenting voices, attempted to restore the equilibrium for the democracy's self-correction capacity. Through its attention to the decision-making process, *Treatment Action Campaign* resembled *Democratic Alliance* again attesting to the cross-cutting logic of jurisprudence. Consistency of judicial review was also visible when the fundamental value of the right to health informed causation tests in delictual liability cases and did not let 'blind spots' escape the attention of judges when upholding legislation, among other things, considering its legitimate aim of realizing the right to health.

[839] Friedman, "Enabling Agency," 36.

This broadly aligns with the dominant observations in the literature[840] against the hopes of those advocating for broad concepts of transformative constitutionalism[841] and post-liberal SoP.[842] Non-achievement of these frameworks[843] served as guideposts for evaluating and criticizing social rights jurisprudence in South Africa and led to characterizations as 'proceduralisation' of social rights.[844] More specifically, scholars criticized the absence of minimum core doctrine,[845] the reluctance to use supervisory orders,[846] and the lack of institutionalization and normative frameworks, especially in meaningful engagement cases.[847] In contrast, others rightly argued that

[840] Dixon and Roux, "Marking Constitutional Transitions," 74-75. Theunis Roux, "Losing Faith in Law's Autonomy: A Comparative Analysis," in *Comparative Judicial Review*, by Erin Delaney and Rosalind Dixon (Edward Elgar Publishing, 2018), 204–25. Hodgson, "The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers," 62; Firoz Cachalia, "Separation of Powers, Active Liberty and the Allocation of Public Resources," 294.

[841] Under this term, Klare referred to 'an enterprise of inducing large-scale social change through nonviolent political processes grounded in law', see. Klare, "Legal Culture and Transformative Constitutionalism," 150. For Brickhill and Leeve, at minimum, transformative constitutionalism implies economic change and change in legal culture, Jason Brickhill and Yana Van Leeve, "Transformative Constitutionaslism - Guiding Light Or Empty Slogan Part II: Reflections on Justice Langa's Court and Philosophy," *Acta Juridica* 2015 (2015): 141–71.

[842] Klare, "Self-Realisation, Human Rights, and Separation of Powers," 445–70. Ngang, "Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection," 655-80. Hodgson, "The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers," 57–90,

[843] Liebenberg, *Socio-Economic Rights.* Sibanda, "Not Purpose-Made!," 482–500.

[844] Danie Brand "The Proceduralisation of South African Socio-economic Rights Jurisprudence, or 'What are Socio-economic Rights For?'" in *Rights and Democracy in a Transformative Constitution*, ed. Henk Botha et al. (Sun Press, 2003), 51-56. Melanie Murcott, "The Role of Administrative Law in Enforcing Socio-Economic Rights: Revisiting Joseph," *South African Journal on Human Rights* 29, no. 3 (January 2013): 481–95.

[845] Bilchitz, "Giving Socio-Economic Rights Teeth:" 484, 488–489. David Bilchitz, "Towards a Defensible Relationship between the Content of Socioeconomic Rights and the Separation of Powers: Conflation or Separation?," in *The Evolution of the Separation of Powers*, ed. David Bilchitz and David Landau (Edward Elgar Publishing, 2018), 57–84. Jackie Dugard, "Courts and the Poor in South Africa : A Critique of Systemic Judicial Failures to Advance Transformative Justice," *South African Journal on Human Rights* 24, no. 2 (January 1, 2008): 214–383. Stuart Wilson and Jackie Dugard, "Taking Poverty Seriously : The South African Constitutional Court and Socio-Economic Rights," *Stellenbosch Law Review* 22, no. 3 (January 2011): 664–82. McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*, 146. Brand "The Proceduralisation of South African Socio-economic Rights Jurisprudence, or 'What are Socio-economic Rights For?',''32-58. Dennis Davis, "Adjudicating the Socioeconomic Rights in the South African Constitution: Towards 'Deference Lite'?," *South African Journal on Human Rights* 22, no. 2 (January 21, 2006): 301–27.

[846] Theunis Roux, "Understanding Grootboom - A Response to Cass R. Sunstein Note," *Constitutional Forum* 12, no. 2 (2001): 41–51. Mia Swart, "Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor," *South African Journal on Human Rights* 21, no. 2 (January 1, 2005): 215–40. Berger and Kapczynski, "The Story of the TAC Case," 1-30. Bilchitz, "Towards a Reasonable Approach to the Minimum Core," 23. Mbazira, "From Ambivalence to Certainty", 1–28.

[847] For the criticism of lacking norm-setting in meaningful engagement cases, Kirsty McLean, "Meaningful Engagement : One Step Forward or Two Back? Some Thoughts on Joe Slovo," *Constitutional Court Review* 3, no. 1 (January 2010): 223–42. Brian Ray, "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy," *Washington University Global Studies Law Review* 9 (January 1, 2010): 399; Sandra Liebenberg, "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement,'" *African Human Rights Law Journal* 12, no. 1 (2012): 1–29. Lilian Chenwi "A New Approach to Remedies in Socioeconomic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others," *Constitutional Court Review* 2, no. 1 (January 2009): 371–93; Anashri Pillay, "Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement," *International Journal of Constitutional Law* 10, no. 3 (July 1, 2012): 732–55.

these critiques undervalue the promise of the evolving reasonableness standard[848] and the judicial structuring of the methodological space for policy-making.[849]

The argument in this Chapter adds to the latter accounts of South African jurisprudence, first, by situating the story of social rights within the broader SoP doctrine, and second, by more comprehensively identifying the cross-cutting reasonableness standard, namely the means-end analysis sensitive to the self-correction capacity of democratic processes. Even if not too often or explicitly, the latter element was still discernible in literature. Scholarship both from home[850] and abroad[851] stressed the democracy-enhancing baggage of social rights adjudication in South Africa, akin to a judicial role of 'scaffolding',[852] including in the context of the meaningful engagement doctrine.[853] Paremoer and Jung observed that the SACC had 'an opposition-enhancing' role.[854] Discussing social rights jurisprudence, Gloppen also discussed the rationale of judicial review in

[848] Quinot and Liebenberg, "Narrowing the Band," 641. Van der Berg, "Meaningful Engagement," 376–98.

[849] Oliver Fuo and Anél Du Plessis, "In the Face of Judicial Deference: Taking the 'Minimum Core' of Socio-Economic Rights to the Local Government Sphere," *Law, Democracy and Development* 19 (2015): 1–28.

[850] Liebenberg, *Socio-Economic Rights*, 146. Brian Ray, "Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights," *Stanford Journal of International Law* 45, no. 1 (2009): 151–202. Brian Ray, "Evictions, Aspirations and Avoidance," *Constitutional Court Review* 5, no. 1 (January 2013): 173–232; Woolman, *The Selfless Constitution*; Friedman, "Enabling Agency," 19-39. Firoz Cachalia, "Precautionary Constitutionalism, Representative Democracy and Political Corruption," *Constitutional Court Review* 9, no. 1 (December 2019): 45–79. Cachalia, "Separation of Powers, Active Liberty and the Allocation of Public Resources" 304, 310. Solange Rosa, "Transformative Constitutionalism in a Democratic Developmental State," *Stellenbosch Law Review* 22, no. 3 (January 2011): 452-565. Gildenhuys, "Esoteric Decision-Making." 338–61. Daniels and Brickhill, "The Counter-Majoritarian Difficulty and the South African Constitutional Court," 399.

[851] Sunstein, *Designing Democracy*, 221. Tushnet, *Weak Courts, Strong Rights* referring to Michael Dorf and Charles Sabel and their democratic experimentalism theory; Keith Syrett, "Revisiting the Judicial Role in the Allocation of Healthcare Resources : On Deference, Democratic Dialogue and Deliberation," *Journal for Juridical Science* 30, no. 2 (December 2005): 1–29. Peris Jones and Kristian Stokke, "Democratising Development: The Politics of Socio-Economic Rights," in *Democratising Development* (Brill Nijhoff, 2005), 34; Katharine G. Young, "The Avoidance of Substance in Constitutional Rights," *Constitutional Court Review* 5, no. 1 (January 2013): 233–43. Dixon and Roux, "Marking Constitutional Transitions," 61-62. Stephen Gardbaum, "Comparative Political Process Theory," *International Journal of Constitutional Law* 18, no. 4 (December 1, 2020): 1429–57. Gardbaum, "Pushing the Boundaries," 1-18.

[852] Stu Woolman, "Understanding South Africa's Aspirational Constitution as Scaffolding," *New York Law School Law Review* 60, no. 2 (2015-2016): 283-296.

[853] Sandra Liebenberg, "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law," *Nordic Journal of Human Rights* 32, no. 4 (October 2, 2014): 312–30. Van der Berg, "Meaningful Engagement ," 376–98.

[854] Paremoer and Jung. "The Role of Social and Economic Rights in Supporting Opposition in Postapartheid South Africa," 202, 207, 221.

South Africa to unblock the channels of democracy.[855] Fowkes brilliantly tracked the puzzling implicitness of Elyian arguments in the SACC jurisprudence (and literature).[856] In a similar vein, it is argued in this Chapter that thick reasonableness sensitive to the self-correction capacity of the political processes underpins the Court's jurisprudence, including on health rights. Indeed, this is in the spirit of Ely's political process[857] theory, however, a delimited one than its more extensive interpretations. [858]

Although the form of the SACC's scrutiny is essentially dialogic in compliance with SoP, this does not lead to the abdication of a judicial role, especially as interpretations of an impermissible state inaction and defective democratic processes evolve. Such court action can (and does) reboot the democratic processes, nudge the political branches by increasing the political costs of inaction. This normative dimension of the argument will be elaborated on in a comparative setting in the Conclusion of the dissertation.

[855] Siri Gloppen, "Social Rights Litigation as Transformation: South African Perspectives," in *Democratising Development* (Brill Nijhoff, 2005), 156.

[856] Fowkes provides a summary of the political process-oriented decisions of the Court, stating it 'defended the institutional independence of the election commission, ordered some recognition of the voting rights of prisoners and for South Africans overseas on election day, and vindicated thick duties to consult and discuss in a variety of other contexts, including administrative rulemaking and eviction. It has also policed internal parliamentary procedures. It has turned genuine public participation into a constitutional requirement for the passage of valid legislation and intervened to prevent ANC majority power from blocking debate on minority bills and from restricting motions of presidential no-confidence and impeachment.' Fowkes, "A Hole Where Ely Could Be," 476 – 485, 490.

[857] Ely, *Democracy and Distrust.*

[858] Klare also referenced Ely to argue for more extensive judicial review in South Africa in socio-economic rights, along the lines that court action that improves democracy could fall under the representation-reinforcing paradigm, however, this defies the narrow logic of Ely's original theory and is unsustainable, see Karl Klare, "Self-Realisation, Human Rights, and Separation of Powers: A Democracy Seeking Approach," *Stellenbosch Law Review* 26 (2015): 468. For criticism of such an approach, see David Prendergast, "The Judicial Role in Protecting Democracy from Populism," *German Law Journal* 20, no. 2 (April 2019): 245–62. See also infra note 858 and the accompanying text.

Chapter 4. Rule of Judge-Made Exceptions in Colombia

This Chapter will take the SoP doctrine of the Colombian Constitutional Court (CCC) as a starting point for discussing social and health rights jurisprudence. Part I will examine the SoP doctrine, including general social rights adjudication standards based on the jurisprudence of the CCC (Section 1.4 and 1.5.2). To understand the context of SoP jurisprudence, Part I will consider the relevant organizing principle(s) of the Constitution (Section 1.1), institutional arrangement, democratic system (Section 1.2), evolving relations between the political branches and the apex Court (Section 1.3) that account for some of the divergencies among the jurisdictions. To understand the context of general social rights jurisprudence, Part I will also touch upon the general political posture in relation to social rights policies and the trajectory of such policies themselves (Section 1.5.1). In Part II, the SoP doctrine and social rights doctrine will be examined through the right to health jurisprudence in the apex Court (Sections 2.2-2.4). The analysis of health rights jurisprudence is preceded and situated in the context of population health, health care, and constitutional, legislative, and policy frameworks, which provides a picture of the democratic processes parallel to health jurisprudence (section 2.1). Unlike in the Indian and South African Chapters, this Chapter does not discuss lower court decisions on the right to health as divergencies are institutionally foreclosed by a *tutela* mechanism providing for the CCC confirmation for all lower court decisions. Unlike in the Indian Chapter, cases during the COVID-19 pandemic will not be singled out as the already intrusive judicial position did not change in this period. Neither the vaccination nor the treatment context of the COVID pandemic could raise any issues that were not already subsumed in the existing judicial standards, which permitted exceptions to all democratically set priorities on health goods and services. Besides, the Colombian case stands out

with the large number of lawsuits reaching the CCC annually,[859] enabling a conclusive identification of the judicial position on health rights without specifically dwelling on COVID-related cases.

By formulating the SoP doctrine and general social rights adjudication standards in Part I and health rights jurisprudence in Part II, the conclusion will answer the following overarching research question for Colombia - To what extent is the *SoP doctrine transformed through health (and social) rights jurisprudence?* – and the three subquestions: *How does the CCC position itself vis-à-vis political branches when enforcing the right to health? How similar or different is the apex court's approach to other social rights? How does the apex court's treatment of health and other social rights correspond to the SoP doctrine in other areas of jurisprudence?* Ultimately, the descriptive analysis in this Chapter, coupled with those in the other jurisdiction Chapters, will produce a continuum of the intensity of review among the jurisdictions alongside drawing typological and normative conclusions through the prism of SoP as conceptualized in Chapter 1.

Part I: SoP doctrine of the CCC

1.1. Judiciary Served with the Thick Constitution

The CCC was intended to function as a powerful institution equipped with jurisdiction in a vast array of political branches' operations. The participatory drafting of the 1991 Constitution produced a thick document and a powerful judiciary,[860] barely leaving any sphere beyond some

[859] Andia and Lamprea, "Is the Judicialization of Health Care Bad for Equity?" 61. Wang, *Health Technology Assessment, Courts, and the Right to Healthcare*, 97.
[860] Art. 1, 2, 40, 79, 103-108, 270, 340-342, 368 of the Constitution. Manuel José Cepeda Espinosa and David E. Landau, *Colombian Constitutional Law: Leading Cases* (Oxford University Press, 2017), 1-9.

regulation and, accordingly, judicial review.[861] The formulation of the state directive principles on socio-economic rights (not under the heading of fundamental rights) without explicit reference to their justiciability, in contrast to India,[862] follows the general thick logic of the text. The Constitution refers to the principles of efficiency, universality, and solidarity for public health care and social security while also explicitly allowing their regulated private provision.[863] Besides, the Constitution requires the adoption of the National Development Plan with the force of law for each Presidential term aimed at addressing the population's social needs through public investments.[864] The Constitution is further thickened through its monist approach to international law and the concept of a 'constitutionality block' implying incorporation of human rights treaties ratified by Colombia into domestic law.[865] These features of the thick Constitution, alongside the social state of law principle[866] (translated to the idea of the social rule of law in the jurisprudence)[867] and the substantive concept of equality,[868] laid a solid ground for the Court to transform the formalist legal culture into that of new constitutionalism (Nuevo Derecho), the idea similar to transformative constitutionalism.[869] Such a thick, transformative constitutional text and broad institutional powers

[861] David Landau and David Bilchitz, "The Evolution of the Separation of Powers in the Global South and Global North," in *The Evolution of the Separation of Powers*, ed. David Bilchitz and David Landau (Edward Elgar Publishing, 2018), 3, 5.
[862] Title II, Chapter II of the Constitution.
[863] Art. 49 and 48 of the Constitution.
[864] Art. 339 of the Constitution.
[865] Art. 93 of the Constitution, Decision C-574 of 1992; Chris Thornhill and Carina Rodrigues De Araújo Calabria, "Global Constitutionalism and Democracy: The Case of Colombia," *Jus Cogens* 2, no. 2 (September 2020): 155–83; Manuel José Cepeda, "The Internationalization of Constitutional Law: A Note on the Colombian Case," *Verfassung Und Recht in Übersee* 41, no. 1 (2008): 61–77. Flávia Piovesan, "Ius Constitutionale Commune en América Latina: Context, Challenges, and Perspectives," in *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*, ed. Armin von Bogdandy et al. (Oxford University Press, 2017), 62-63.
[866] Preamble and Art. 2 of the Constitution.
[867] For the illustration of the new conception of a judicial role in a constitutional order, see Decision T-406 of 1992.
[868] Art. 13 of the Constitution.
[869] Roberto Gargarella, "The "New" Latin American Constitutionalism: Old Wine in New Skins," in *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*, ed. Armin von Bogdandy et al. (Oxford University Press, 2017), 211-212.

with institutional and political memory before the 1991 Constitution made the strong conception of a judicial role an inevitable reality.

1.2. Institutional Setting for the CCC with a Weak Legislature

The institutional arrangement in the decentralized unitary state of Colombia is that of a presidential system.[870] Although subject to material and procedural conditions for exercising its power,[871] the President remained strong in the post-1991 constitutional order. Alongside ordinary subordinate legislation,[872] the President retained the power to issue decrees with the force of law under the states of emergency[873] and in normal times through extraordinary delegation by Congress, though only for six months.[874] The Constitution defines legal acts that can never be delegated and issues that require statutory regulation.[875] On the other hand, only the executive has the power to make specific policy decisions, such as those on setting tariffs.[876]

The bicameral legislature is weakened in practice through the party system and coalition politics. In the proportional electoral system, open lists for candidates lead to 'personalist politics', clientelism,[877] and weak ideological grounds for parties, often with members of the same party affiliated with different ideological platforms. Once elected, MPs often vote for Presidential

[870] Local governments are autonomous and elected, see Art. 1, 356 and 357 of the 1991 Constitution.
[871] For instance, considering historic abuse of emergency powers, the new Constitution specified conditions under which the state of emergency would be permissible, see Art. 213 and 214 of the Constitution.
[872] Art. 189 (11).
[873] President can announce two types of emergencies, the state of economic, social, or ecological emergency without prior approval of the legislative body, and state of internal commotion, for which the same applies only for the first 90 days, see Art. 213-215.
[874] The Congress can make such a delegation through the vote of an absolute majority of the members of both Houses of the Legislature, see Art. 150 (10).
[875] Art. 210, 211.
[876] Art. 189 (25), see also Decision C-026 of 2020.
[877] Clientelissm is a non-programmatic political strategy to win elections with 'personalized and discretionary exchange of goods or favors for political support' see Ezequiel Gonzalez-Ocantos and Virginia Oliveros, "Clientelism in Latin American Politics," in *Oxford Research Encyclopedia of Politics*, ed. Ezequiel Gonzalez-Ocantos and Virginia Oliveros (Oxford University Press, 2019), 1;

initiatives in exchange for personal privileges/benefits.[878] Besides, the legislative process has shortcomings, such as delays and deadlocks.[879]

With fewer institutional guarantees of independence than in South Africa, namely, no explicit constitutional guarantees against dismissals, the Constitution of Colombia also provides for the control organs in order to enhance the accountability of the elected branches. Such are the Public Ministry headed by the General Prosecutor of the Nation (also incorporating the Ombudsman's office) and the Office of the Controller General of the Republic, with the General Prosecutor and Controller elected by simple and absolute majority of the Congress, respectively.[880]

The need to restore the balance between the legislative and executive branches is met by the strong institutional standing of the specialized CCC, which inherited judicial review powers from the Supreme Court, now even broadened through a thick Constitution. The independence of the Court has strong guarantees.[881] With the Senate choosing six out of nine justices from the lists originating within the judicial branch, the CCC composition still largely depends on the choices made within the judiciary.[882] This is not to say that the preferences of political branches have not affected the final choices from among the presented candidates.[883] Political fragmentation in Congress further reduces the possibilities for interference with the Court's independence. The powers afforded to

[878] Richard Albert et al., eds., *2019 Global Review of Constitutional Law*, (I·CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2020), 68.
[879] Arturo Alvarez-Rosete and Benjamin Hawkins, "Advocacy Coalitions, Contestation, and Policy Stasis: The 20 Year Reform Process of the Colombian Health System," *Latin American Policy* 9, no. 1 (2018): 32, 49.
[880] Art. 117-119, 267, 276 of the Constitution.
[881] Daniel M Brinks and Abby Blass, "Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice," *International Journal of Constitutional Law* 15, no. 2 (April 1, 2017): 319.
[882] The nine Justices are appointed to Court to eight-year, nonrenewable terms by the Senate from the three person lists that the president, Supreme Court and Council of State send to it, Art. 239 of the Constitution.
[883] Sandra Botero, "Courts That Matter: Judges, Litigants and the Politics of Rights Enforcement in Latin America" (PhD diss., University of Notre Dame, 2015), 121.

the independent CCC are vast. The Court has both abstract centralized (a priori[884] and a posteriori) and concrete review powers without any restriction for the types of remedies it can issue. The Constitution retains *actio popularis* present since 1910 and specifies that abstract review includes scrutiny over both material content and errors of procedures in the formation of laws,[885] states of emergency,[886] decrees with the force of law (Council of State retains the power to review the subordinate legislation),[887] and international treaties.[888] Concrete review by the Court is instituted through *tutela* – a relatively flexible institutional mechanism for rights protection – shared with lower courts. *Tutela* can be presented before any judge without legal representation and is decided within ten days, and if selected for review by the CCC, within two months.[889] The Court further strengthened *tutela* actions and their consistency by setting their precedential value for the similarly situated[890] priorly unknown to civil law systems such as Colombia.[891]

This flexibility, speed, and strength of the mechanism translated into the reality that tutela cases constitute the absolute majority of all cases (80% from 1992 to 2018) decided by the CCC. In turn, the broad reach of *tutela* action to the masses of the population reinforced judicial power. The obligatory fast pace of the mechanism required that small panels (3 judges) decide *tutela* cases.[892] Notably, unlike India, the usual resolution of the cases by small panels did not lead to the polyvocality of the Court, and despite certain signs of (failed) changes/reversals over time, the

[884] For statutory laws designated for regulation of fundamental rights, international treaties, emergency decrees, see Art. 152-153 and Art. 241 (7), (8), (10) of the Constitution.
[885] Art. 241 (1), (4), (5), (7), (8) of the Constitution. Vicente F Benítez-R, "'With a Little Help from the People': Actio Popularis and the Politics of Judicial Review of Constitutional Amendments in Colombia 1955–90," *International Journal of Constitutional Law* 19, no. 3 (July 1, 2021): 1020–41.
[886] Art. 213, 214 of the Constitution.
[887] Art. 237 (2) of the Constitution.
[888] Art. 241 (10) of the Constitution.
[889] Decree 2591 of 1991.
[890] Decisions T-534 of 1992; C-113 of 1993; T-406 of 1994; C-037 of 1996; T-583 of 2006; T-025 of 2015; T-233 of 2017.
[891] Art. 230 of the Constitution.
[892] Marcus Flávio Horta Caldeira, "Concentrated Judicial Review in Brazil and Colombia: Which (or Whose) Rights Are Protected?," *Revista de Investigações Constitucionais* 7, no. 1 (October 18, 2020): 171.

judicial approach remained more consistent across different compositions. The pace of *tutela* is more characteristic of an administrative proceeding than of a judicial one and, as will be demonstrated in this Chapter, complicated court-like, minimalist, and incremental rulemaking – an effect the Justices of the Court were also aware of.[893]

1.3. Consolidation Dynamics of the CCC Power

The power of the CCC has been affected by the evolving relations between the political and judicial branches on the ground. The judicial power did meet with various challenges under various Presidents. However, none of those challenges reached the intensity of creating a real risk to its authority, enabling a consolidation of judicial power less dependent on the political branches than in India or South Africa.

The powerful Court emerged with the first progressive bench of mainly academics and the strong support of then-incumbent President Gaviria.[894] From the start, the Court frequently issued decisions opposed by the incumbent administration, even the ordinary courts, some discussed in this Chapter.[895] This has motivated all administrations since Gaviria to restrict the Court's powers.[896] However, no actual court-curbing attempts succeeded except the modulation of previous court decisions[897] or overriding through constitutional amendments. The attacks were

[893] From an interview with Manuel Jose Cepeda, as referenced in Landau, "The Reality of Social Rights Enforcement," 224.
[894] Sandra Botero, "Agents of Neoliberalism? High Courts, Legal Preferences, and Rights in Latin America," in *Latin America Since the Left Turn* (University of Pennsylvania Press, 2018), 225-226.
[895] Juan Carlos Rodríguez-Raga, "Strategic Deference in the Colombian Constitutional Court, 1992–2006," in *Courts in Latin America*, ed. Gretchen Helmke and Julio Rios-Figueroa (Cambridge University Press, 2011), 85. Botero, "Agents of Neoliberalism?," 214.
[896] President Gaviria did not directly attack the court powers but intended to override the Court's decisions through a constitutional amendment, however, without success.
[897] Decision C-027 of 1996.

also directed against *tutela* action, including its precedential value and extension to social rights – changes invalidated by the Court in 1996.[898]

The most potent attack on the Court came in 2002 under the newly elected and popular President Uribe, with an approval rating ranging from 65 to 80%, who, like others, wished to limit the constitutional review over constitutional amendments to procedural matters, to introduce the supermajority requirement for invalidating laws, and restrict tutela, namely, to prohibit decisions involving expenditures not previously included and approved in the budget plan. These proposals failed to pass despite tensions also mounting between the ideas of new constitutionalism of the Court and the legal formalism of the Council of State (the high administrative court) and the Supreme Court.[899] The proposal to restrict tutela actions on social rights also failed after the 2008 Structural Judgment on the health care system against the context of continuous protests supporting the Court's decision (see Section 2.3). Uribe ultimately also accepted the Court's decision against the constitutional amendment that would have allowed him to run for the third term[900] based on the doctrine of the substitution of the constitution, which developed into a shield against the relative ease of constitutional amendments.[901]

The fact that none of the attacks against tutela jurisprudence or the 2008 Structural Judgment on the health care system succeeded, even from a popular President, illustrates the high political costs of such attacks. This must be partially attributable to the expanded reach of *tutela* decisions to vast parts of the population, including the middle class.[902] The fact that five former Justices of the Court

[898] Decision C-037 of 1996.
[899] Rodríguez-Raga, "Strategic Deference in the Colombian Constitutional Court, 1992–2006," 86. Juan Carlos Rodríguez-Raga, "Strategic Prudence in the Colombian Constitutional Court, 1992-2006," (PhD diss., University of Pittsburgh, 2011), 109-115.
[900] Eduardo Posada-Carbo, "Colombia after Uribe Latin America," *Journal of Democracy* 22, no. 1 (2011): 137–51.
[901] Art. 375, 377 of the Constitution.
[902] Rosalind Dixon and David Landau, "Defensive Social Rights," in *The Oxford Handbook of Economic and Social Rights,* ed. Malcolm Langford and Katharine Young (Oxford University Press, 2022).

entered politics after leaving the bench[903] must also indicate the unusual popularity of justices in Colombia. Together with the thickness of the Constitution, this level of consolidation of power and legitimacy, less dependent on the political branches, accounts for the outstanding evolution of judicial power among the jurisdictions discussed in the dissertation.

1.4. SoP Doctrine: Thick by Default

Due to the noted thickness of the Constitution, the boundaries between the branches draw less on a judicial conception of SoP but rather on the already specified rules in the Constitution, including regarding the broad rationale of SoP itself. Unlike those of India and South Africa, where this is emphasized in jurisprudence, the Constitution of Colombia explicitly states the dual nature of SoP, encompassing checks and balances and 'harmonious collaboration' for limiting the powers and increasing the state's capacity, respectively.[904] Building upon this text, the Court links checks and balances with freedoms and harmonious collaboration to positive rights.[905] Besides, the Court stresses that the SoP, more specifically, the rulemaking function of the legislature, is constrained by the deliberative nature of democracy, from which it must emanate.[906]

The Court has been explicit about its contextual, realist approach to SoP from the outset, considering the actual (also historic) strength of branches, namely the strong position of the President vis-à-vis a weak, fragmented legislature often in need of support from the President's majority.[907] Even in the transitional context when it came to the implementation of the 2016 peace

[903] Landau, "The Reality of Social Rights Enforcement," 219, fn. 150.
[904] Art. 113 of the Constitution
[905] Decisions C-630 of 2014; C-141 of 2010; C-970 of 2004; C-971 of 2004, C-170 of 2012; C-118 of 2018.
[906] Decision C-251 of 2002.
[907] Decisions T-406 of 1992; C-141 of 2010; C-172 of 2017; C-092 of 2020; C-253 of 2017.

agreement, the Court insisted that the Congress was in no way sidestepped in the process, even if it had consented to it through constitutional amendments.[908] This impetus for strengthening the Congress institutionally is evident in the strict scrutiny of extraordinary delegations requiring a precise framework for exercising this power.[909] This strict scrutiny of delegation, like other matters, is supported by the Constitution, which closely regulates under which circumstances and for how long delegations can be used, excluding certain laws from its scope, including those regulating constitutional rights. The express power to review procedural errors in the legislative process creatively used by the Court also enhanced the accountability function of the legislature. The CCC invalidated laws both when they were enacted through the violation of express RoL requirements (regarding sequence, timelines, committee consideration, and reporting in the legislative process),[910] including when statutory rather than constitutional rules were violated.[911] The Court also invalidated laws based on a broad standard of its own making, which stipulated that there had to be a true formation of a democratic will through public reasoning.[912]

At times, the Court has constructed robust powers without the support of the Constitution. The substitution of the constitution doctrine is such an example. The doctrine allows the annulment of constitutional amendments when the Court believes they substitute rather than amend core constitutional principles such as the RoL, the social state of law, separation of powers, the democratic principle, participatory democracy, popular sovereignty, constitutional supremacy, and

[908] The Court invalidated constitutional amendments that required the Congress to vote bills presented by the executive in its entirety rather than its separate provisions and that barred the Congress from introducing changes to them without governmental approval, see Decision C-332 of 2017.
[909] The Court requires that the subject matter, scope, objectives and criteria guiding executive decision-making are precisely defined, see Decisions C-097 of 2003; see also C-564 of 1995; C-917 of 2002; C-251 of 2002; C-970 of 2004; C-971 of 2004; C-240 of 2012; C-630 of 2014; C-253 of 2017; C-160 of 2017; C-172 of 2017; C-092 of 2020.
[910] Decisions C-754 of 2004; C-760 of 2001; C-481 of 2019.
[911] Decision C-816 of 2004.
[912] Decision C-776 of 2003.

the principle of equality.[913] The Court revoked constitutional amendments on this basis when they were believed to concentrate power in one body or threaten the autonomy of a branch.[914] This standard was interpreted rather broadly when applied to the amendments changing features of the judicial governance without removing the judicial self-government as such.[915]

Actualizing the principle of harmonious collaboration embedded in the Constitution, the CCC has demanded positive action from both the executive and legislative branches even outside the social rights context. The CCC has required a legislative regulation of issues affecting social[916] as well as civil and political[917] rights. For instance, the Court conditionally accepted the constitutionality of a law if certain positive measures would be taken.[918] The Court also ordered specific legislative amendments, for instance, that it adopts a preferential approach to gender violence victims in their application to housing programs alongside other groups the law already has a differential approach to.[919] The Court has also formulated a judicial alternative that would enter into force conditionally unless the instruction to legislate was complied with.[920] The CCC went as far as modifying the legislation itself by reading in International Humanitarian Law principles in the scope of a crime defined in the legislation.[921] Besides, based on its power to review international treaties, the Court

[913] The summary of these standards and cases can be found in Decision C-170 of 2012.
[914] Famously, the Court prohibited the third consecutive term holding that nomination powers throughout 12 years of the President's service led to such disbalance of power that it would amount to substitution of the Constitution impermissible without the constituent power, see Decision C-141 of 2010; Espinosa and Landau, *Colombian Constitutional Law*, 327-328.
[915] Decisions C-285 of 2016; C-373 of 2016; "The Unconstitutional Constitutional Amendment Doctrine and the Reform of the Judiciary in Colombia," I·CONnect, September 1, 2016, http://www.iconnectblog.com/the-unconstitutional-constitutional-amendment-doctrine-and-the-reform-of-the-judiciary-in-colombia/
[916] Decisions T-528 of 2014; T-425 of 2021; T-280 of 2022; T-308 of 2022.
[917] Decisions C-577 of 2011; T-357 of 2022; T-275 of 2022; T-316 of 2018.
[918] The Court required that punitive measures against street dwellers who perform their physiological needs in public space could only be used provided that the municipality provided access to public infrastructure on the street, see Decision C-062 of 2021.
[919] The Court urged Congress and the Government to adopt programs for priority access to housing programs of gender violence victims, see Decision T-531 of 2017.
[920] Decision C-577 of 2011.
[921] Decision C-291 of 2007; see also Decision C-816 of 2011.

has ordered the executive to continue negotiations with the other contracting state to agree on such interpretations of the treaty that, according to the Court, complied with the Constitution.[922]

The nominal judicial standard favoring the political branches' broad discretion on social,[923] economic,[924] and tax[925] policies does not survive as the grounds for narrowing down that discretion is constructed flexibly. The Court asserts the power to interfere in those spheres if the case concerns a violation of rights, including positive social rights,[926] especially their retrogression[927] and/or vulnerable populations.[928] The decision whether to interfere is made in accordance with the reasonableness and proportionality standards used as a single test leaning towards the rigor of the latter (see also Section 2.3-2.4).[929] Reasonableness review as a safety net outside the rights context and as part of the principle of legality is also acknowledged in jurisprudence;[930] however, understandably, it is invoked less than in South Africa as the thick Constitution equips the CCC with more specific grounds for its decisions.

Thus, the thickness of the Constitutional text and the institutional and practical guarantees of the autonomy of the Court did result in the judicial role at the margins of SoP, especially when fundamental rights were held to be affected. This scope of judicial role reached into inaction from the legislative (e.g., lack of differential approach to domestic violence victims) and executive branches (e.g., need to renegotiate treaties) and carved out space for judge-made rules through

[922] Decision C-252 of 2019.
[923] Decisions T-043 of 2007; C-671 of 2002.
[924] Decisions C-265 of 1994; C-727 2009. C-674 of 2002, C-427 of 2000, C-429 of 1997; C-445 of 1995; C-038 of 2004
[925] Decisions C-664 of 2009; C-521 2019; C-066 of 2021.
[926] Decision T-080 of 2018.
[927] Decisions T-043 2007; C-671 2002.
[928] Decisions C-265 of 1994; C-445 of 1995; C-081 of 1996; C-673 of 2001; C-1191 of 2001; C-093 of 2001; C-782 2004; C-809 of 2007. T-697 of 2004.
[929] Decisions T-129 of 2018; C-575 of 2009. C-177 of 2009, see also C-093 of 2001; C-671 of 2001; T-248 of 2012.
[930] The Court briefly refers to reasonableness as part of legality principle in Decisions C-205 of 2003; C-872 of 2003.

conditional constitutionality orders (e.g., broadening definition of a crime in light of IHL standards). Expanding its powers beyond the direct constitutional mandate, the Court also developed a substitution of the Constitution doctrine and applied that rule rather broadly to preserve the *status quo* in the judicial architecture when the changes did not even reform the judicial self-government. Nevertheless, as will be seen, nothing in this rather broad SoP doctrine resembled the *ad hoc* individual enforcement undertaken in social and health rights cases.

1.5. Social Rights Policy and Doctrine

In this Section, the social rights jurisprudence will be discussed against the background of poverty and inequality in the country - the factors affecting the political attitude towards social rights protection and the resulting social policies.

1.5.1. Social Rights Policy

Poverty and inequality remain a challenge in Colombia as well. However, the level of poverty is the lowest among the jurisdictions of this dissertation, while the inequality indicator – the GINI coefficient (0.51 in 2021[931]) is lower than in South Africa but higher than in India. Colombia has been an upper-middle-income country since 2007.[932] Measured in accordance with MPI, poverty decreased from around 30% in 2010 to 16% by 2021,[933] with lower or similar indications of

[931] "Gini index - South Africa, India, Colombia," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SI.POV.GINI?locations=ZA-IN-CO
[932] "WDI - Classifying Countries by Income," World Bank, September 9, 2019 https://datatopics.worldbank.org/world-development-indicators/stories/the-classification-of-countries-by-income.html.
[933] "Multidimensional poverty headcount ratio (% of total population) – Colombia," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SI.POV.MDIM?locations=CO

6.6%[934] and 16%[935] when measured at income levels of 2.15$ and 6.85$ a day, indicating a much lower vulnerability to poverty than in South Africa.

As in India and South Africa, the evolving social welfare policies in Colombia illustrate the political cost of outright rejection of anti-poverty state action. Colombia spent as much as 15.2% of its GDP on social spending in 2022 (cf. 12.8% for Ireland).[936] The social component has been present in all Presidents' National Development Plans, including economic liberalization policies.[937] The most extensive anti-poverty program of conditional cash transfers per child in poor families achieved national coverage during the presidency of the right-wing Uribe.[938] A temporary unconditional cash transfer program was also launched during the COVID-19 pandemic.[939] Left-wing Gustavo Petro's victory in the 2022 presidential elections broke the long predictability of right-centrist domination since the 1990s; however, tellingly, his coalition began to fall apart precisely around the proposal to overhaul the health care system by introducing more state control over private entities delivering health care.[940]

[934] "Poverty headcount ratio at $2.15 a day (2017 PPP) (% of population) – Colombia," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SI.POV.DDAY?locations=CO
[935] "Poverty gap at $6.85 a day (2017 PPP) (%) – Colombia," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SI.POV.UMIC.GP?locations=CO
[936] On public social Spending as percentage GDP in 2022 and total net social spending as percentage of GDP in 2019, see "Expenditure for Social Purposes," OECD CompareYourCountry, accessed March 12, 2024, https://www.compareyourcountry.org/social-expenditure.
[937] René Moreno Alfonso, "The Fallacy of the Social State in Colombia," *Análisis Jurídico - Político* 3, no. 5 (January 31, 2021): 71-72.
[938] Juan Fernando Bucheli, "Conditional Cash Transfer Schemes and The Politicisation of Poverty Reduction Strategies Schemes and Politicisation Of Poverty Reduction Strategies," *Análisis Político* 28, no. 83 (January 1, 2015): 19–31,
[939] Juliana Londoño-Vélez and Pablo Querubín, "The Impact of Emergency Cash Assistance in a Pandemic: Experimental Evidence from Colombia," *The Review of Economics and Statistics* 104, no. 1 (January 6, 2022): 157–6.
[940] "Colombia's First Leftist President Is Stalled by Congress and a Campaign Finance Scandal," AP News, August 7, 2023, https://apnews.com/article/colombia-president-gustavo-petro-971565cc35371626699257c55d61798f.

1.5.2. Social Rights Doctrine: *Ad hoc* Individual Enforcement

The CCC erases lines between civil and political rights and social rights by focusing on freedoms and positive dimensions of both categories of rights acknowledging minimum core[941] and progressive (e.g. evidence-based policymaking)[942] dimensions of civil and political rights as well. Similarly, the social state of law principle, which paved the way for the negative and positive enforcement of the right to vital minimum/right to survival and justiciability of social rights, is considered on par with the RoL principle. The fundamental and justiciable nature of social rights was claimed by the CCC first through the connectivity doctrine, namely when it overlapped with other fundamental rights such as the right to life and dignity[943] or concerned subjects of special constitutional protection (e.g. children, pregnant women, elderly, people with disabilities, displaced, indigenous population, patients suffering from orphan diseases)[944] eventually to be upheld in its own right.[945] The fundamental nature of social rights made *tutela* action applicable, which became decisive for unleashing mass individual enforcement.[946] The incorporation of international law also helped in breathing more concrete content into social rights, sometimes even referencing soft law instruments.[947]

[941] Decisions C- 756 of 2008; T-428 of 2012.
[942] Decisions T-595 of 2002; T-133 of 2006; T-299 of 2017.
[943] Decisions T-406 of 1992; T-426 of 1992; SU-111 of 1997; T-395 of 1998 and T-1204 of 2000.
[944] Decisions SU-225 of 1998; T-544 of 2016; T-448 of 2021.
[945] Decisions T-206 of 2008; T-760 of 2008; T-160 of 2011; T- 585 of 2008; T- 495 of 2010.
[946] Bruce M. Wilson, "Institutional Reform and Rights Revolutions in Latin America: The Cases of Costa Rica and Colombia," *Journal of Politics in Latin America* 1, no. 2 (August 2009): 59–85.
[947] Decisions T-426 of 1992; T-533 of 1992; C-251 of 1997; SU-559 of 1997; T-068 of 1998; T-153 of 1998; SU-090 of 2000; T-859 of 2003; T-025 of 2004; T-760 of 2008; C- 444 of 2009; T-068 of 2010; T- 495 of 2010; T-418 of 2010; T-199 of 2016.

5.2.1. Negative Duties against State Policies

The Court exercises scrutiny over negative social rights duties based on the vital minimum in various ways by setting preconditions, including participatory remedies or alternative entitlements; or by revoking relevant measures in full. The Court required accompanying positive measures as a precondition for state action, which affected a vital minimum of street vendors,[948] informal recyclers,[949] or evictees, in the latter case requiring adequate alternative accommodation.[950] These positive measures often included the obligation of prior consultations, for instance, with those affected by developmental projects.[951]

Besides, the Court invalidated tax and housing credit policies adopted by the legislature when it was found to conflict with the constitutional standards, including the right to vital minimum. The Court found that the changes extending taxes to goods of primary necessities without compensatory mechanisms violated the progressive and equitable nature of taxation in the Constitution,[952] as well as the principle of vital minimum, which was regarded especially problematic due to minimal deliberation on these changes in Congress.[953] Against the background of a serious housing foreclosure crisis in the late 1990s, the Court found that the adjustment of the Unit of Constant Acquisitive Power (UPAC) to rates in the broader economy, besides the inflation, violated the right to housing as the scheme distorted the balance between what was owed and eventually paid by homeowners. According to the Court, this was an unjust prioritization of the

[948] Decision T-772 of 2003.
[949] Decision T- 291 of 2009.
[950] The Court sets specific requirement in terms of infrastructure and habitability, see Decisions T-544 of 2016; T-637 of 2013.
[951] Decisions SU-39 of 1997; T-652 of 1998.
[952] Art. 363 of the Constitution.
[953] Decision C-776 of 2003. similar policy was upheld when there were no deliberation problems and compensatory mechanisms existed, see Decision C-592 of 2019.

lenders, especially as homeowners' income was not aligned with the interest rate changes in the economy.[954] With the far-reaching impact on thousands of middle-class homeowners, the case was the first sign of a creeping middle-class capture of jurisprudence.[955] The decision did interfere with complex state policy, as two dissenters indicated. However, it cannot be ignored that such interpretations were supported by a thick conception of an equitable credit system in the Constitution of Colombia. [956]

The interference with the policy was even more intense when the Court invalidated the part of the UPAC scheme that allowed 'capitalization of interest' on the principal of the housing loan (unlike other types of loans).[957] The CCC subtly introduced the standard of maintaining housing loans 'below the lowest real interest rate being charged' in other areas[958] when it reviewed and upheld the constitutionality of the new scheme, which fixed the real interest rate over the life of the housing loan. In another case favorable to the middle class and perhaps interfering with even a weaker constitutional basis, the Court protected the general right of public sector workers to maintain acquisitive power of their salaries. Soon after, with seven new justices,[959] the Court changed its position and allowed a limitation of that right except when the acquisitive power of lower-income civil servants' salaries was at stake.[960] The rigorous standards in these cases are now

[954] Decision C-383 of 1999.
[955] Landau, "The Reality of Social Rights Enforcement," 189-287. Espinosa and Landau, *Colombian Constitutional Law*, 157.
[956] Art. 51 and 335 of the Constitution.
[957] Decision C-747 of 1999.
[958] Decision C-955 of 2000.
[959] Espinosa and Landau, *Colombian Constitutional Law*, 159-161.
[960] Decision C-1064 of 2001.

considered under the non-retrogression rule[961] which is broadly defined[962] in connection with the protection of legitimate expectations[963] and more explicitly invokes the proportionality scrutiny.[964]

1.5.3. Individual Enforcement of Positive Duties

Most importantly for this Chapter, the social state of law principle and the right to vital minimum paved the way for the justiciability of positive social rights, which led to *ad hoc* individual enforcement. Mass individual enforcement was unleashed as the *tutela* mechanism was also applied to social rights. This development was also enabled through flexible interpretation of the subsidiarity principle applicable to *tutela* action. The CCC broadly defined the situations when the judicial determination of a *tutela* did not have an alternative, for instance, in order to prevent serious affront to human dignity and life, adequately address the petitioners' vulnerability, or ensure the timeliness of a remedy.[965] This flexible approach to the subsidiarity principle pointed to the Court's aim to make the most of its powers under the *tutela* mechanism. The loosening of the judicial standard on economic incapacity evidenced the same inclination. Namely, the Court shifted the burden of proving financial incapacity[966] to the state agencies, noting their possession of necessary information to disprove economic incapacity claims,[967] and eventually, did not even

[961] Decisions C-1165 of 2000; T-789 of 2002: T-671 of 2002; C-931 of 2004; C-991 of 2004; T-1318 of 2005; C-444 of 2009; C-486 of 2016.
[962] Retrogression encompasses reforms (1) which cuts or limits the substantive scope of protection of the respective right; (2) substantially increases the requirements for accessing the respective right (3) decreases or appreciably diverts the public resources destined to the satisfaction of the right without satisfactorily reaching the relevant needs, see Decisions C-630 of 2011; C-507 of 2008.
[963] Decision T- 428 of 2012.
[964] The test as applied to non-retrogression requires that it serves pressing constitutional purpose, does not affect the minimum core of the right, does not take place unexpectedly but based on a careful study, that alternatives are considered seeking equally effectives options that would be less harmful to the right and that the harm is not excessive compared to the benefits aimed, see Decisions C-038 of 2004; T-1318 of 2005; C-630 of 2011.
[965] Decisions SU-508 of 2020; T-235 of 2018. T-594 of 2016.
[966] Decision SU-819 of 1999.
[967] Decisions T-113 of 2002; T-171 of 2016; T-260 of 2017.

shy away from directly reclassifying the economic status determined by the state.[968] The low evidentiary hurdle, coupled with a flexible and contextualized approach to economic capacity, increased judicial leeway in these cases.[969] Sometimes, financial capacity scrutiny was loosened to the extent of vanishing. This also had an institutional reason: the fast pace of *tutela* action that complicated the examination of each applicant's individual circumstances.[970] Succumbing to this fast pace, the CCC started to enforce the minimum core of social rights on a large scale without shying away from giving concrete content to such vital needs, for instance, from defining the minimum core of the right to water at a daily amount of 50 liters per person according to the WHO standard.[971]

It must be noted that the development of minimum core jurisprudence did not necessarily flow from the initial cases in which the CCC reviewed policy decisions. Before the CCC interfered in these early cases, the state had taken some prior steps, for instance, had initiated construction works of the sewage system (and then suspended it)[972] or had put in place laws that were not implemented.[973] When ordering the continuation of suspended works, the Court noted that the political branches were deprived of the resource scarcity argument due to the prior initiation of the construction. The Court explained that the 'blatant neglect' of state authorities' failure to provide explanations after acknowledging the problem opened the space for judicial intervention.[974] The fact that the future trajectory of the jurisprudence was not predetermined is also evident in the 1997

[968] Decision T-547 of 2015.
[969] Decisions T-841 of 2012; T-017 of 2013.
[970] Pablo Rueda, "Legal Language and Social Change during Colombia's Economic Crisis," in *Cultures of Legality: Judicialization and Political Activism in Latin America*, ed. Alexandra Huneeus, Javier Couso, and Rachel Sieder, Cambridge Studies in Law and Society (Cambridge University Press, 2010), 31-38. Landau, "The Reality of Social Rights Enforcement," 213.
[971] Decision T-740 of 2011; see also T-058-21
[972] Decisions T-406 of 1992; T-426 of 1992.
[973] Decision T-426 of 1992.
[974] Decision T-406 of 1992

decision of the full bench. In this case, the CCC permitted a suspension of medical service in the contributory scheme due to the petitioners' non-compliance with contribution payments and highlighted the potential financial and equity repercussions of individual enforcement of social rights outside the existing laws. As the SACC, the full bench of the CCC emphasized that the Court could not substitute for the democratic process that was supposed to be led by the government and citizens themselves.[975]

Leaving the initial minimalism behind, the Court soon started to grant anything that was seen to harm life, dignity, and personal integrity if economic incapacity was established. This will be best illustrated by a detailed review of health rights jurisprudence in Part II. This shift has fed into the same middle-class capture of jurisprudence noted above in relation to the decisions on taxation, housing, and salaries of public servants issued in the same period.

1.5.4. Programmatic Add-on to Individual Enforcement

Despite the programmatic aspects of social and positive rights[976] coming to the forefront in the 2000s, mass individual enforcement not only ran in parallel but still dominated jurisprudence. The CCC in this period increasingly relied on complex remedies, often required a plan of action, and set standards a plan/public policy had to satisfy (e.g. participatory mechanisms at all stages of policymaking and implementation).[977] The most crucial development in this period was the doctrine of an 'unconstitutional state of affairs' expressly linked to the harmonious collaboration principle. The doctrine was applied when actions or omissions, as structural problems, resulted in massive and repeated violations of rights, which could not remedied without significant legislative,

[975] Decision SU-111 of 1997.
[976] Programmatic aspect was underlined in relation to accessibility of public transportation for the disabled, see T-595 of 2002.
[977] Decision T-760 of 2008; T-302 of 2017.

administrative, and budgetary measures and a coordinated intervention of multiple state agencies. The Court noted that these are the cases in which individual *tutela* remedies would lead to judicial congestion due to the spread of violations.[978] Besides, through this structural prism presenting the *fundamentality* and *justiciability* of rights as *related* but *independent issues*, the Court questioned the appropriateness of *tutela* action in light of SoP concerns, especially as individual remedies became a *de facto* requirement for accessing rights.[979] More emphasis was placed on the SoP limitations of judicial power due to economic and technical difficulties and uncertainty related to the multiplicity of possible policies.[980] To overcome the uneasiness of ordering now much larger public expenditures than in each individual case, the Court differentiated between ordering an unbudgeted expense and ordering the relevant authorities to overcome the insufficiency of resources and shortcomings in institutional capacity.[981] However, as best demonstrated in Part II of this Chapter, this rhetoric leaning toward structural solutions could not be realized. Contrary to the portrayal of individual enforcement as an 'exceptional' possibility,[982] it dominated social rights jurisprudence. Structural orders were issued without individual ones when individual enforcement was practically impossible, for instance, as infrastructure was needed for providing access to water[983] or electricity.[984]

Like social rights in general, the doctrine of an 'unconstitutional state of affairs' had modest beginnings. The doctrine was first invoked to respond to systemic disrespect of existing laws (on

[978] A385 of 2010, para 11 [for T-025 of 2004].
[979] Decisions T-235 of 2011; T-428 of 2012; T-884 of 2006; T- 291 of 2009; T- 616 of 2010; T-418 of 2010; T-388 of 2013; T-299 of 2017.
[980] Decisions T-760 of 2008; T- 125 of 2008; T- 495 of 2010; T-500 of 2020; T-058 of 2021.
[981] A385 of 2010 [for T-025 of 2004].
[982] Decisions T-080 of 2018; T-058 of 2021.
[983] Decision T-091 of 2010.
[984] Decision T-209 of 2019.

the social security system,[985] prison overcrowding[986]), then - to structural problems of insufficient public policy and resources (internally displaced persons) [987] or regulatory framework and implementation (health care system),[988] recently, even reacting to the often invisible root causes of structural problems such as reactive and populist criminal policy behind the prison overcrowding.[989] Some of these cases, including the Structural Judgment on the health care system (see Section 2.3), entailed various dimensions of this structural turn simultaneously.

This structural turn also coincided with the emphasis placed on the intersectional vulnerability of groups both in judgments and monitoring processes. The CCC decriminalized medically assisted suicide,[990] established an extensive right to abortion,[991] and invalidated the tax on menstrual products.[992] The Court also imposed heightened/tailored positive duties in relation to the indigenous population,[993] indigenous children,[994] women and foreigners in prison,[995] homeless women in terms of their menstrual hygiene,[996] women IDPs vulnerable to sexual and other kinds of abuse,[997] and users of the health care system in poor regions.[998] The Court also gradually erased

[985] Decisions SU-559 of 1997; SU- 068 of 1998; T-535 of 1999; SU-090 of 2000.
[986] Decision T-153 of 1998.
[987] Decision T-025 of 2004.
[988] Decision T-760 of 2008.
[989] Decisions T-388 of 2013; T-762 of 2015.
[990] Decision C-164 of 2022.
[991] Decision C-055 of 2022.
[992] Decision C-117 of 2018; İlayda Eskitaşçıoğlu, "Access to Menstrual Products Is a Constitutional Right. Period.: On Period Poverty and the (Un)Constitutionality of Tampon Tax," *Verfassungsblog*, December 5, 2019, https://verfassungsblog.de/access-to-menstrual-products-is-a-constitutional-right-period/.
[993] Decisions SU-217 of 2017; SU-123 of 2018; T-333 of 2022; SU-097 of 2017; T-308 of 2018.
[994] See the Structural Judgment concerning fundamental rights to health, to water and to food of indigenous children, Decision T-302 of 2017; also concerning their right to health in another region, see Decision T-592 of 2017.
[995] Structural Judgment on the crisis in the prison system discussed the need for differential treatment of these groups Decision T-388 of 2013.
[996] Decision T-398 of 2019. Mónica Arango Olaya, "Blood, Taxes, and Equality," OHRH, November 17, 2019, https://ohrh.law.ox.ac.uk/blood-taxes-and-equality/.
[997] Autos 092/08 and Auto 737/17 issued under the monitoring of the Structural Judgment on IDPs T-025 of 2004.
[998] Auto 262A/19 and Auto 110/2021 issued under the monitoring of the Structural Judgment on Health Care T-760 of 2008, see also the Structural Judgment T-357 of 2017.

the distinction between the social rights protection of citizens and irregular migrants,[999] singling out groups requiring differential treatment within the latter group.[1000]

The CCC refined complex remedies in parallel to routine individual enforcement. The CCC explained that dialogic review was more appropriate not only due to the better epistemic position of political branches but also of those affected[1001] and that 'meaningful dialogue',[1002] which abandons the binary judicial adjudication and syllogistic method of reasoning,[1003] was preferred as the more appropriate for unlocking institutional inertia.[1004] Aligned with this logic, orders for short, medium-, and long-term solutions, institutional architecture, and appropriate funding were issued together with participatory measures.[1005] The remedies regarded as dialogic were not always this broad. For instance, under the label of dialogic justice, the court ordered that a policy be drafted to solve the problem of child hunger in a specific region,[1006] that a group of specialists be sent to examine the whole population in a town,[1007] that a vaccination plan be devised and implemented in a specific region.[1008] The Court has sometimes insisted on the terminology of dialogue even when the discretion left to political branches was rather narrow – a choice between covering the transportation costs to education facilities all year or providing boarding service during some periods.[1009]

[999] Decision T-210 of 2018: The Court in this case granted request for hernia repair surgery interpreting it as an urgent care: " as a minimum, in accordance with international law, States must guarantee all migrants, including those in an irregular situation, not only emergency care with a human rights perspective, but also care in preventive health with a strong public health focus."
[1000] Decision T-074 of 2019.
[1001] Decisions T-193 of 2021; T-209 of 2019. T-500 of 2020.
[1002] Decision T-500 of 2020.
[1003] Decision T-058 of 2021.
[1004] Decision T-209 of 2019; This decision ordered dialogue instead of directly ordering construction works as in the preceding cases, see Decisions T-306 of 2015; T-012 of 2019; T-167 of 2019. This change in jurisprudence is discussed in Decision T-500 of 2020.
[1005] Decisions T-091 of 2018; A156 of 2020; A811-21. C-191 of 2021; T-058 of 2021; T-209 of 2019.
[1006] Decision T-302 of 2017.
[1007] Decision T-357 of 2017.
[1008] Decision T-592 of 2017.
[1009] Decision T-091 of 2018

Together with the fluid generality of remedies issued, monitoring frameworks gradually tightened by the CCC depart from the dialogic justice as conceptualized in Chapter 1 of this dissertation. The court-led monitoring was initially conceived as an open-ended process oriented at the identification of the problem's scale, compliance parameters, and evaluation of compliance.[1010] However, over time, the framework in which it proceeded lost sight of that flexible approach. The CCC now increasingly determines the composition of participatory mechanisms (e.g., the minimum number of female representatives of those affected); the frequency of meetings and reporting; the deadlines for the submission of a contingency plan and for the agreed solution with a schedule of implementation. As a rule, the Court explicitly regulates deadlines for achieving short-term solutions (e.g. delivery of daily water supply as a transitory measure in 10 days) and medium-term solutions (e.g. water purification system in 6 months), while for long-term solutions, it sets the deadline for agreement on its details (e.g. agreeing on the details of constructing a continuous drinking water supply system in 6 months).[1011] The less open-ended the ordered solution is, the more stringent the deadlines are. For instance, the deadline was three days for deciding on the best infrastructural measure for fixing the landslide-related problem of damaged water pipes and five days for finishing the necessary works.[1012] Some orders are as concrete as the building of an appropriately equipped field hospital 30 days after the judgment in response to a hurricane-related crisis.[1013]

Coinciding with the increasing specificity of orders and stringency of the monitoring framework, the court-led supervision succumbed to protracted and complicated processes over time.

[1010] A178 of 2005, A411 of 2015, A218 of 2006, A266 of 2006, A337 of 2006 and A109 of 2007 for T-025 of 2004 and A121 of 2018 [for T-762 of 2015]; A226 of 2011; A755 of 2021[for T-760 of 2008];
[1011] Decision T-058 of 2021; T-193 of 2021; T-475 of 2017.
[1012] Decision T-476 of 2020.
[1013] Decision T-333 of 2022

Monitoring is ongoing in the structural judgments on the rights of the displaced population and the health care system issued in 2004 and 2008, respectively (see Section 2.3). The difficulties of the implementation monitoring have blurred the lines between complex and structural remedies, the latter distinguished by the Court through additional obligations of result (e.g. adoption of a policy) besides a more generic duty of making 'best efforts' for overcoming the problem under complex remedies. The Court permits the declaration of compliance with even the structural remedies when formally acceptable plans and institutions exist, and some positive results are visible.[1014] Such a flexible approach is understandable from the strain that previous monitoring processes have placed on judicial resources and is justified by the Court based on the right to have effective access to the administration of justice that requires a final decision instead of 'indefinite and indeterminate' judicial intervention awaiting some 'utopian moment' of full compliance.[1015] To relieve the strain on the judicial system, in recent years, the Court has increasingly transferred the monitoring task to lower courts[1016] or taken monitoring outside the judiciary entirely,[1017] retaining the power to take over if necessary. In delegating these duties, the Court determines a detailed framework in which the monitoring should proceed and provides guidelines for lower courts to assess compliance. [1018]

The most recent development in enforcing social rights is a rather complex combined reasonableness and proportionality test. The first step of this test is to assess the reasonableness of both what is requested by the petitioner and what is provided by the state in terms of the existing

[1014] Decisions T-388 of 2013; T-267 of 2018; T-762 of 2015, T-103 of 2016; T-302 of 2017; A001 of 2017; A264 of 2020; Richard Albert et al., eds., *2019 Global Review of Constitutional Law*, (I·CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2020), 60.
[1015] T-388 of 2013; A264-20, A548 of 2017, A693 of 2017, A111 of 2019 [for T-466 of 2016]. A195 of 2020 [for SU-484 of 2008].
[1016] T-302 of 2017; T-359 of 2017; T-267 of 2018; T-193 of 2021. T-500 of 2020.
[1017] T-762 of 2015.
[1018] T-302 of 2017; T-267 of 2018; T-762 of 2015; T-103 of 2016.

law. If both are found reasonable, as a second step, the Court then assesses the proportionality of going along with a lower standard offered by the state. Even if the solution requested by the petitioner cannot be derived from a reasonable interpretation of a right as defined in the existing law, according to this test, the Court must proactively identify proportional and effective alternatives that could be higher than the one provided by the state.[1019] Most importantly, the Court adds that, exceptionally, the content of the right specified in subconstitutional norms may itself be unreasonable and, therefore, unconstitutional. In developing this test, the Court reiterates early precedents establishing the primary duty of the Congress to concretize the content of social rights[1020] and stresses the relevance of resource constraints even when rights violations are serious.[1021] However, these statements, including the exceptionality of sidestepping subconstitutional norms by the Court, do not hold in practice as best illustrated through health rights jurisprudence discussed in Part II.

To sum up, on its face, the CCC pursued a wholesome view of social rights adjudication encompassing both negative and positive dimensions, and within the latter, both individual and structural enforcement coupled with court-led monitoring under the label of dialogic justice. However, in essence, despite the rhetorical preference for structural solutions and the exceptional nature of granting individual benefits, the inertia of ad hoc individual enforcement prevailed. The incongruity between the SoP-sensitive rhetoric of the Court and the practice was most evident in the ever-expanding judge-made exceptions to all kinds of democratically set priorities on the basis of broad standards such as affront to fundamental rights. Besides, what developed under the label

[1019] To illustrate, the Court has refused reasonableness of the request to open upper grades in a rural school without legally required level of demand, however, held that an alternative offered by the authorities – enrollment in other schools located further would be reasonable provided that the transport costs were covered, holding this to be a proportionate measure considering minor effect on the administrative autonomy, see Decision T-091 of 2018.
[1020] C-251 of 1997.
[1021] T-027 of 2018; T-091 of 2018.

of dialogic justice itself departed from the open-ended, flexible, and collaborative spirit associated with dialogic justice in theory. The extent of reconceptualizing the judicial role in Colombia will become most evident when discussing health rights jurisprudence in Part II below.

Part II: Right to Health through the Prism of SoP

2.1. Population Health, Health Care and Legislative/Policy Framework

Colombia has the highest life expectancy among the three countries studied in this thesis, reaching 77 years in 2019 before the COVID-19 pandemic led to a slight decrease, as elsewhere.[1022] Infant mortality is also the lowest, with 11 deaths per 1000 live births.[1023] The most common cause of death is non-communicable diseases (76% in 2019).[1024] Government health expenditure is also the highest among the jurisdictions, standing at 6.5% of GDP in 2020.[1025] OOP in public and private healthcare systems was 13.59% in 2020, lower than the global average of around 18% and 50.59% in India but higher than 5.36% in South Africa.[1026] Nevertheless, health inequities among population groups and regions did not improve since the transition, and measured in relation to the pace of improvements before the transition and average regional trend, shortfall inequalities (shortfall from the optimal average) even widened.[1027]

[1022] "Life expectancy at birth, total (years) - India, South Africa, Colombia," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=IN-ZA-CO

[1023] "Mortality rate, infant (per 1,000 live births) - India, South Africa, Colombia," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SP.DYN.IMRT.IN?locations=IN-ZA-CO

[1024] "Cause of death, by non-communicable diseases (% of total) – Colombia", World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SH.DTH.NCOM.ZS?locations=CO .

[1025] "Domestic general government health expenditure (% of GDP) - Colombia, India, South Africa." World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SH.XPD.GHED.GD.ZS?locations=CO-IN-ZA

[1026] "Out-of-pocket expenditure (% of current health expenditure) - Colombia, India, South Africa," World Bank Open Data, accessed March 3, 2024 https://data.worldbank.org/indicator/SH.XPD.OOPC.CH.ZS?locations=CO-IN-ZA

[1027] Roberto JF Esteves, "The Quest for Equity in Latin America: A Comparative Analysis of the Health Care Reforms in Brazil and Colombia," *International Journal for Equity in Health* 11, no. 6 (February 2, 2012): 1-16. Irene Garcia-Subirats et al., "Inequities in Access to Health Care in Different Health Systems: A Study in Municipalities of Central Colombia and North-Eastern Brazil," *International Journal for Equity in Health* 13, no. 10 (January 31, 2014): 1-15.

The health care system in Colombia is based on a managed competition model, with state funding and universal coverage as its basis, essentially operating as a social insurance scheme.[1028] The system introduced in 1993 envisaged state funding for the delivery of Mandatory Healthcare Plans (POS) in two schemes - subsidized and contributory, to be provided by private insurance companies - Health Promotion Entities (EPSs), which on their own contracted individual healthcare providers as direct suppliers of the services. The state calculated the funding for EPSs by determining the Capitation Payment Unit (UPC) per patient, considering the health goods and services covered in the two schemes. Part of the contributions from those employed in the formal sector went to the subsidized scheme to complement the state resources, which, before unification with the contributory scheme, included around half of the benefits available in the latter.[1029]

The 1993 healthcare reform did have some positive effects, at least in terms of formal coverage. However, the problems of implementation and regulatory supervision over it impeded the achievement of the set goals, particularly in terms of reducing inequities in health.[1030] Formal coverage increased dramatically from 21% to around 90% of the population in 2008 and 96% in 2020. Apart from formal coverage, a positive impact was also identified in increased expenditure for the poorest 20% when measured in relation to their income in the first decade of the new system's operation (from 6.25% to 50% of their income). However, over time, the increase in coverage with no such increase in employment (subsidized population surpassed contributors by

[1028] Everaldo Lamprea, Lisa Forman, and Audrey R. Chapman, "Structural Reform Litigation, Regulation and the Right to Health in Colombia," in *Comparative Law and Regulation* (Edward Elgar Publishing, 2016), 338–339.
[1029] Lamprea-Montealegre, *Local Maladies, Global Remedies,* 96. Alvarez-Rosete and Hawkins, "Advocacy Coalitions, Contestation, and Policy Stasis," 36. Lamprea and García, "Closing the Gap Between Formal and Material Health Care Coverage in Colombia," 54.
[1030] Esteves, "The Quest for Equity in Latin America," 1-16.

2005) became difficult to sustain financially as fewer contributions flowed into the system. This also complicated the unification of contributory and subsidized schemes planned to be accomplished by 2001, as well as the comprehensive updating of POS.[1031] Jurisprudence leading to reimbursements to EPSs discussed below further reduced resources for expanding the pool of services covered. As estimated, the annual cost of reimbursements to EPSs for non-POS drugs ordered by the Court amounted to the cost of including 9 million more people in the subsidized regime, while if the reimbursement costs were excluded, the contributory scheme would have had a surplus for most periods up to 2015.[1032]

Besides deficits, the system had regulatory shortcomings that must be seen in the context of a somewhat hasty, technocratic, and non-participatory adoption of Law 100 of 1993 and subordinate legislation.[1033] The Law established the National Council on Social Security in Health (CNSSS) under the Ministry of Social Protection to make decisions, including on the addition of new drugs to insurance plans; however, until 2009, POS was not regularly and comprehensively updated, while existing POS remained ambiguous also in terms of included health goods and services. In this context, litigation became the administrative pathway for obtaining POS services and also led

[1031] Wang, *Health Technology Assessment, Courts, and the Right to Healthcare,* 100-101, 111. Lamprea-Montealegre, *Local Maladies, Global Remedies*, 90-91, 96. Camila Gianella-Malca, Siri Gloppen, and Elisabeth Fosse, "Giving Effect to Children's Right to Health in Colombia? Analysing the Implementation of Court Decisions Ordering Health System Reform," Journal of Human Rights Practice 5, no. 1 (March 1, 2013): 157.

[1032] Wang, *Health Technology Assessment, Courts, and the Right to Healthcare*, 111, 120.

[1033] Alvarez-Rosete and Hawkins, "Advocacy Coalitions, Contestation, and Policy Stasis," 36; C. Arturo Alvarez-Rosete and Benjamin Hawkins, "Using Evidence in a Highly Fragmented Legislature: The Case of Colombia's Health System Reform," in *Evidence Use in Health Policy Making*, ed. Justin Parkhurst, Stefanie Ettelt, and Benjamin Hawkins (Cham: Springer International Publishing, 2018), 100; Everaldo Lamprea and Johnattan García, "Closing the Gap Between Formal and Material Health Care Coverage in Colombia," *Health and Human Rights* 18, no. 2 (December 2016): 50.

to ad hoc inclusion of often high-tech, costly medications while many cost-effective treatments were omitted.[1034]

Besides, EPSs were under no effective monitoring and accountability measures, as the agency responsible for that - the National Superintendent of Health - was constantly underfunded, while the Scientific Technical Committees (CTCs) deciding disputes between patients and EPSs had members appointed by the same EPSs.[1035] Neither did accountability follow from the demand side, as ordinarily, users did not have a real choice between EPSs and service providers, which weakened the efficiency rationale behind the competition model, too.[1036]

With weak regulation and competition against the context of radically expanding coverage,[1037] the good faith of EPSs came under question. The problems such as corruption (e.g. agreement between EPSs to deny treatments in POS to receive extra funding through reimbursements besides UPC), vertical integration (e.g. EPSs purchasing health services from suppliers belonging to their network), cost-containment (e.g., barriers to accessing health care) coupled with payment delays from the state led to a decreased quality, effectiveness, and efficiency of the system.[1038] As will be

[1034] Wang, *Health Technology Assessment, Courts, and the Right to Healthcare*, 119-120. Karina Gallardo Solarte, Fanny Patricia Benavides Acosta, and Rosario Rosales Jiménez, "Crônica custo doença intransferível: realidade colombiana," *Revista Ciencias de la Salud* 14, no. 01 (2016): 106. Camila Gianella-Malca and Ole Frithjof Norheim, "A fairer health system? Assessing Colombia's new health plans" in *Challenges in Implementing the Colombian Constitutional Court's Health-Care System Ruling of 2008*, by Camila Gianella-Malca (PhD diss., University of Bergen, 2013).

[1035] Lamprea-Montealegre, *Local Maladies, Global Remedies*, 92. Herrera and Mayka, "How Do Legal Strategies Advance Social Accountability?," 10.

[1036] Everaldo Lamprea, "Colombia's Right-to-Health Litigation in a Context of Health Care Reform," in *The Right to Health at the Public/Private Divide*, ed. Colleen M. Flood and Aeyal Gross (Cambridge University Press, 2014), 142.

[1037] Lamprea-Montealegre, *Local Maladies, Global Remedies*, 82.

[1038] Diego Gómez-Ceballos, Isabel Craveiro, and Luzia Gonçalves, "Judicialization of the Right to Health: (Un)Compliance of the Judicial Decisions in Medellin, Colombia," *The International Journal of Health Planning and Management* 34, no. 4 (October 2019): 1278. Cesar Ernesto Abadia and Diana G. Oviedo, "Bureaucratic Itineraries in Colombia. A Theoretical and Methodological Tool to Assess Managed-Care Health Care Systems," *Social Science & Medicine (1982)* 68, no. 6 (March 2009): 1159. Camila Gianella-Malca, "A Human Rights Based Approach to Participation in Health Reform: Experiences from the Implementation of Constitutional Court Orders in Colombia," *Nordic Journal of Human Rights* 31, no. 1 (March 14, 2013): 84–107. Daniel Alzate Mora, "Health Litigation in Colombia: Have We Reached the Limit for the Judicialization of Health," *Health and Human Rights Journal* 16, no. 2 (2014). Alvarez-Rosete and Hawkins, "Advocacy Coalitions, Contestation, and Policy Stasis," 41. Herrera and Mayka, "How Do Legal Strategies Advance Social Accountability?," 10.

seen, the systemic denial of services included in POS to which the patients were entitled in law occupied the largest part of the jurisprudence.

The judicial precedent permitting the granting of non-POS drugs with reimbursements for EPSs (see section 2.3) added to the incentives of pharmaceutical companies to lobby politicians for policies increasing their profit.[1039] The health rights litigants were also encouraged and supported by EPSs financially.[1040] The lobbying proved successful when, in 2002, the state allowed the prescription of brand name medicine by EPSs, even if the generic one existed,[1041] and in 2006, pharmaceutical prices were deregulated unless competition was completely absent in a specific therapeutic class.[1042]

There were several attempts to fundamentally reform the health care system in 2003 and 2004, but draft bills could not be passed within deadlines and were abandoned.[1043] Law 1122 of 2007 established an autonomous agency, the Regulatory Commission for Health (CRES), in charge of updating POS and defining the value of UPC. However, with CRES members only appointed in 2009,[1044] the CRES proved ineffective and was abolished in 2012, with its functions transferred to the Ministry.[1045] The law also introduced incentives for CTCs within the health insurance

[1039]Camila Gianella-Malca, "Implementing the Colombian Constitutional Court's Health-Care System Ruling of 2008," (PhD diss., University of Bergen, 2013), 31, 34, 53. Alicia Ely Yamin and Oscar Parra-Vera, "Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates," *Hastings International and Comparative Law Review* 33 (2010): 437-438, fn. 24. International Crisis Group (ICG), *Cutting the Links Between Crime and Local Politics: Colombia's 2011 Elections* (ICG 2011), 4,9, 14, fn. 114 https://www.refworld.org/docid/4e3008392.html

[1040] Lamprea-Montealegre, *Local Maladies, Global Remedies*, 121. 127, 131-132. Andia and Lamprea, "Is the Judicialization of Health Care Bad for Equity?" 2; Corey Prachniak-rincón and Jimena Villar de Onís, "HIV and the Right to Health in Colombia," *Health and Human Rights* 18, no. 2 (December 2016): 162. César Rodríguez-Garavito, "A Golden Straitjacket? The Struggle over Patents and Access to Medicines in Colombia," in *Balancing Wealth and Health: The Battle over Intellectual Property and Access to Medicines in Latin America*, ed. Rochelle Dreyfuss and César Rodríguez-Garavito (Oxford University Press, 2014), 188-189. Alicia Ely Yamin and Fiona Lander, "Implementing a Circle of Accountability: A Proposed Framework for Judiciaries and Other Actors in Enforcing Health-Related Rights," *Journal of Human Rights* 14, no. 3 (July 3, 2015): 326.

[1041] Art. 4 of the CNSSS Agreement 228 of 2002.

[1042] Lamprea, Forman, and Chapman, "Structural Reform Litigation, Regulation and the Right to Health in Colombia," 340-341.

[1043]Alvarez-Rosete and Hawkins, "Advocacy Coalitions, Contestation, and Policy Stasis," 41.

[1044] Alvarez-Rosete and Hawkins, "Using Evidence in a Highly Fragmented Legislature" 103; Botero, "Courts That Matter", 93-94.

[1045] Lamprea, "Colombia's Right-to-Health Litigation in a Context of Health Care Reform," 136, fn. 17.

companies to grant patient requests for drugs, as this made EPSs entitled to full reimbursement, unlike partial refund from litigation. This did lead to a temporary decrease of *tutelas* from 2009 to 2011.[1046] However, this change could not fix the problem of financial sustainability of the health care system, which even worsened as the deregulated expensive brand name drugs were granted by CTCs. The adoption of Law 1751 of 2015 to comply with the Structural Judgment on the healthcare system was the most significant policy change since the 1993 healthcare reform, which again affected jurisprudence and financial sustainability of the healthcare system. Due to this reform's embeddedness in the context of Structural Judgment and court-led implementation, this policy change will be discussed below together with that phase of health rights adjudication (see Section 2.3).

2.2. Individual Enforcement of Health Rights

The relevant provision for the individual right to health in Colombia comprehensively defining the state duties follows the thick logic of the Constitution. The right to health is formulated as individual access to the care of one's health that promotes, protects, and restores health, while health care itself is recognized as a public service that can be provided through the private sector under state control. The relevant provision specifies that the state has the duty of regulating the provision of health services per the principles of efficiency, universality, and solidarity. Besides, the Constitution requires statutory regulation of the terms under which basic care is free and mandatory for all, as well as the distribution of competencies and subsidies among territorial levels of the state, which are to provide health care in a decentralized manner through the participation

[1046] Wang, *Health Technology Assessment, Courts, and the Right to Healthcare*, 109. Benjamin Hawkins and Arturo Alvarez Rosete, "Judicialization and Health Policy in Colombia: The Implications for Evidence-Informed Policymaking," Policy Studies Journal 47, no. 4 (November 2019): 966.

of the local communities.[1047] Jurisprudence takes an even more all-encompassing approach to the scope of the right to health, reaching into the psychological and social aspects of health,[1048] diagnosis,[1049] rehabilitation, and follow-up,[1050] as well as the coping with untreatable diseases (e.g. when in a coma).[1051]

As with other social rights, health rights jurisprudence based on this constitutional provision was defined by individual enforcement. The CCC granted requests to acquire drugs or services denied, both from POS and outside it, sometimes supported by a non-discrimination argument, for instance, when benefits were included in the contributory but not the subsidized scheme.[1052]

The case that came to define the trajectory of the health jurisprudence concerned the HIV epidemic.[1053] In this case, the CCC granted ART treatment as otherwise there would be an imminent and serious threat to life. When granting ART, the CCC went beyond existing administrative practice, according to which non-POS drugs and services could be granted exceptionally when those could fully 'cure' the health condition.[1054] Besides, while ART was still costly, the Court made the doctor's assessment of the patient's need for treatment decisive without discussing the relevance of scientific evidence and cost-effectiveness. Most importantly, this case placed the burden of reimbursing EPSs for providing non-POS medicine on the state. According to the Court, as the calculation of UPC did not count such treatments, new contractual duties could

[1047] Art. 49 of the Constitution.
[1048] Decisions T-045 of 2010; T-159 of 2015; T-1176 of 2008; T-026 of 2011; T-231 of 2021.
[1049] The Court often orders diagnosis when medical prescription is absent for the granted health good or service, see decisions SU-508 of 2020; T-005 of 2023; T-061 of 2019; T-263 of 2020.
[1050] Decisions T-579 of 2017; T-218 of 2022; T-231 of 2021; T-001 of 2021; T- 274 of 2009: T-244 of 2008; T-586 of 2013; C-313 of 2014.
[1051] Decisions T-320 of 2009; T-171 of 2018; T-439 of 2018.
[1052] Decision SU- 225 of 1998.
[1053] Decision SU-480 of 1997, see also an earlier case SU-43 of 1995, in which the Court granted health service to a minor even though it could not provide full cure.
[1054] Lamprea-Montealegre, *Local Maladies, Global Remedies*, 119.

not have been imposed on EPSs without reimbursement.[1055] CNSSS then mandated reimbursements in its regulations, which also formalized criteria and procedures for the prescription of non-POS drugs.[1056] Significantly, the Court did not choose a structural approach demanding the state to include ART therapy in POS, hence, in UPC calculations or to formulate an appropriate universal mechanism for funding non-POS treatments granted through *tutelas.* Eventually, following the *tutela* case, the state did include ART treatment in POS.[1057] However, as a rule, non-POS treatments continued to be granted (to be provided within 48 hours) on a case-by-case basis, leaving no possibility of moderating the prices through a systemic approach. The reimbursement scheme set in this precedent also turned into a potential incentive for EPSs to increasingly deny even included treatment[1058] and to encourage the prescription of non-POS alternatives.[1059] To illustrate, in 2009, more than 8 million USD was paid as reimbursement to EPS for anti-hemophilic pharmaceuticals that were already included in POS.[1060] The structural problems discussed above – lack of clarity in POS on the inclusion/exclusion of treatments and lack of EPS accountability – contributed to this development in jurisprudence.

The judicial standard for ordering non-POS treatment soon extended to all cases in which the life, dignity, and personal integrity of persons were threatened, provided that a medical professional ordered the treatment, the treatment was not substitutable with treatments in POS, and the petitioners could not afford to cover it on their own.[1061] This became a standard for setting

[1055] Decision SU-480 of 1997.
[1056] CNSSS Resolution 5061 of 1997.
[1057] Lamprea-Montealegre, *Local Maladies, Global Remedies,* 119; Prachniak-rincón and Onís, "HIV and the Right to Health in Colombia," 161-162.
[1058] Espinosa and Landau, *Colombian Constitutional Law,* 170. Landau, "The Reality of Social Rights Enforcement," 212. Yamin, "The Right to Health in Latin America," 719.
[1059] Wang, *Health Technology Assessment, Courts, and the Right to Healthcare,* 104
[1060] Lamprea, "Colombia's Right-to-Health Litigation in a Context of Health Care Reform," 140-141
[1061] Decisions T- 533 of 1992; T-697 of 2004.

exceptions to any democratic priority-setting/rationing. The health goods and services granted based on this test included diapers,[1062] transportation,[1063] reconstructive plastic surgery (e.g., after mastectomy),[1064] and even semi-intensive care for those in a coma.[1065] Most importantly, *tutela* became a routine procedure for granting access to a wide range of expensive (often brand-name) drugs and services. As Lamprea summarizes, 'judicial precedent [...] opened Pandora's box, thanks to which high-cost, brand-name pharmaceuticals for several types of cancer, arthritis, hemophilia, rare diseases, neurological disorders, kidney, and hepatic dysfunction, and also dialysis, chemotherapy, transplants, plastic surgery, overseas medical treatments, among many others, joined an ever-expanding number of "excluded" health services that could be obtained using litigation.' [1066] In parallel, the Court developed the standard of integrated health care, which implied that all health goods and services besides the one in POS had to be provided if that was necessary for the overall effectiveness of the treatment.[1067]

With the added effect of deregulated drug prices since 2006, this wave of litigation seriously impacted the system's financial sustainability.[1068] The reimbursement costs rose from 1.5 million USD in 2001 to 648 million (22% of which for only seven expensive drugs) in 2008[1069] and continued to grow with the newly established CTCs, reaching a 60% (2.5. billion USD) increase between 2008 and 2010.[1070] It also strained judicial resources. Counting all instance courts, only

[1062] Decisions T-899 of 2002; T- 292 of 2009. See also T- 212 of 2009 granting colostomy bags.
[1063] Decision T- 082 of 2009.
[1064] Decision T- 649 of 2008.
[1065] Decision T-320 of 2009.
[1066] Lamprea-Montealegre, *Local Maladies, Global Remedies*, 126.
[1067] Decision T-859 of 2003.
[1068] Lamprea, "Colombia's Right-to-Health Litigation in a Context of Health Care Reform," 142-144. Manuel Jose Cepeda-Espinosa, "Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court Report," *Washington University Global Studies Law Review* 3, no. Special Issue (2004): 698.
[1069] Lamprea-Montealegre, *Local Maladies, Global Remedies*, 129-130. Rodríguez-Garavito, "A Golden Straitjacket?," 188; Landau, "The Reality of Social Rights Enforcement," 215.
[1070] Botero, "Courts That Matter", 96-97.

in 2008, 142,957 health *tutelas* were filed (41.5% of the total number of tutelas), which was a 300% increase since 1999. Around 80% of these health *tutelas* were fully and 95% - partially granted. By 2003, 56% of these claims were related to health goods and services already included in POS, the rate of which even increased due to the rising informal administrative barriers and implicit health rationing within the system.[1071] These developments in individual health rights enforcement demonstrated a general shift from a poor-oriented to a middle-class jurisprudence and raised equity concerns due to both types of health goods and services obtained and greater access of less vulnerable applicants to the justice system (despite the absence of legal representation costs[1072]).[1073] Furthermore, even the timeliness of *tutela* action could not guarantee that healthcare needs were met early enough for the effectiveness of the treatment. It is true that decisions in this period have also concerned structural issues and rights of the most vulnerable (e.g. free vaccinations of children[1074] proposed budget cuts to the subsidized regime).[1075] However, mass individual enforcement still dominated. As will be demonstrated, eventually, *tutela* remained a routine bureaucratic pathway seen this way by health care users themselves[1076] for obtaining both included and excluded health goods and treatments even after the new legislation resulting from the Structural Judgment had come forward with a regularly updated and generous coverage plan.

[1071] Wang, *Health Technology Assessment, Courts, and the Right to Healthcare*, 105-107. Lamprea-Montealegre, *Local Maladies, Global Remedies*, 108, 128; Landau, "The Reality of Social Rights Enforcement," 215-216.
[1072] Julieta Lemaitre, "Someone Writes to the Colonel: Judicial Protection of the Right to Survival in Colombia and the State's Duty to Rescue," *SELA papers*, January 1, 2005, https://openyls.law.yale.edu/handle/20.500.13051/17539
[1073] On middle-class preferences of courts in general see Sajó, "Social Rights as Middle-Class Entitlements in Hungary," 83-107. Landau, "The Reality of Social Rights Enforcement," 189-287. Leonardo Cubillos et al., "Universal Health Coverage and Litigation in Latin America," *Journal of Health Organization and Management* 26, no. 3 (2012): 398. Yamin and Parra-Vera, "Judicial Protection of the Right to Health in Colombia," 444. Abadia and Oviedo, "Bureaucratic Itineraries in Colombia," 1156- 1159. João Biehl and Joseph J. Amon, "The Right to Remedies: On Human Rights Critiques and Peoples' Recourses" *Humanity Blog*, October 4, 2019, http://humanityjournal.org/blog/the-right-to-remedies-on-human-rights-critiques-and-peoples-recourses/
[1074] Kavanagh, "The Right to Health," 351.
[1075] Yamin, "The Right to Health in Latin America," 711.
[1076] Whitney K. Taylor, "Ambivalent Legal Mobilization: Perceptions of Justice and the Use of the Tutela in Colombia: Ambivalent Legal Mobilization," *Law & Society Review* 52, no. 2 (June 2018), 360-361, 363, 364.

2.3. Towards Dialogue Temporarily?

The 2008 Structural Judgment on the health care system came in the wake of failing political attempts to fix the structural problems that would reduce the skyrocketing *tutela* cases and relieve the burden on courts. The judgment was preceded by an operation of a three-judge panel within the court that reviewed all health care *tutelas,* eventually selecting 22 as illustrative of engrained failures in the healthcare system. Although an unconstitutional situation was not declared,[1077] the judgment bore significant similarities with the previous structural decisions.

The Court's decision both granted individual, direct benefits and issued dialogic remedies to reform the existing system and fix its regulatory failures. Namely, it ordered the monitoring of EPSs and dispute resolution mechanisms between EPSs and patients; a systematic updating of POS with all inclusions and exclusions clearly defined and justified following the criteria in the judgment;[1078] and the unification of the contributory and subsidized regimes into a single system, the latter mandated by law to have taken place seven years before. As the Court instructed, these policy processes had to be transparent and evidence-based, with a meaningful involvement of professional communities and the public.[1079] The Court also issued orders to address the problems of delayed and inadequate reimbursements to EPSs for the non-POS treatments granted through *tutelas*.[1080]

Coinciding with the rhetoric of structural solutions in social rights cases in general, the reasoning in this judgment did stress programmatic aspects of the right to health. However, the rhetoric did

[1077] Decision T-760 of 2008. Lamprea, Forman, and Chapman, "Structural Reform Litigation, Regulation and the Right to Health in Colombia," 342,
[1078] The criteria were the following: (1) changes in demographic structure, (2) the national epidemiological profile, (3) appropriate technology available in the country, and (4) the financial conditions of the system, see T-760 of 2008, para 6.1.1.1.1.
[1079] Decision T-760 of 2008, para 6.1.1.2; 17th and 22nd orders.
[1080] Ibid, order 27th.

not translate into an actual change of the judicial position as the Court retained the power of individual adjudication over non-POS medicine. The treatments continued to be granted routinely through courts as the CCC stressed SoP limitations and the appropriateness of an essentially dialogic judicial role,[1081] especially when confronted by structural problems that could not be fixed by prior individual enforcement.[1082] According to the standard formulated by the Court, treatments would be granted in the case of a person's economic incapacity to pay for them as a transitional, exceptional remedy when 'the failure to meet the minimum obligations places the holder of the right to health in imminent danger of suffering unreasonable harm' to life, dignity and personal integrity.[1083] This insistence on setting exceptions to democratic decisions was to define the later stages of health rights jurisprudence. The ground for such exceptions was strengthened by the reiteration of standards on timely, integral, continuous, and comprehensive care, the principle of most favorable interpretation of POS (*pro homine* principle),[1084] and the primacy of doctors' assessments (except for brand-name drugs that also required justifications from CTCs[1085]) at least before the regulatory mechanisms for conflict resolution within the CTCs improved.[1086] In light of this and later developments, statements regarding the inevitability of limiting POS due to the scarcity of resources per priorities set in the democratic process, the applicability of reasonableness and proportionality tests, and the permissibility of even removing items from POS[1087] only seemed as a symbolic tribute to SoP. This eclecticism in the judgment resulted from an objective difficulty of reconciling the previous jurisprudence with the new structural turn. Indeed, the fact that the

[1081] Ibid, paras 3.3.7; 3.3.15.
[1082] Ibid, paras 6; 6.1.4.1.
[1083] Ibid, paras 3.3.2; 3.3.6; 4.4.1.
[1084] Ibid, paras 4.4.6; 6.1.1.1.3
[1085] Ibid, paras 6.2.1.1.5; 4.4.2.
[1086] Ibid, paras 4.4.2; 4.4.4.2.
[1087] Ibid, paras 3.2.2; 3.3.9; 3.3.15; 3.5.1; 6.1.1.2.2.

court has 'ingrained into the popular consciousness a sense of healthcare entitlement'[1088] in Colombia complicated the shift to structural enforcement of rights.

As in other structural judgments in that period, the court-led monitoring (still ongoing) was promising initially; however, it became complicated over time in terms of ensuring accountability through flexible remedies even within the framework of formalized and civil society-backed supervision. To monitor the enforcement of the structural orders in the 2008 Judgment, the CCC established a follow-up panel supported by a team of clerks and a collaborative oversight committee (CSR) of 21 civil society organizations formally assigned to this case. This participatory framework was aided by a few public hearings and hundreds of follow-up court orders (autos). CSR collaborated with the Ombudsman, the Controller General, and the Public Prosecutor to study structural problems, including the misuse of public funds in the health sector.[1089] Follow-up orders requested information and demanded improvements in reporting (e.g. to provide a list of services denied by EPSs in a specific period and evidence that UPC is sufficient for the unification of packages).[1090] The Court also specified that all exclusions from the new POS of health goods and services included in the most recent WHO Model List of Essential Medicines, or among those 100 most granted outside POS through court orders, had to be appropriately justified, including considering the availability of resources.[1091] Some of the court orders even requested the initiation of inquiries into EPSs' corrupt practices.[1092] During one of the public

[1088] Everaldo Lamprea, "The Judicialization of Health Care: A Global South Perspective," *Annual Review of Law and Social Science* 13, no. 1 (2017): 434.
[1089] Gianella-Malca, Gloppen, and Fosse, "Giving Effect to Children's Right to Health in Colombia?,"165. Botero, "Courts That Matter", 98, 103, 105, 107, 111, 117.
[1090] Herrera and Mayka, "How Do Legal Strategies Advance Social Accountability?," 11-12. citing A245 of 2010. Botero, "Courts That Matter", 103, 105, 107, 111, 114; Yamin and Parra-Vera, "Judicial Protection of the Right to Health in Colombia" 450, fn. 88.
[1091] A226 of 2011.
[1092] A552A of 2015.

hearings held in 2012, the Court closed the session with the question of whether it was time to critically reflect on the role of private actors in the health insurance scheme, considering the prevailing problems of corruption.[1093]

This dialogic and structural impetus of the monitoring became harder to sustain over time. The monitoring became more categorical than dialogic, complicated by the technical reports of political branches. Some of the more specific orders concerned the policy steps already undertaken (e.g. extending an online platform MIPRES to treatments not originally intended to be processed through it, see Section 2.5.). Others were as specific as the improvement of conditions in a specific hospital (after undertaking an inspection visit).[1094] As for effectiveness, up to now, most of the structural orders of the 2008 Judgment have been qualified by the CCC to have achieved a medium level of compliance only. For instance, there was medium compliance with the orders on the prescription and authorization of treatments through the MIPRES regime; [1095] scientific substantiation of POS updates through participatory mechanisms; or the final clarity of POS.[1096] According to the CCC, low compliance persists for two crucial aspects of the structural orders - 1) implicit rationing and accountability of EPSs, namely, waiting times, overcrowding in emergency facilities, and other types of administrative barriers to accessing health services,[1097] and 2) lack of an appropriate reporting system for denial of services by EPSs (compliance was medium for periodic Ministry rankings of EPSs based on their performance[1098]).[1099]

[1093] Gianella-Malca, "Implementing the Colombian Constitutional Court's Health-Care System Ruling of 2008," 70, 73.
[1094] A039 of 2017, see also A354 of 2014; A413 of 2015; A001 of 2017; Yamin, "The Right to Health in Latin America," 731.
[1095] A1191 of 2021; A1213 of 2022.
[1096] A755 of 2021; A094A of 2020.
[1097] A584 of 2022; A999 of 2023.
[1098] A358 of 2020.
[1099] A439 of 2021.

Notably, at the first stage, both President Uribe and his successor Santos displayed reluctance in undertaking even those steps that eventually led to medium compliance. Initially, Uribe tried to shift attention to the inequitable consequences of the judicialization of health and intended to mitigate the effects of the decision through economic emergency decrees[1100] invalidated by the Court[1101] against the background of continuous protests from various groups that expressly supported the Court's decision.[1102] The next President, Santos, also from the Liberal Party, proposed constitutional amendments that introduced the principle of fiscal sustainability in the Constitution. However, the amendment, eventually upheld by the Court, did not pose threats to the jurisprudence given fiscal sustainability was presented as 'an instrument to achieve the objectives of the social state of law in a progressive and programmatic manner', while 'spending destined for the ends of the social state of law [would] have a prioritized character.'[1103]

Eventually, against the rising health rights discourse among the state representatives and the public in which the policymaking proceeded,[1104] both Presidents took some steps in compliance with the Structural Judgment. The political branches used/introduced accountability measures for EPSs.[1105] Investigations were initiated against EPSs, even ending in the conviction of the President of the largest EPS.[1106] Law 1438 of 2011, proposed by Santos, regulated the biannual updating of POS based on clear, transparent, and participatory mechanisms, among other things, incorporating the

[1100] The decrees barred access to treatments outside the standard package of benefits and limited the ability of doctors to prescribe such treatment.
[1101] Decision C-252 of 2010.
[1102] Yamin, "The Right to Health in Latin America," 726.
[1103] Landau and Dixon, "Constitutional Non-Transformation? Socioeconomic Rights beyond the Poor," 128.
[1104] Alvarez-Rosete and Hawkins, "Advocacy Coalitions, Contestation, and Policy Stasis," 44. Rodríguez-Garavito, "Beyond the Courtroom" 1681. Yamin, "The Right to Health in Latin America," 729-730. César Ernesto Abadía-Barrero, "Neoliberal Justice and the Transformation of the Moral: The Privatization of the Right to Health Care in Colombia: Privatization of the Right to Health Care in Colombia," *Medical Anthropology Quarterly* 30, no. 1 (March 2016): 73-74.
[1105] A584 of 2022.
[1106] Botero, "Courts That Matter", 94-95, 98 fn. 59, 108, 110, 111.

cost-effectiveness criterion and setting down procedures for the unification of the contributory and subsidized schemes for adults, eventually unified in 2012. The same law entitled children to full free healthcare. Regulations on pharmaceutical prices were also adopted (within five years, it saved USD 1.4 billion). Recently, POS updates have become more regular, inclusive, and transparent, with a priority-setting tool following the HTA principles applied by a specialized state agency (IETS) yet to be reflected in jurisprudence.[1107]

What came as a final breakthrough in the implementation of the Structural Judgment was Law 1751 of 2015, based on the right to health, which took an exclusive approach to POS by listing types of health goods and services that would not be financed, namely cosmetic and aesthetic, experimental, unauthorized treatments, and those provided overseas. The first list of exclusions implementing the law came into force in 2017.[1108] Considering many attempted reforms beforehand, the new law did seem unlikely without the Structural Judgment.[1109] The adjustments with which the Court upheld the new law in the decision C-313 of 2014 then defined the next trajectory jurisprudence would take (see Section 2.5.). Under an ex-ante review, the CCC made adjustments/specifications to the law, surpassing the function of a negative legislator. Namely, the Court declared positive lists of health care coverage unconstitutional in light of the *pro homine* principle and permitted the non-application of exclusions in the legislation. As for fiscal sustainability and cost-effectiveness analysis, the Court reiterated that those would remain irrelevant when enforcing the minimum core of health rights.[1110]

[1107] Wang, *Health Technology Assessment, Courts, and the Right to Healthcare*, 111, 121-123. Lamprea-Montealegre, *Local Maladies, Global Remedies*, 169. Nicolás Vargas-Zea et al., "Colombian Health System on Its Way to Improve Allocation Efficiency—Transition from a Health Sector Reform to the Settlement of an HTA Agency," *Value in Health Regional Issues* 1, no. 2 (December 2012): 221.
[1108] Ministry of Health Resolution No. 5267 of 2017.
[1109] Herrera and Mayka, "How Do Legal Strategies Advance Social Accountability?," 12.
[1110] Decision C-313 of 2014.

As also seen in jurisprudence discussed in the next subsection, eventually, the unaccountability of EPSs proved too path-dependent to be remedied despite the formalized civil-society-backed court-led-monitoring of the Structural Judgment, while the *ad hoc* individual enforcement of health rights through courts was also too path- dependent for allowing a genuine structural shift – the two becoming reinforcing hurdles for fundamentally reforming the system.

2.4. Individual *Ad hoc* enforcement Prevails over Dialogue

As in social rights cases discussed above, individual enforcement prevailed alongside the dialogic remedies.[1111] By design, the new unrestrained wave of individual enforcement again led to an arbitrary and inequitable distribution of health care contrary to a reasonable interpretation of the right to health. As with social rights, the fact that the Court had no intention of relinquishing its powers in health rights cases was also evident with its treatment of the subsidiarity principle post-2008 Structural Judgment, namely, the finding that with its shortcomings (e.g. average of 217 days for review, geographic unavailability)[1112] the Superintendent of Health was not a suitable remedy to be exhausted. Notably, the Court asserted these 'exceptional' powers even if the structural shortcomings were to be resolved.[1113] Besides, as with social rights, the burden of proving patients' economic incapacity was also shifted to the state, for instance, in the context of co-payments[1114]

[1111] For instance, besides ordering that a policy on specialized psychological care for victims of armed conflict have specific credentials, the CCC also granted psychological services to petitioners individually, see Decision T-045 of 2010; Similarly, the Court ordered to remove ambiguity regarding inclusion of genetic tests in in UPC-financed POS list and regulate procedures to deal with technical barriers created by MIPRES online application within 6 months alongside issuing individual remedies, see Decision SU-124 of 2018.
[1112] A668 of 2018.
[1113] Decision SU-508 of 2020.
[1114] Decisions T-547 of 2015; T-062 of 2017; T-178 of 2017; T-359 of 2022. T-270 of 2020; T-399 of 2017; T-513 of 2020.

or the availability of family networks when deciding on entitlements to state-funded caretaker services.[1115] This was coupled with specific judge-made rules on financial incapacity, finding one when the cost of a required health service was greater than half of the patient's income.[1116]

As noted, the first years of implementation of the Structural Judgment did coincide with a temporary fall in health *tutelas*, which must have resulted from the decreased incentives to apply to courts as CTCs increasingly granted non-POS treatments (with full reimbursements to EPSs) since the legislative changes in 2007.[1117] However, this could not be sustained. Since 2011, *tutela* numbers have gone upwards again and doubled by 2020 reaching 220, 000 tutela cases,[1118] more than in 2008. The percentage of cases concerning already included health goods and services also consistently increased, reaching around 70% in 2016,[1119] 85% in 2019, and 89.03% in 2020.[1120] This can be explained by a radically expanded coverage of health goods and services that must have become subject to implicit rationing. Besides, the Court insisted on setting exceptions to all explicit exclusions set by political branches. As already noted, these developments had roots in the decision C-313 of 2014, which, while upholding Law 1751 of 2015, affirmed the broad minimum core doctrine, declared positive lists of health care coverage unconstitutional, permitted the non-application of exclusions set in the legislation effectively permitting exceptions to all conceivable democratically set priorities/health rationing.[1121]

[1115] Decisions T-399 of 2017; T-099 of 2023.
[1116] Decision T-320 of 2009.
[1117] Wang, *Health Technology Assessment, Courts, and the Right to Healthcare*, 108-109.
[1118] Lamprea-Montealegre, *Local Maladies, Global Remedies*, 93, 128.
[1119] Jairo Humberto Restrepo-Zea, Lina Patricia Casas-Bustamante, and Juan José Espinal-Piedrahita, "Cobertura Universal y Acceso Efectivo a Los Servicios de Salud: ¿Qué Ha Pasado En Colombia Después de Diez Años de La Sentencia T-760?," *Revista de Salud Pública* 20, no. 6 (November 1, 2018): 675.
[1120] Wang, *Health Technology Assessment, Courts, and the Right to Healthcare*, 105-107 123, the data is also discussed in A584 of 2022.
[1121] Decision C-313 of 2014.

Subsequent policy changes coupled with jurisprudence repeating the logic of decision C-313/2014 did not remove uncertainty about included and excluded services. Instead, such uncertainty was even deepened by the CCC continuously setting exceptions to even a generous POS with an exclusive list. In turn, the prevailing reimbursement possibilities for EPSs continued to strain public resources. The Court reiterated its position first voiced in decision C-313 of 2014 regarding the impermissibility of an inclusive list once subordinate legislation still produced an inclusive list alongside an exclusive one. The Court explained that an inclusive list could only serve as an instrument for calculating UPC rather than determining patient entitlements. In parallel to individual enforcement through courts, non-POS treatments were still granted with full reimbursements outside the courts, just through a different procedure: an electronic system called MIPRES (replacing CTC). The total costs of reimbursements for EPSs rose by 31% from 2010 to 2018, representing up to 10% of the total amount spent on financing the healthcare packages. State debts to EPSs and EPS debt to health care providers also rose, as of 2019, reaching US$1.8 and US$3 billion, respectively.[1122]

In response to financial deficits in the system, in 2020, a system of 'maximum budgets' was created, which set fixed payments per person for non-POS health care granted by the Court. This change was upheld by the CCC, referring to the broad discretion of the political branches in this sphere, the interest in rationalizing public health spending, and the possibility of adjusting maximum budgets considering the real costs of EPSs. However, the previous scheme of direct reimbursement remained applicable to specific high-cost treatments, such as orphan drugs, and those expressly excluded services granted through *tutela* action.[1123] With the exceptions on

[1122] Wang, *Health Technology Assessment, Courts, and the Right to Healthcare*, 115-117, 123.
[1123] Decision C-162 of 2022.

adjusting the maximum budgets and exclusions of high-cost treatments from it, the change could not fix the financial deficits, which fed back into the trend of implicit rationing evidenced in the rising *tutela* cases on included services noted above.

Before the CCC interpreted Law 1751 of 2015 as a ground for including all goods and services except those explicitly excluded, it granted those in a 'grey area' (neither in inclusion nor exclusion lists) as complementary services and technologies under the previous standard applicable to non-POS treatments, namely that life, dignity, and personal integrity were affected in the absence of economic capacity to cover those needs independently. The health goods and services granted based on the said standard included diapers, creams, wheelchairs (often requested together),[1124] transportation even by air,[1125] and for companions,[1126] with food and accommodation coverage.[1127] The Court also granted Applied Behavior Analysis (ABA) therapy for autistic children.[1128] Even before it was explicitly included in POS, [1129] the Court also granted nursing and caregiver services when the appropriate family network was absent; for instance, if family members studied or worked and did not have the economic capacity to contract a third person for this service.[1130] Eventually, in its expansive approach to patient entitlements, the Court re-interpreted all non-POS health goods and services in this grey area as implicitly included, erasing the need to check even the economic capacity priorly applicable to those services.[1131]

[1124] Decisions T-742 of 2017; T-120 of 2017; T-445 of 2017; T-235 of 2018.
[1125] Decision T-261 of 2017.
[1126] Decisions T-062 of 2017; T-329 of 2018.
[1127] Decisions T-399 of 2017; T-706 of 2017; T-261 of 2017.
[1128] Decision T-802 of 2014.
[1129] Art. 8 of Ministry of Health Resolution No. 5269 of 2017: 'home care is a modality of provision of extra-hospital health services that seeks to provide a solution to health problems at home or residence and that has the support of professionals, technicians or assistants in the health area and the participation of the family'.
[1130] Decisions T-445 of 2017; T-065 of 2018; T-423 of 2019; T-435 of 2019.
[1131] Decisions SU-508 of 2020; T-287 of 2022; T-475 of 2020; T-358 of 2022. T-065 of 2023.

The Court kept setting exceptions even to the generous exclusionary list introduced by political branches. Namely, the Court carved out exceptions from the exclusive list in the law and subordinate legislation when it threatened a person's life, dignity, and personal integrity, provided that there was no economic capacity.[1132] Based on that standard, the Court granted moisturizing cream and cleaning supplies to a patient in a coma when those were explicitly excluded from POS. The exceptions themselves were interpreted narrowly. The CCC distinguished purely cosmetic interventions from reconstructive ones and elaborated that restoration of a person's normal appearance could be restorative of psychological well-being and, in that sense, would not be just aesthetic.[1133] Since 2016,[1134] all reconstructive surgeries have been expressly included in POS and granted by the Court on that basis (e.g. gender reaffirmation interventions, [1135] breast reconstruction,[1136] and obesity-related weight loss surgeries).[1137]

The Court then went even further and granted purely cosmetic interventions, for instance, when those were to fix a mistake for which EPS was responsible.[1138] Making an even larger leap forward, the Court granted purely cosmetic treatment when, for instance, the patient with skin flaccidity was having depressive episodes (even ordered a diagnosis as the patient only presented private doctor reports)[1139] and when a child suffered from teasing by peers that could be fixed by cosmetic surgery.[1140] Treatment abroad is also granted in exceptional circumstances when that treatment, if not experimental, is urgently needed to save the patient's life.[1141] The Court even orders the

[1132] Decisions SU-508-20 reiterating standards from SU-480 of 1997, T-237 of 2003 and C-313 of 2014.
[1133] Decisions T-159 of 2015; T-142 of 2014; T-771 of 2013.
[1134] Resolution No. 6408 of 2016.
[1135] Decisions T-421 of 2020; T-231 of 2021.
[1136] Decisions T-449 of 2019, T-003 of 2019
[1137] Decision T-322 of 2018.
[1138] Decision T-579 of 2017
[1139] Decision T-101 of 2023.
[1140] Decision T-010 of 2019, see also Decision T-055 of 2023 in which psychosocial assessment was ordered to determine the need.
[1141] Decision T-279 of 2017.

importation of unauthorized drugs - another excluded category – if, alongside satisfying the test for all excluded services, its safety and efficacy are proven based on the best available scientific evidence as assessed by the Court in each specific case.[1142] These developments deplete the clear legislative policy to ration health care even within the generous framework of the exclusion model.[1143]

The extreme breadth of *ad hoc* exceptions introduced by the judicial branch to the democratically set health care rationing is evident in the Court's jurisprudence on fertility treatments. In a rather unceremonial manner, the Court reversed the precedent that excluded such treatment from the scope of the right to health,[1144] placing it under reproductive health. This shift started when the Court criticized the absolute exclusion of this health service from funded POS, stating there was a need for at least some policy on the issue.[1145] Finally, the Court clarified that even if the inability to procreate did not seriously affect the life, dignity, or the personal integrity of the patient, it could still affect the 'psychological and social well-being, the right to reproductive health, to equality, to free development of personality and to form a family, facets that must also be protected by the constitutional judge.'[1146] Based on this standard, the Court first granted special, less costly assisted reproduction techniques as part of fertility treatment when particular circumstances of patients, for instance, HIV status and bipolar disorder, so demanded and they did not have the economic capacity to afford it.[1147] After Congress passed Law 1953 of 2019 that set the policy framework on this issue, envisaging partial state financing of in vitro fertilization, the Court started to order

[1142] Decision T-298 of 2021.
[1143] Yamin, "The Right to Health in Latin America," 730-731.
[1144] Decisions T-550 of 2010; T-009 of 2014; This rule applies except in case of secondary infertility when the requested treatment is mainly aimed at treating a health problem incidentally also affecting fertility, see Decisions T-901 of 2004; T-605 of 2007; T-890 of 2009; T-226 of 2010; T-274 of 2015.
[1145] Decisions T-528 of 2014; T-274 of 2015; C-093 of 2018.
[1146] Decisions T-306 of 2016, see also T-375 of 2016; SU-074 of 2020; T-144-22.
[1147] Decisions T-375 of 2016; T-126 of 2017; C-093 of 2018

medical recommendations about in vitro fertilization treatment and the issuance of the final decision on co-financing arrangements. Although the Court's involvement was portrayed as exceptional, in line with the Court's *modus operandi*, in the end, it came down to a standard of imminent risk to fundamental rights, including the psychological well-being of petitioners. The Court's relative restraint in terms of going along with the partial financing rule and the discretion of the Administrator of the Resources of the General Social Security System (ADRES) to decide on the final payment arrangement must be attributable to the extraordinary cost of the procedure noted by the Court itself.[1148] This was what stood behind the prior position of the Court to exclude in vitro fertilization from the scope of the right to health in the first place.[1149]

Exceptions were even applied to the basic judge-made standard requiring a prior medical prescription for granting treatment. Namely, the Court now may grant access to treatment provided that the doctor confirms the need post factum;[1150] based on private doctor opinion, unless the prescription is refuted based on scientific reasons; and even without any prescription if other evidence attests to the need.[1151] Paradoxically, the CCC could not ignore the need for explicit rationing during the COVID-19 pandemic when it ordered the Ministry of Health to issue clear and binding guidelines (instead of recommendations) on ethical triage. However, the CCC explicitly prohibited such an exception in normal times outside the public health emergency.[1152]

[1148] Decisions T-144 of 2022; SU-074 of 2020.
[1149] Decisions SU-074 of 2020; T-528 of 2014; T-398 of 2016.
[1150] Decisions T-471 of 2018; SU-508 of 2020.
[1151] Decisions T-637 of 2017; T-899 of 2002.
[1152] Decision T-237 of July 2023.

These developments indicate that instead of reversing to a structural approach to the right to health post-2008, the Court expanded its powers by allowing exceptions to all democratically set priorities/health rationing, even to a generous POS based on an exclusionary model, through a vague standard of affecting life, dignity, and personal integrity of a person. This does not remove uncertainty about included and excluded services and even deepens it by depleting the legislative policy of the ability to ration health care, which is not only permitted but required under the reasonable interpretation of the right to health (see Chapter I) - the approach rhetorically also preferred in the Structural Judgment. As a result, despite some progress with health indicators, equitable distribution of resources and, hence, equity in health is at no lesser risk in Colombia today.

2.5. Conclusion

Despite sharing the general concept of the SoP as both encompassing checks and balances and the collaboration between the branches with the apex courts in the other jurisdictions of this dissertation, in practice, the CCC acquired powers absent in India or South Africa even beyond own narrow SoP constraints.

The general breadth of judicial power in Colombia is embedded in the thickness of the Constitution both on institutional and rights issues and is strengthened through institutional and practical guarantees of this power (e.g. coalition politics, weak legislature). Using this power, the CCC orders positive action, sometimes rather concrete, from the legislative (e.g. differential approach to domestic violence victims) and executive branches (e.g. renegotiate treaties) and even adds judge-made rules to legislation under conditional constitutionality orders (e.g. broadened

definition of a crime in light of IHL standards). The CCC also expanded its powers beyond the direct constitutional mandate and developed the rather flexible substitution of the Constitution doctrine. However, *ad hoc* individual enforcement of social rights through the flexibility, speed, strength, and reach of the *tutela* mechanism surpassed even this breadth of judicial power.

As expected in Chapter 1 of the dissertation, SoP doctrine was most evidently stretched on health rights from among other social rights. In the health rights context, *ad hoc* individual enforcement circumvented all conceivable limits, both originating from the democratic process and own judicial standards. These limits disappeared as the Court developed an all-encompassing interpretation of an already elusive concept of health (against the background of constantly emerging new health technologies and services) and adopted a loose definition of harming the right to life, dignity and personal integrity; normalized exception-setting to health rationing even to the rather generous exclusive list produced by political branches; abandoned even the judicial standard of checking patients' economic capacity (for the treatment not explicitly excluded from POS) and requiring doctor's prior prescriptions.

Through normalizing exceptions to all democratically formulated priorities based on vague standards, the Court overstepped both locally applicable SoP and that conceptualized in Chapter 1 of the dissertation. This was also contrary to RoL standards, as the extent of exceptions could not be foreseen due to the broad standard of harming life, dignity, or personal integrity. In turn, the chain unleashed as a result of abandoning SoP and RoL limits led to an unreasonable interpretation of the right to health, as the court favored judge-made *ad hoc* rationing over the explicit, foreseeable one by the political branches. Indeed, explicit health rationing is embedded in the definition of the right to health as a less arbitrary alternative among other non-ideal ones. This point was more eloquently made by Justice Sachs in *Soobramoney*, 'When rights by their very

nature are shared, and inter-dependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights […], but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.'[1153]

Like the CCC, the Constitutional Court of Germany (CCG) does not reject individual enforcement in exceptional cases. For instance, the CCG interfered with the discretion of political branches when it required the reimbursement of health care costs for life-threatening conditions.[1154] However, this standard limited to the likelihood of death without intervention was more reconcilable with the reasonable interpretation of the right health, SoP and the RoL, than 'life in dignity' and 'personal integrity' in Colombia (all in a broad sense). Following this broad standard, the CCC ended up ordering funding for the cosmetic surgery to protect a child from teasing, or to address the psychological effects of skin flaccidity following obesity treatment.

This interpretation in this Chapter contrasts with that of the authors who endorse health rights jurisprudence in Colombia while noting shortcomings of implementation. The defenders presented health rights jurisprudence in Colombia as a middle-ground approach enforcing minimum core standards alongside dialogic remedies under the frameworks of 'empowered participatory jurisprudence'[1155] and 'biting substantive progressiveness'.[1156] Some of the authors merely

[1153] Concurring opinion of Justice Sachs in Soobramoney v Minister of Health, KwaZulu-Natal 1998 1 SA 765 (CC), 54; for a similar argument on realization of positive and socio-economic rights, see Stephen Gardbaum, "Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?," in *Proportionality: New Frontiers, New Challenges*, ed. Mark Tushnet and Vicki C. Jackson, Comparative Constitutional Law and Policy (Cambridge University Press, 2017), 219–20. Möller, The Global Model of Constitutional Rights (Oxford University Press, 2012), 179.

[1154] BVerfG, decision of December 6, 2005 - 1 BvR 347/98.

[1155] Rodríguez-Garavito, "Empowered Participatory Jurisprudence", 235-236.

[1156] anuel Jose Cepeda-Espinoza, "Transcript: Social and Economic Rights and the Colombian Constitutional Court," *Texas Law Review* 89 (2011 2010): 1702.

emphasized the shortcomings of an otherwise justifiable judicial strategy[1157] and the limitations of the judicial role to bring about optimal policy.[1158]

In contrast, the argument in the dissertation aligns with the interpretation of the case-law by Yamin,[1159] Wang,[1160] and Landau,[1161] observing that through its prevailing individual enforcement of health rights, the Court itself contributed to structural problems of the health system. Wang rightly emphasized that a 'right to receive any potentially beneficial treatment for any serious health condition' preferring implicit over explicit rationing contradicts the interpretation of ICESCR in the General Comment 14.[1162] Indeed, the Court could not escape health care rationing itself when it came to the exorbitant cost of in vitro fertilization, which compelled it to accept the rule set in legislation, namely that such treatments would only be subject to co-financing by the state no matter the circumstances. Neither could the CCC escape the need for rationing in the context of the COVID-19 pandemic, while it still insisted on judge-made exceptions to all explicit rationing in normal times. As Yamin comments, evidence-based guidelines to equalize equity across the system are as critical during the health crisis as ordinary times. According to her, 'denying the need for priority setting invariably leads to implicit rationing through queues and costs, which in turn reinforces ingrained lines of privilege and market power and undermines social pressure for change.'[1163] Agreeing that individual enforcement somewhat mitigating the failures

[1157] Everaldo Lamprea-Montealegre, *Local Maladies, Global Remedies: Reclaiming the Right to Health in Latin America* (Edward Elgar Publishing, 2022), 178-192.
[1158] Veronica Herrera and Lindsay Mayka, "How Do Legal Strategies Advance Social Accountability? Evaluating Mechanisms in Colombia," *The Journal of Development Studies* 56, no. 8 (August 2, 2020): 1–18.
[1159] Yamin, "The Right to Health in Latin America," 729-730.
[1160] Daniel W.L. Wang, *Health Technology Assessment, Courts, and the Right to Healthcare* (Routledge, 2021), 97-126.
[1161] David Landau, "Choosing between Simple and Complex Remedies in Socio-Economic Rights Cases," *University of Toronto Law Journal* 69, no. supplement 1 (November 2019): 105–23,
[1162] Wang, *Health Technology Assessment, Courts, and the Right to Healthcare*, 79, 112, 125.
[1163] "Priority-Setting and the Right to Health: Important Advances and Missed Opportunities from the Colombian Constitutional Court – I·CONnect," August 27, 2023, https://www.iconnectblog.com/priority-setting-and-the-right-to-health-important-advances-and-missed-opportunities-from-the-colombian-constitutional-court/.

of the health care system may divert public and political energy from a fundamental reform, Landau reasons that the problems originated from the co-existence of individual remedies alongside structural ones in the 2008 Structural Judgment.[1164]

Indeed, the signaling of a structural turn in the 2008 Judgment, as well as in the initial monitoring process, lost its potency against the background of the persisting individual trajectory of the jurisprudence. Without making an explicit U-turn from routine individual enforcement in the Structural Judgment, the Court fell into the same pattern. Although unjustified in doctrinal terms, there were explanations for this failure. A more radical change of judicial standards would be challenging not just one separate precedent, but the sense of entitlement engrained through mass individual enforcement of health rights. Such a change would also contradict the non-retrogression doctrine developed by the CCC in defense of the same legitimate expectations of the population. Besides, the reach of *tutela* to all strata of the population was significant enough for the Court to fear the loss of public support if markedly retreating from the individual enforcement of health rights.[1165] This also leads to another descriptive observation that due to the precedential value of its decisions, the judicial branch has a lower degree of self-correction potential vis-à-vis political branches, especially in the context of the *tutela* mechanism in Colombia.

Alongside failing in doctrinal terms against the prevailing individual enforcement, the Structural Judgment eventually could not be successful in resolving some of the key structural problems either. The Structural Judgment proved easiest to be enforced in the aspects in which compliance was achievable through concrete identifiable action[1166] such as the increase of health care budgets,

[1164] Landau, "Choosing between Simple and Complex Remedies in Socio-Economic Rights Cases," 105–23,
[1165] Landau, "Choosing between Simple and Complex Remedies in Socio-Economic Rights Cases," 111. Herrera and Mayka, "How Do Legal Strategies Advance Social Accountability?," 12
[1166] Gianella refers to it as "nominal compliance", see Gianella-Malca, "Implementing the Colombian Constitutional Court's Health-Care System Ruling of 2008," 68.

namely updating of POS, unification of packages, or adoption of a new law with the exclusion model. In contrast, the judicial role proved inherently limited in terms of building a lasting accountability system.[1167] Eventual abandonment of all SoP and RoL limits and unreasonable interpretation of the right to health with roots in the decision C-313 of 2014 further impeded the fundamental reform and led to identifiable adverse material outcomes – an increase of financial strains on the health care system, hence implicit rationing at the point of delivery (by 2020, up to 90% court cases concerned included services) and inequitable access to health care.

Nevertheless, this need not necessarily be traced back to the doctrinal approach adopted in the Structural Judgment of 2008. Dialogic justice implies the triggering of a political process while the guarantees of a substantive improvement surpass the objective capacity of a monitoring process, even as intense as the Colombian one. Indeed, despite having been triggered by judicial action, at least some of the insufficient/inadequate changes must be attributable to the systemic problems of the legislative branch in Colombia. The difficulty of gathering enough support for reforms in Colombia was recently evidenced by the breakdown of the new President's coalition precisely around the proposed health care bill. Even if insufficient, the legislative changes achieved by the 2008 Structural Judgment in this hostile political environment, in fact, is a sign of the potential of such judicial review. At a minimum, the CCC managed to translate health policy into a rights issue in the public discourse and made accountability more feasible, even if not guaranteed.

[1167] Landau, "Choosing between Simple and Complex Remedies in Socio-Economic Rights Cases," 105–23,

Conclusion

The dissertation investigated the effect of social rights on SoP doctrines, practices, and structures in the selected jurisdictions of India, South Africa, and Colombia using the example of a social right – the right to health. The right to health was selected among social rights as most conducive to judicialization together with the most pronounced positive, costly, expertise-oriented, and, hence, polycentric dimensions. These features of the right to health were the basis for anticipating the most far-reaching and comprehensive conceptualization of a judicial role within the SoP scheme in jurisprudence (see Introduction, Section 3).

Unlike existing literature (see Introduction, Section 1), the dissertation studied the development (or the lack thereof) of a pre-existing SoP doctrine through social and health rights adjudication standards. Such a comprehensive doctrinal approach paved the way for more nuanced typological and normative conclusions that move away from negating/refuting the SoP objections to identifying a SoP framework for social rights adjudication embedded in SoP conceptualized in Chapter 1 of the dissertation.

This Concluding Chapter is organized into three parts. Drawing on Chapters 2-4 of the dissertation, Part I describes the relation of health (also social) rights adjudication standards to SoP doctrines in a comparative context of the selected jurisdictions, which answers the overarching descriptive research question. The overarching research question is answered by drawing together responses to the three research subquestions. Reflecting the same descriptive analysis in Chapters 2-4, Part II proposes a work-in-progress typology of judicial review and reasoning on social and health rights. Part III draws normative conclusions by juxtaposing the typology with SoP as

conceptualized in Chapter 1 of this dissertation. The Chapter concludes by pointing to the broader relevance of the conclusions for judicial review of positive rights beyond the three country studies in this dissertation.

Part I. SoP Doctrines through Health Rights: A Continuum

Continuum of Judicial Review

Despite the shared general concept of the SoP rejecting any form of political question doctrine, the institutionally strong and independent apex courts in the selected jurisdictions displayed a rather different judicial role. The institutional and practical strength of the CCC did stand out, ultimately leading to the strongest position of commander/controller in the continuum of judicial review, followed by a medium position of a watchdog/scaffolding in South Africa and a weak one of a partner/negotiator in India.

The intensity of review applied to institutional and rights issues in India, South Africa, and Colombia, under the labels of rationality, reasonableness, or proportionality (not necessarily reflecting the respective strength of review) was a litmus test for identifying the continuum of judicial power in the selected jurisdictions.

The weakest review in India takes place under the label of rationality and reasonableness tests used interchangeably with roots in English common law converging towards rationality/thin reasonableness in contrast to South Africa. Except for a few areas in which the ISC emerged as a commander (e.g. judicial self-appointment), the Court mainly reviewed the political branches' action/inaction in terms of existing statutory obligations, assurances/commitments, and/or official

technocratic interpretation made possible to be obtained through flexible PIL proceedings (itself instituted in line with the political will of the day) and continuing mandamus. Exceptionally, the ISC stepped in with judge-made rules, giving political branches the freedom to override them. In the absence of existing duties or some form of political commitments, the ISC limited itself to non-binding directions, in the Court's words, aimed at 'prodding' the political branches. Both categorical/managerial orders formalizing already achieved political acquiescence/assurances and soft remedies attest to the dependence of judicial review on the pre-existing political will in India, as well as its more strategic rather than principled nature.

The intensity of review next in line is that of the SACC, described as rationality, reasonableness, and proportionality tests depending on issues (social v. civil and political rights) and state powers addressed (administrative bodies v. political branches). Despite formal differentiation made by the SACC between rationality and reasonableness tests, in substance, they converged, incorporating means-end analysis. The means-end dimension of the reasonableness test in South Africa fluctuates in accordance with the identifiable self-correction capacity of the democratic process/political branches. This test enabled the SACC to react to failures of the democratic process in cases of legislative/executive bad faith and/or use of false evidence in the decision-making process. The thick reasonableness in South Africa displays the most universal approach to judicial review with cross-cutting logic among the jurisdictions.

Finally, the CCC had asserted the broadest power over the political branches' discretion of action/inaction in general, partly attributable to the thickness of the Constitution itself. The CCC describes the high-intensity review in Colombia as a combined reasonableness and proportionality test consisting of intense means-end scrutiny with rather flexible consideration of the scope of rights and the affront to them. This test has recently incorporated even the

proactive power of the Court to propose solutions in between what is demanded by the applicant and offered by the political branches. In theoretical terms, this resonates with proportionality/strict scrutiny tests and occupies the strongest position in the continuum.

Continuum of Judicial Review on Social/Health Rights

The review standard on social and health rights largely replicated the strength of general judicial power in all jurisdictions. However, variations were discernible on the edges of the continuum of judicial power – in India and Colombia. In principle, apex courts in India and South Africa remained within their own SoP doctrines, while Colombia reconceptualized it through social and health rights. As noted, the SACC had the most consistent, cross-cutting logic, closely aligning with its SoP doctrine. In contrast to South Africa, weak judicial power in a SoP scheme in India translated into a weaker position on social rights, while strong judicial power in Colombia led to the further stretching of the SoP doctrine in this area.

The ISC proved less rigorous in social rights as constitutional social rights (as opposed to statutory rights) were barely justiciable. Rationality/Reasonableness in the social rights context in India did not even lead to procedural standards such as the requirement of an inclusive prior consultation process as a condition for eviction. Moreover, in association with social rights, even essentially an equality case on the new liberalized vaccination policy was dealt with extremely weak characterization of prima facie *irrationality* and weak order of policy revisitation.

The opposite has occurred in Colombia. With failed attempts to reverse the individualization of social rights, the CCC stretched the judicial power in social and health rights cases, adding a new dimension of ad hoc/broad individual enforcement, setting judge-made exceptions to all

democratically set priorities, even to judicial standards. This breadth of judicial discretion in social rights cases was unprecedented within own SoP doctrine of the CCC.

Thus, weak judicial power in a SoP scheme in India translated into a weaker position on social rights, while strong judicial power in Colombia led to the further stretching of the SoP doctrine. This shortfall in India, convergence in South Africa and stretching in Colombia in relation to locally applicable SoP led to a general observation that judicial review at the edges of the continuum manifests in extremes in the context of social rights adjudication. This claim necessitates that certain divergencies and convergencies between India and Colombia be accounted for.

1. In terms of the weakness of social rights in the Constitutions, India and Colombia were similar enough to anticipate a similar effect of social rights on the SoP doctrine. Justiciability of social rights was not given and had to be established through judicial interpretation in Colombia as well. This formal barrier to justiciability was overcome even more assertively in India than in Colombia, where the CCC had an incremental approach, first invoking the connectivity doctrine before claiming the justiciability of social rights in its own right. Besides, the ISC overcame an even weaker textual basis when establishing the rule on judicial self-government.
2. PIL in India is similar to *tutela* in Colombia (except deadlines binding the CCC), especially in the context of direct access, standing, and accelerated decision-making (through interim orders in India). Some of the flexibilities of PIL (*suo moto*) even go beyond the *tutela* mechanism in Colombia.
3. Both the ISC and CCC went through a crisis, which could have broken the path-dependence of a weak and strong review, respectively. India was confronted with an external crisis of

the COVID-19 pandemic perceived as such by the ISC, which did lead the Court to more judicial activity, but not in terms of the quality of review. Colombia went through an internal crisis of ever-increasing, unprecedented burden of *tutela* actions, which did push the judges to attempt a reversal of individualized enforcement in favor of a structural one, but to no avail. This resilience could be attributable to the relatively path-dependent, precedent-based, and incremental operation of a closed institution such as the judiciary. Nevertheless, the Indian position did not change even as this path-dependence was weakened through the polyvocal nature of judging - fragmentation into 2-judge benches with more exposed ideological differences of individual justices.

Continuum of Dialogic Justice

A similar continuum of judicial power vis-à-vis political branches emerged in India, South Africa and Colombia when incorporating the remedial dimension under the label of dialogic justice (on dialogic justice theory, see Chapter 1, section 3).

Dialogic review in India was the weakest, ranging from non-binding recommendations, often expressing (unwarranted) faith in good faith implementation, to exceptional robust monitoring over enforcement of the existing subconstitutional duties of the executive. As the review standards, remedies also depended on the pre-existing favorable will of the political branches. Still, the very weak dialogic review in India occasionally succeeded in nudging the political branches into compliance through the flexibility of PIL, especially non-finality and the fast pace of interim orders. However, nudging in this manner was possible at the expense of the distinct judicial function of conclusively deciding cases based on binding judicially manageable standards.

Dialogic review in South Africa was more intense than in India, with more routine use of mandatory orders, skepticism toward the political branches, and increasingly robust implementation monitoring. The jurisdiction was maintained with tight monitoring of the implementation as a last resort when the absence of the political branches' self-correcting capacity was demonstrated. Up to now, such court-led monitoring only concerned the non-observance of existing statutory duties.

As for Colombia, the dialogic review extended to the protection of broad constitutional duties and was most robust in this continuum to the extent that it was gradually depleted of its open-ended, flexible nature (see Chapter 1, Section 3).

Part II. Typology of Social Rights Adjudication

Reflecting on the descriptive findings, this Section categorizes models of judicial reasoning and review (including in the HCs) into a work-in-progress typology, which will be relied on to develop normative arguments in Part III through the prism of theoretical SoP. The typology consists of 10 categories of substantive review roughly arranged in the order of increasing intensity and tensions with SoP, with each previous one appearing as a less controversial option for judging on social rights. On the remedial level, these categories in the typology can be combined with mandatory orders on the decision-making process, participatory remedies and/or supervisory jurisdiction depending on the evidential basis for distrusting the political branches in the implementation. The 10 categories are as follows: 1) Equality, rationality-based and/or inclusive interpretation of existing subconstitutional norms. 2) Requiring enforcement/finalization of uncodified commitments. 3) Prodding through non-binding directions. 4) Requiring fair procedures,

proportionality/consistency, or accompanying positive action as a condition of negative interference/retrograde state action. 5) Requiring reversal of retrogression due to prior initiation of a policy/recognition of a problem [assuming SoP argument defeated/attenuated]. 6) Requiring appropriate action when inaction fails the right to equality and/or reasonableness/means-end analysis as groups similarly or better situated are catered for. 7) Requiring appropriate state action (at least a plan) when political branches are informed about the systemic nature of problems and their inaction is protracted, accordingly, the self-correcting capacity of the democratic processes is low. 8) Requiring appropriate state action when previous policy/inaction was undertaken in bad faith or with false factual and legal foundations. 9) Requiring appropriate state action when resource unavailability and infeasibility arguments are not evidentially supported. 10) Granting of individual benefits absent from legislation [even if collectively for all similarly situated].

Part III. Normative Argument: Judging on Positive Social Rights

Excluding the granting of individual benefits (Chapter 4, 2.2. and 2.3) and non-incremental inclusive interpretations as present in Colombia (Chapter 4, p. 206), the types of reasoning and review in social rights cases formulated in the typology above fall within the limits of theoretical SoP defended in Chapter 1 of this dissertation. Although within limits, nudging through non-binding directions, as present in India**,** falls below the distrustful dimension of dialogic justice rooted in SoP doctrine. This leads to the ISC falling below the SoP limits, SACC aligning with it, and CCC overstepping it.

The typology, coupled with the theoretical and doctrinal analysis in Chapters 1 and 2-4, respectively, leads to three overarching normative conclusions elaborated below. 1) SoP limits to

adjudication on state inaction are not an abstract imposition; rather, it is determined in the particular circumstances of a case based on available evidence and in accordance with judicially manageable standards. 2) The SoP-compliant judicial action has the (varying) capacity to nudge the political branches, that is, to increase the political cost of their inaction, which tends to increase in a cycle of dialogue between the branches. 3) Judicial review erasing the SoP limits risks falling into a pattern of unsustainable inconsistent stretching of principles that will not necessarily advance the goal of realizing social rights, including the right to health.

To elaborate on the first conclusion, SoP can be attenuated in two ways: first, considering the position of the political branches as an evolving, non-monolithic one consisting of sometimes conflicting democratic forces, and second, relying on evidence that refutes SoP-related objections of resource constraints, infeasibility of state action, and greater competence of the political branches.[1168] This conclusion also responds to a theoretical dilemma posed in Chapter 1 of the dissertation regarding judicial review over state inaction as opposed to state action. The dilemma was refuted in Chapter 1 (section 4) on theoretical grounds (with reference to practical examples) and is now confirmed through the empirical evidence of this dissertation. Namely, the empirical evidence in Chapters 2-4 showed that judicial determination of an unconstitutional state inaction is not impossible, but like every other judicial task, it depends on evidence and argumentation. In Colombia, the protracted failure to address a systemic problem was evidenced through routine *tutela* litigation, as well as the political branches' acknowledgment of problems by initiating (sometimes failed or unsuccessful) legislation. This evidence could shift the burden of proof/reverse the benefit of the doubt that the problem was being dealt with in the normal course

[1168] Kavanagh observes judicial reasoning of the UKSC pointing to the possible rebuttal of such competence based on available evidence, Kavanagh, *The Collaborative Constitution*, 300.

of a democratic process. An Incompletely Theorized Agreement[1169] on impermissible inaction can also be reached in social rights cases when faced with the failure to devise some plan and policy, make it coherent in logic,[1170] integrate some participatory elements, make it transparent, base it on relevant evidence, and periodically revise to meet the original targets.[1171] Moreover, given appropriate evidence, there is no principal impediment to scrutinizing the good faith or factual basis of resource constraint and feasibility arguments,[1172] among other things, by drawing lines between a new cost allocation and an allocative impact of a decision.[1173] Exemplifying distrust, these standards against inaction serve the legal accountability of the government, increase its trustworthiness,[1174] and make appropriate state action more likely, indirectly also addressing the challenge of inducing appropriate state action – the subject matter of the second conclusion below.

The second conclusion that judicial action within SoP limits can nudge the political branches and increase the political cost of inaction was also defended in Chapter 1 (section 5) of this dissertation on theoretical grounds (with reference to practical examples) and is further supported through the empirical evidence of this dissertation. Indeed, though at the expense of the distinct judicial function of authoritatively, conclusively deciding cases based on binding judicially manageable standards, even the weakest dialogic review by the ISC evolved into a tool for nudging the political branches, which laid grounds for more intrusive and effective jurisprudence afterward.

[1169] Cass R. Sunstein, "Incompletely Theorized Agreements," *Harvard Law Review* 108, no. 7 (1995): 1733–72.
[1170] Möller, *The Global Model of Constitutional Rights*, 172.
[1171] Sabel and Simon, "Destabilization Rights," 1016. David Vitale, "Political Trust as the Basis for a Social Rights Enforcement Framework," *Queen's Law Journal* 44, no. 1 (2019 2018): 177–220.
[1172] Ferreira, "Feasibility Constraints and the South African Bill of Rights," 274–302.
[1173] Jeff King, "The Justiciability of Resource Allocation," *The Modern Law Review* 70, no. 2 (2007): 197–224..
[1174] David Vitale, "The Relational Impact of Social Rights Judgments: A Trust-Based Analysis," *Legal Studies* 42, no. 3 (September 2022): 408–24.

Indeed, in a cycle of dialogue, types of SoP-compliant judicial review used in combination will help the nudging further increase the political cost of inaction. Judicial action sets in motion a process that can multiply types of applicable review in the future. For instance, nudging can lead to state action such as elaboration of policy in statutes or subordinate legislation, and even when *pro forma* in nature, such measures can attenuate SoP concerns and subject them to more robust judicial review. The SoP-attenuating potential of such a cycle of dialogue was also recognized, though, by passing, in the literature on social rights adjudication.[1175] This is the gist of the dialogic justice as conceptualized in this dissertation, which, against the thrust of the metaphor, is still embedded in the logic of institutionalized distrust, through which both sides, judicial and political, incrementally specify their standards in consideration of the input coming from one another. This also reinforces the first conclusion about the non-abstract application of SoP doctrine in jurisprudence, namely, that SoP limit to adjudication exists in degrees and must not be seen as an abstract obstacle outside the context of a particular case.

The Colombian experience of *ad hoc* individual enforcement of health rights is the best evidence for the third normative conclusion. Having erased the SoP limits, the CCC did fall into a pattern of unsustainable, inconsistent stretching of principles that did not advance the initial goals of achieving equitable access to health care. Without SoP limits, the rule of judge-made exceptions itself became a precedent, which proved difficult to depart from or shield from inconsistency. Inconsistency in judging became inevitable as the CCC, routinely ordering unbudgeted expenses for any treatment in connection to the protection of life, dignity, and personal integrity, including the psychological well-being of a person was confronted with a claim for individual treatment as

[1175] Supra note 190-191 and accompanying text.

costly as in vitro fertilization. Neither could the CCC escape the need for rationing in the context of the COVID-19 pandemic, while it still insisted on judge-made exceptions to all explicit rationing in normal times. Unable to take away entitlements affirmed by judicial precedent and to reverse the entrenched judicial approach, the CCC contributed to the health system's unsustainability and had an identifiable adverse effect on the realization of the right to health. As the case of the CCG referenced in the conclusion of Chapter 4 showed, the extent of overstepping SoP itself varies according to the breadth or narrowness of the standard through which individual benefits are granted. The criterion on the likelihood of death without intervention in the German case is a more manageable standard than 'life in dignity' and 'personal integrity' in Colombia (all in a broad sense), while the primacy of life-threatening situations over other health conditions could be a reasonable interpretation of the right in the Constitution and reduce SoP tensions in that manner.

Drawing these descriptive, typological, and normative threads together, this dissertation demonstrates that a **(1) means-end reasonableness review (2) with principled rights-based reasoning, that is (3) sensitive to the self-correction capacity of the political branches,[1176] and depending on the latter (4) integrates some standards for the policy-making process, including (not automatically) participatory remedies and court-led monitoring of implementation comes closest to the golden mean of judging on unconstitutional state inaction in the context of social rights.** This model is justified both on the level of complying

[1176] Kavanagh approves of considering the quality of parliamentary proceedings before judging on a rights issue, among other things, for its confirmatory role - reassurance that the issue was dealt with in substance in the democratic process, which would deserve more institutional comity. She also stresses the need for court to avoid pre-emption. Although not explicit in this analysis, the same arguments for deference could be made on the basis of the self-correction capacity in the democratic process, Kavanagh, *The Collaborative Constitution*, 302-311.

with SoP and offering desirable effectiveness to bring necessary changes to the political process. In other words, courts can, and, in the absence of the self-correction capacity of the democratic processes, must remedy an unconstitutional state inaction in the context of social rights with evolved forms of constitutional adjudication – *distrustful dialogic review* within the bounds of the SoP principle.

Reflecting this model, apart from substantiating unconstitutionality of state inaction with concrete evidence and legal arguments, the 2008 Structural Judgment also set standards for the policy-making process, including its participatory nature, and at least in the initial phases, enforced the decision through a court-led and civil-society-backed monitoring. Such a review rooted in the distrustful dimension of SoP is most tailored to overcome both challenges of judicially defining unconstitutional state inaction and ensuring appropriate state action for compliance. This is not to endorse any of the theories envisaging effective government as an equal rationale behind SoP alongside limiting of government, but rather to propose that such a judicial role against arbitrary state inaction is defensible despite SoP that defines policymaking and resource-allocation as primary functions of political branches.

This framework differs from *Garavito*'s similar framework in significant respects: it does not overlook the step of judicially determining unconstitutional status quo; it does not necessarily require the adoption of minimum core doctrine; it envisages participatory remedies not as an automatic requirement but as a type of judicial remedy justifiable in the specific circumstances of the case; it more explicitly draws the line between categorical orders of substantive and process-

oriented origin and endorses the latter unlike the former in line with SoP, including its distrustful dimension discussed in Chapter 1 of this dissertation.[1177]

Finally, as supported on theoretical grounds in Chapter 1 and empirically demonstrated by the dynamics of implementing court cases in the dissertation, ultimate success or failure of court cases (especially in terms of building a lasting accountability system) does not undermine this normative argument. At least some of the insufficient/inadequate changes since the 2008 Structural Judgment must be attributable to the systemic problems of the legislative branch in Colombia. On the other hand, it is telling that final breakthroughs in the successful court cases occurred with a change of heart in the political leadership (for *Treatment Action Campaign*, see Chapters 3, Section 2.2; for *2008 Structural Judgment*, see Chapter 4 Section 2.3) Indeed, distrustful dialogic justice implies the triggering of a political process while the guarantees of a substantive improvement surpass the objective capacity of a monitoring process, even as intensive as the Colombian one.

These normative conclusions derived from empirical evidence of social rights adjudication feed back into general SoP and judicial review theories and can be extended beyond the justiciability of social rights, at least, to positive duties in general. The potential for such feedback, due to the universal logic of fundamental rights [1178] and even the constitutional democracy, is also increasingly acknowledged in the literature.[1179] The judicialization of positive rights was recently

[1177] Capturing his normative approach in the term empowered participatory jurisprudence (EPJ), Garavito characterized it 'as a combination of (1) strong judicial recognition of minimum core contents of SERs; (2) a means-oriented, moderate approach to judicial remedies that leaves to public deliberation and collective problem solving the details of SER content beyond the minimum core; and (3) strong, court-orchestrated monitoring mechanisms that create spaces for such deliberative and problem-solving processes and that regularly verify progress toward the realization of the rights protected in judicial rulings, see Rodríguez-Garavito, "Empowered Participatory Jurisprudence", 235-236.

[1178] For one of the first comprehensive engagements with judicial review of state inaction as a separate category in a domestic context, see Fredman, *Human Rights Transformed,* see also Möller, *The Global Model of Constitutional Rights.*

[1179] Kavanagh, *The Collaborative Constitution*.

explored in the ECtHR jurisprudence with an analytical approach similar to the one in this dissertation, among other things, assessing the standards through the prisms of 'margin of appreciation' – an equivalent of SoP doctrine in a supranational context.[1180] Indeed, ECtHR is developing standards to address the problems of impermissible state inaction both in the contexts of admissibility (linked to the right to an effective remedy)[1181] and merits of cases.[1182] Comparative examples in the domestic context outside the jurisdictions in this dissertation also confirm the potential of evolving reasonableness review both as a constitutional and administrative law response to state inaction. Reasonableness review has been developing beyond narrow *Wednesbury* standard in Canada,[1183] the UK,[1184] Israel.[1185] The CCG declared unconstitutional a delay in reforming the legislation that could no longer meet the original goals due to the passage of time and changed circumstances.[1186] Domestic courts seem to react even when state inaction is primarily attributed to capacity problems that objectively constrain the government, among other things, by attempting to boost such capacity.[1187]

Unexpectedly, the descriptive, typological, and normative conclusions in the dissertation lead us to reflect on dilemmas beyond the legal context. The continuum of judicial review on social and

[1180] Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries* (Oxford University Press, 2023), 73-94.
[1181] standards on administrative practice exempting applicant from the requirement to exhaust domestic remedies as an admissibility criterion assuming full knowledge and impermissible inaction from the domestic authorities, Georgia v. Russia (I) [GC], no. 13255/07, ECHR 2014; Ukraine v. Russia (re Crimea) (dec.) [GC], nos. 20958/14 and 38334/18, 16 December 2020.
[1182] standards on positive state duties under various Convention rights including on the basis of systemic nature of rights-endangering problems, see Lopes de Sousa Fernandes v. Portugal [GC], no. 56080/13, 19 December 2017 and decisions cited therein.
[1183] Minister of Citizenship and Immigration v. Vavilov [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.).
[1184] Nzolameso v City of Westminster [2015] UKSC 22; Wang, "From Wednesbury Unreasonableness to Accountability for Reasonableness," 642–70.
[1185] HCJ 8948/22 Sheinfeld v. The Knesset (2023).Mordechai Kremnitzer, "Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness," *Israel Law Review* 56, no. 3 (November 2023): 343–54.
[1186] BVerfG, decision of July 18, 2012 - 1 BvL 10/10 The German Constitutional Court declared provisions governing basic cash benefits according to the Asylum Seekers Benefits Act incompatible with the fundamental right to a minimum existence because they had not been changed since 1993 despite considerable price increases.
[1187] Khosla Tushnet, "Courts, Constitutionalism, and State Capacity," 95–116;

health rights vis-à-vis respective SoP doctrines reflects a reality of life - that edges of the continuum are prone to further radicalization, while a slippery slope can be avoided in a more balanced, consistent approach directly confronting the virtues and vices of each approach, including of one's own. Eventually, the normative conclusion expounded in this Chapter reminds us of the importance of frames. An explicit, critical SoP prism of the dissertation revealed more similarities between adjudication of state action and inaction, identifying cross-cutting logic of judicial review, which would not be this visible through either a cursory, blanket SoP skepticism or its exaggerated re-interpretations as a simplistic solution to a legitimate need of exercising judicial review over state inaction. This intellectual exercise may be somewhat comforting for those who cannot help but see injustice in much of what was previously understood as misfortune the way Shklar saw it, whose words opened and now will close the hopefully meaningful intellectual conversation in this dissertation.

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Decision T-426 of 1992.
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Decisions C-265 of 1994.
Decision C-265 of1994.
Decision T-406 of 1994
Decision SU-43 of 1995.
Decision C-445 of 1995
Decision C-564 of 1995.
Decision C-037 of 1996.
Decision C-081 of 1996.
Decision SU-39 of 1997.
Decision SU-111 of 1997.
Decision C-251 of 1997.
Decision C-429 of 1997.
Decision SU-480 of 1997,
Decision SU-559 of 1997.
Decision T-068 of 1998.
Decision T-153 of 1998.
Decision SU-225 of 1998.
Decision T-395 of 1998.
Decision T-652 of 1998.
Decision C-383 of 1999.
Decision T-535 of 1999.
Decision C-747 of 1999.
Decision SU-819 of 1999.
Decision SU-090 of 2000.
Decision C-427 of 2000.
Decision C-955 of 2000.
Decision T-1204 of 2000.
Decision C-1165 of 2000.
Decision C-093 of 2001.
Decision C-671 of 2001.
Decision C-673 of 2001.
Decision C-760 of 2001.
Decision C-1064 of 2001.
Decision C-1191 of 2001.
Decision T-113 of 2002.
Decision C-251 of 2002.
Decision T-595 of 2002.
Decision C-671 of 2002.
Decision C-674 of 2002.
Decision T-789 of 2002.
Decision T-899 of 2002.
Decision C-917 of 2002.
Decision T-859 of 2003.
Decision C-097 of 2003.
Decision C-205 of 2003.
Decision T-237 of 2003.
Decision T-772 of 2003.
Decision C-776 of 2003.
Decision C-872 of 2003.
Decision T-025 of 2004.
Decision C-038 of 2004.
Decision T-697 of 2004.
Decision C-754 of 2004.
Decision C-782 of 2004.
Decision C-816 of 2004.
Decision T-901 of 2004.
Decision C-931 of 2004.
Decision C-970 of 2004.
Decision C-971 of 2004.
Decision C-991 of 2004.
Decision T-1318 of 2005.
Decision T-133 of 2006.
Decision T-583 of 2006.
Decision T-884 of 2006.
Decisions T-043 of 2007.
Decision C-291 of 2007.
Decision T-605 of 2007.
Decision C-809 of 2007.
Decision T- 125 of 2008.
Decision T-206 of 2008.
Decision T-244 of 2008.
Decision SU-484 of 2008.
Decision C-507 of 2008.
Decision T- 585 of 2008.
Decision T- 649 of 2008.
Decision C- 756 of 2008.
Decision T-760 of 2008.
Decision T-1176 of 2008.
Decision T- 082 of 2009.
Decision C-177 of 2009.
Decision T- 274 of 2009.
Decision T- 291 of 2009.
Decision T- 292 of 2009.
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Decision C- 444 of 2009.
Decision C-575 of 2009.
Decision C-664 of 2009.
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Decision T-890 of 2009.
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Decision T-068 of 2010.
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Decision T-226 of 2010.
Decision C-252 of 2010
Decision T-418 of 2010.
Decision T- 495 of 2010.
Decision T-550 of 2010.
Decision T- 616 of 2010.
Decision T-026 of 2011.
Decision T-160 of 2011.
Decisions T-235 of 2011.
Decision C-630 of 2011.
Decision C-577 of 2011.
Decision C-630 of 2011.
Decision T-740 of 2011
Decision C-816 of 2011.
Decision C-170 of 2012.
Decision C-240 of 2012.
Decision T-248 of 2012.
Decision T-428 of 2012.
Decision T-841 of 2012.
Decision T-017 of 2013.
Decision T-388 of 2013.
Decision T-586 of 2013.
Decision T-637 of 2013
Decision T-771 of 2013.

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Decision T-142 of 2014.
Decision C-313 of 2014.
Decision T-528 of 2014.
Decision C-630 of 2014.
Decision T-528 of 2014.
Decision T-802 of 2014.
Decision T-025 of 2015.
Decision T-159 of 2015
Decision T-274 of 2015.
Decision T-306 of 2015.
Decision T-547 of 2015.
Decision T-762 of 2015.
Decision T-103 of 2016.
Decision T-171 of 2016.
Decision T-199 of 2016.
Decision C-285 of 2016.
Decision T-306 of 2016.
Decision C-373 of 2016.
Decision T-375 of 2016.
Decision T-398 of 2016.
Decision T-466 of 2016
Decision C-486 of 2016.
Decision T-544 of 2016.
Decision T-594 of 2016.
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Decision SU-097 of 2017.
Decision T-120 of 2017.
Decision T-126 of 2017.
Decision C-160 of 2017.
Decision C-172 of 2017.
Decision T-178 of 2017.
Decision SU-217 of 2017.
Decision T-233 of 2017.
Decision C-253 of 2017.
Decision T-260 of 2017.
Decision T-261 of 2017.
Decision T-279 of 2017.
Decision T-299 of 2017.
Decision T-302 of 2017.
Decision C-332 of 2017
Decision T-357 of 2017.
Decision T-359 of 2017.
Decision T-399 of 2017.
Decision T-445 of 2017.
Decision T-475 of 2017.
Decision T-531 of 2017.
Decision T-579 of 2017.
Decision T-592 of 2017.
Decision T-637 of 2017
Decision T-706 of 2017.
Decision T-742 of 2017.
Decision T-027 of 2018.
Decision T-065 of 2018.
Decision T-080 of 2018.
Decision T-091 of 2018
Decision C-093 of 2018.
Decision C-117 of 2018.
Decision C-118 of 2018.
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Decision SU-124 of 2018.
Decision T-171 of 2018.
Decision T-129 of 2018.
Decision T-210 of 2018.
Decision T-235 of 2018.
Decision T-267 of 2018.
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Decision T-329 of 2018.
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Decision T-471 of 2018.
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Decision T-167 of 2019.
Decision T-316 of 2018.
Decision T-209 of 2019.
Decision C-252 of 2019.
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Decision T-435 of 2019.
Decision T-449 of 2019,
Decision C-481 of 2019.
Decision C-521 2019.
Decision C-592 of 2019.
Decision C-026 of 2020.
Decision SU-074 of 2020.
Decision C-092 of 2020.
Decision T-263 of 2020.
Decision T-270 of 2020.
Decision T-421 of 2020.
Decision T-476 of 2020.
Decision T-500 of 2020.
Decision SU-508 of 2020.
Decision T-513 of 2020.
Decision T-001 of 2021.
Decision C-057 of 2021.
Decision T-058 of 2021.
Decision C-062 of 2021.
Decision C-066 of 2021.
Decision C-191 of 2021.
Decision T-193 of 2021.
Decision T-231 of 2021
Decision T-298 of 2021
Decision T-425 of 2021.
Decision T-448 of 2021.
Decision C-055 of 2022
Decision T-144 of 2022.
Decision C-162 of 2022.
Decision C-164 of 2022.
Decision T-218 of 2022.
Decision T-275 of 2022.
Decision T-280 of 2022.
Decision T-308 of 2022.
Decision T-333 of 2022
Decision T-357 of 2022.
Decision T-359 of 2022.
Decision T-005 of 2023.
Decision T-055 of 2023.
Decision T-099 of 2023.
Decision T-101 of 2023.
Decision T-237 of 2023.

Autos [Implementation Orders]

For Decision T-760 of 2008

A245 of 2010.
A226 of 2011.
A354 of 2014,
A413 of 2015.
A552A of 2015.
A039 of 2017.
A001 of 2017.
A668 of 2018.
A262A of 2019.
A094A of 2020.
A358 of 2020.
A110 of 2021.
A1191 of 2021.
A1213 of 2022.
A439 of 2021.
A755 of 2021.
A584 of 2022.
A999 of 2023.

For Decision T-025 of 2004

A178 of 2005.
A218 of 2006
A266 of 2006
A337 of 2006
A109 of 2007
A092 of 2008.
A385 of 2010.
A411 of 2015.
A737 of 2017.
A156 of 2020.
A811 of 2021.

For Decision SU-484 of 2008

A195 of 2020

For Decision T-762 of 2015

A121 of 2018

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Union of India v. Rakesh Malhotra (2021) SC 391
University of Kerala v. Council of Principals of Colleges, Kerala, (2010) 1 SCC 353.
Upendra Baxi (1) v State of UP (1983) 2 SCC 308.
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X v. Principal Secretary. Health and Family Welfare Department, (2022) SCC OnLine SC 1321 [September 29, 2022]

South Africa

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