3

Judicial Politics and Social Rights

MALCOLM LANGFORD

I. Introduction

The future is already here – it's just not very evenly distributed.

William Gibson[1]

The march of social rights into national constitutions and international law raised hopes that adjudication would be a vehicle for defending and promoting social justice.[2] Reflecting the ideal of responsive law, this legal transformation provided the opportunity to foreground adjudication as a 'facilitator of response to social needs and aspirations'.[3] Such expectations have not been confined to rights advocates or activists; some of the intended guardians of judicialised social rights foresaw a new terrain of law and practice. In 1999, Justice Sachs of the South African Constitutional Court declared that '21st-century jurisprudence will focus increasingly on socio-economic rights'.[4] In a similar vein in 2005, the former Supreme Court of Canada Justice Louise Arbor championed a complaints mechanism to the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[5] on the grounds that it 'can make a real difference to

[1] *San Francisco Examiner* (1992).

[2] For a quantitative overview of the rise in constitutional protection of judicially enforceable social rights, see Courtney Jung and Evan Rosevear, 'Economic and Social Rights across Time, Regions, and Legal Traditions: A Preliminary Analysis of the TIESR Dataset' (2012) 30 *Nordic Journal of Human Rights* 372–394 and updates by Hirschl, Jung and Rosevear, 'Justiciable and Aspirational Economic and Social Rights in National Constitutions' (Chapter 2).

[3] To quote Philippe Nonet and Philip Selznick, *Law and Society in Transition: Towards Responsive Law* (New Brunswick, NJ: Transaction Publishers, 1978), p. 14. Note that Selznick and Nonet argue that the primary force for responsive law should be regulation rather than litigation.

[4] Albie Sachs, 'Social and Economic Rights: Can They Be Made Justiciable?' (2000) 53 *Southern Methodist University Law Review* 1381–1392.

[5] International Covenant on Economic, Social, and Cultural Rights (ICESCR), art. 2(1), New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3.

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those who are often left to languish at the margins of society'.[6] To be sure, this vision of law was not unbounded and unconditional. Most were conscious of the legal, institutional and political challenges surrounding a project of transformative social rights constitutionalism.[7] Nonetheless, the arrival of legalised social rights and a burgeoning jurisprudence provided grounds for sanguinity: this was a project for the future.

Yet, this optimism has not been universally shared. Critics have sought to puncture the narrative by highlighting the soft empirical underbelly of social right adjudication claims. Three general risks are commonly invoked. The first is *judicial abdication* – that courts will resist the winds of change by resorting to a host of well-honed and time-honoured legal techniques.[8] Through procedural obfuscation, justiciability doctrines, deferential review, minimalistic thresholds or weakly framed remedies, social rights claims will be hollowed out or simply rejected. The second is *distributive inequality*. Even when social rights are adjudicated in a robust manner, the beneficiaries will be those far from the 'margins of society'.[9] It is the middle class that will reap the benefits of this new legal opportunity structure. The third is *diffuse impact*. The dictates of realism suggest that unsuccessful but powerful respondents will resist compliance. Moreover, even when a judgment is implemented, legal remedies may do little to dislodge unjust policies; inflect public and elite opinion; and disturb the maldistribution of power and resources.[10]

[6] Louise Arbour, 'Freedom from Want – From Charity to Entitlement', LaFontaine-Baldwin Lecture (2005), https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3004&LangID=E (last accessed 22 June 2018). She was UN Commissioner for Human Rights at the time.

[7] See, e.g., Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta: Claremont, 2010); and many authors in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008), including Malcolm Langford, 'Hungary: Social Rights or Market Redivivus?', in Langford (ed.), *Social Rights Jurisprudence*, p 250.

[8] See, e.g., Radha D'Souza, 'Liberal Theory, Human Rights and Water-Justice: Back to Square One?' (2008) *Law, Social Justice and Global Development Journal* 1–15; Paul O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 *Modern Law Review* 532–554.

[9] See, e.g., Octavio Luiz Motta Ferraz, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities?' (2009) 11 *Health and Human Rights* 33–45; David Landau, 'The Reality of Social Rights Enforcement' (2011) 53 *Harvard International Law Journal* 401–459.

[10] See, e.g., David C. Thompson and Faith E. Crampton, 'The Impact of School Finance Litigation: A Long View' (2002) 28 *Journal of Education Finance* 133–172; Ran Hirschl and Evan Rosevear, 'Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities', in Tom Campbell, K. D. Ewing and Adam Tomkins (eds.), *The Legal Protection of Human Rights – Sceptical Essays* (Oxford: Oxford University Press, 2012).

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Indeed, these three challenges were largely predicted by Hazard a half-century ago: the judicial contribution to social change will be 'diffuse, microcosmic, and dull'.[11]

Yet, are these critiques right? Does the 'social rights community' hold a Panglossian faith in the virtues of social rights adjudication? As this chapter will contend, the answer is only partly yes. The contribution of courts is and will be contingent. For reasons of space and analytical coherence, this chapter will only address the first two concerns: judicial abdication and distributive inequality. However, many of the underlying methodological issues and explanatory theories are relevant to the question of compliance and broader impact.[12]

The chapter proceeds in three phases. Section 2 parses out what we mean by adjudicative responsiveness, in light of different and competing theories of the judicial role and distributive equality. Section 3 sets out different hypotheses for judicial outcomes of a liberal, realist, constructivist structural and strategic colour.[13] The remainder of the chapter turns

[11] Geoffrey Hazard, 'Social Justice through Civil Justice' (1969) 36 *University of Chicago Law Review* 699–712.

[12] For methodological driven studies on impact of social rights adjudication, see, e.g., Christopher Berry, 'The Impact of School Finance Judgments on State Fiscal Policy', in Martin R. West and Paul E. Peterson (eds.), *School Money Trials: The Legal Pursuit of Educational Adequacy* (Washington DC: Brookings Institution, 2007); Varun Gauri and Daniel Brinks. *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York, NY: Cambridge University Press, 2008); Alicia Ely Yamin and Siri Gloppen, *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Cambridge, MA: Harvard University Press, 2011); Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds.), *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge: Cambridge University Press, 2014); César Rodríguez Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge: Cambridge University Press, 2016); Mark Heywood, 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health' (2009) 1 *Journal of Human Rights Practice*, 14–36; Stuart Wilson, 'Litigating Housing Rights in Johannesburg's Inner City' (2011) *South African Journal on Human Rights* 27; Malcolm Langford, César Rodríguez-Garavito and Julietta Rossi (ed.), *Making It Stick: Compliance with Social Rights Judgments in Comparative Perspective* (2017); Thomas Murray, *Contesting Economic and Social Rights in Ireland: Constitution, State and Society, 1848–2016* (Cambridge: Cambridge University Press, 2016).

[13] See, e.g., Lee Epstein and Jack Knight, 'Reconsidering Judicial Preferences' (2013) 16 *Annual Review of Political Science* 11–31; Keith E. Whittington, 'Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics' (2000) 25 *Law and Social Inquiry* 601–634; Ran Hirschl, 'The Judicialization of Politics', in Robert Goodin (ed.), *Oxford Handbook of Political Science* (Oxford: Oxford University Press, 2009); Siri Gloppen, 'Courts and Social Transformation: An Analytical Framework', in Roberto

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to empirics. Section 4 takes up the rich and comparative experiences from five decades of state-level US school finance litigation, and Section 5 adopts a cross-national perspective.

II. Responsive Adjudication

A. *Substantive and Reflexive Law*

What is meant by responsive adjudication? How do we measure it? Is every loss in court a tick for judicial abdication? Is a narrowly crafted judicial decision indicative of an unresponsive posture? The question is challenging: judicial decision-making is a hermeneutic process embedded in a legal, political and institutional context.

Current literature on social rights adjudication tends to envisage three types of courts (see Figure 3.1).[14] The first is a *classical court* that seeks to uphold autonomous forms of justice – impartial, neutral and equal treatment before the law. A court may be constitutionally constrained to follow this liberal ideal (think the United States) or it may simply ignore the presence of constitutionalised social rights (think Ireland). By law or by will (and often the latter given the mutability of law), the overriding commitment of such a court is to ensure autonomous justice and refrain from deciding questions of a social nature.

At the other end of the spectrum is what is often referred to as an activist court, although the moniker is often misleading. The term is used for courts that push the bounds of legal text (e.g., the Indian Supreme Court in implying social rights from civil), but it can also be applied to courts that simply seek to fully enforce constitutionally recognised social rights (e.g., the supreme courts of Portugal, Nepal or Argentina). The latter courts may be active in enforcing social rights but they cannot be called *legally activist*. Thus, my preferred term for ascribing the posture of these types of courts is *enforcer-* and others might use transformative. The overriding and ultimate aim is to ensure some level or modicum of social rights is enforced with less consideration of competing factors.

Gargarella, Pilar Domingo and Theunis Roux (eds.), *Courts and Social Transformation in New Democracies* (Aldershot, UK: Ashgate, 2006), p. 35.

[14] For a somewhat similar but different overview and approach to judicial postures, see Katharine G. Young, 'A Typology of Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 *International Journal of Constitutional Law* 3, 385–420.

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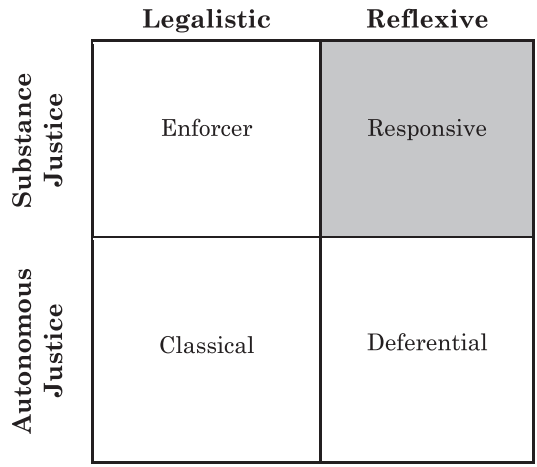

Figure 3.1 A typology of court postures

In between, one can find a category that one might label deferential – here, courts are careful in moving forward social rights claims. They are quick to exercise deference to the state when issues of resources and trade-offs are raised and any development of the jurisprudence is likely to be incremental. For example, Sunstein and Vermuele argue that judges should strive to adopt narrow decisions, preferably literalist and rule-oriented rather than purposive and standard-oriented to avoid unintended consequences in both policy-making and the systemic fabric of law.[15] King envisages slightly more room for judges but urges caution:

> [J]udges should, when adjudicating vague constitutional rights under conditions of uncertainty (1) avoid significant, nationwide allocative impact, and either (2) give decisions on narrow, particularised grounds, or (3) when adjudicating a macro-level dispute with significant implications for large numbers of people, decide in a manner that preserves flexibility.[16]

Which approach is most attractive? If one accepts or desires that courts have a role to play as guardians of social rights, then the enforcer archetype might be desirable. Such courts may arguably even contribute to the rule of law if

[15] Cass R. Sunstein and Adrian Vermeule, 'Interpretation and Institutions' (2003) 101 *Michigan Law Review* 885.
[16] Jeff A. King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012), p. 293.

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social rights are judicially enforceable. However, there are also good grounds for being cautious about loading up courts with an overly robust institutional mission to realise social rights. This is partly for reasons of institutional competence, as outlined by Sunstein, Vermuele and King. But there are also other reasons. In some (rare) cases, the doctrine of justiciability may counsel the perfunctory dismissal of a case: there may be simply no conceivable 'discoverable and manageable legal standards'. More likely, at the merits stage in complex or hard cases, concerns with democratic legitimacy in addition to institutional competence, may point towards the need for deference or minimalism.[17] Most importantly, courts risk their sociological legitimacy if they overstep such boundaries too often, threatening levels of compliance and in some cases their own survival.[18] Most courts are in some form of principal-agent relationship with the executive and/or parliament. These governing bodies can restrain or punish a court through legal and constitutional reforms, future appointments and reappointments, budget reallocations and sluggish compliance with judgments. However, the alternative solutions of deferentialism and incrementalism may be equally unsatisfactory. Courts may become too cautious in defending and advancing social rights and neglect to engage in necessary procedural innovations that generate optimal judicial outcomes. Equally problematic is that these approaches can soon lead to asymmetric outcomes. Courts become activists on seemingly 'easy' questions and abdicators on 'hard' questions, but empirical research suggests that this distinction is far from obvious. The result is that judges may impose problematic or ineffective solutions (often a read-in remedy) as part of a standard response to an 'easy' question.

In this respect, a *responsive* court might be desirable (but also more sustainable). It can be defined as an adjudicatory body that is *substantively* attuned to its legally mandated social mission (which may be broad or narrow) and *reflexively* mindful of its relationship with other actors (state organs, public opinion, non-state actors). As is apparent, this

[17] Sandra Liebenberg and Katharine Young, 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?', in Helena Alviar García, Karl Klare and Lucy A. Williams (eds.), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (New York and Abingdon, UK: Routledge, 2014); Ernest A. Young, 'Institutional Settlement in a Globalizing Judicial System' (2005) 54 *Duke Law Journal* 1143–1261.

[18] See, e.g., Mikael Rask Madsen, 'The Legitimization Strategies of International Courts: The Case of the European Court of Human Rights', in Michal Bobek, *Selecting Europe's Judges* (Oxford: Oxford University Press, 2015); César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 *Texas Law Review* 1669–1698; Malcolm Langford, 'Housing Rights Litigation: Grootboom and Beyond', in Langford et al. (eds.), 'Symbols or Substance?'

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second element is not included in Nonet and Selznick's well-known exposition of responsive law. But it is folded in for good reason and is used in this sense in other literatures. As Nonet and Selznik acknowledge, legislation or adjudication that proactively addresses substantive issues such as inequalities will often strain law's internal integrity, imposing costs that spark a counter-reaction or even backlash.[19] Responsive law in their conception will always be more unstable than 'autonomous law'.

Instead, this chapter draws on contemporary conceptions of responsiveness, which often include a reflexive component.[20] In complex systems, we should not expect any institution to possess or maintain a monopoly on optimal decision-making. It is thus reasonable to suggest that courts should consider the competence, values and reactions of actors outside their functionally differentiated sphere.[21] Or as captured in Ayers and Braithwaite's conception of responsive regulation: 'there are no optimal or best regulatory solutions, just solutions that respond better than others to the plural configurations of support and opposition'.[22]

To be sure, this inclusion of reflexivity is not offered as an excuse for judicial deferentialism. A benchmark of responsive adjudication requires that a court remain attentive to the text and purpose of social rights provisions. Furthermore, reflexivity is a multidirectional and dynamic concept. In some cases, it may signal the need for proactive judicial engagement. If the aim is to enhance or optimise inter-*institutional competence* and legitimacy, the appropriate judicial strategy may be innovation rather than caution.[23] This is where the notion of reflexivity parts ways with deferentialism and the legal process school.[24] Deference is not the axiomatic

[19] Nonet and Selznick, *Law and Society in Transition*, pp. 26, 78.

[20] Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York and Oxford: Oxford University Press, 1992).

[21] Niklas Luhmann, 'Differentiation of Society' (1977) 2 *The Canadian Journal of Sociology* 29–53; Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239–286. As the latter states: 'Social processes and economic arrangements are simply too dense, complex, and potentially contradictory to be adequately accounted for in the kinds of interventionist control mechanisms that have been created. Legal and bureaucratic structures cannot incorporate models of social reality that are sufficiently rich.'

[22] Ayers and Braithwaite, *Responsive Regulation*, p. 5.

[23] For a full discussion of this point, see Malcolm Langford, 'Beyond Institutional Competence: A Consensualist Model of Rights Adjudication' (2014), presented at the International Association for Constitutional Law, Oslo, 16–20 June 2014.

[24] As E. Young, 'Institutional Settlement', 1161 puts it, in an 'area where technical expertise is at a premium' an adjudicator 'may defer to the superior competence of an expert administrative agency by applying a very lenient standard of review'.

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default option when courts face strong boundary conflicts. Instead, both pragmatism and creativity is counselled. For example, courts can boost their competence through allowing or requesting *amicus curiae* submissions, developing innovative processes for evidential gathering, ordering experimental remedies or benchmarking decisions against approved professional or governmental standards.[25] This way, courts minimise both the moral and empirical uncertainty over their interventions. Equally, attentiveness to democratic legitimacy may paradoxically justify stronger forms of review (e.g., for litigants whose voice or vote is not heard or counted in a democracy).[26]

B. *Distributive Equality*

Turning to the second benchmark, a risk with any court is a blindness to disparities and inequalities in judicial outcomes. The problem of asymmetry is the common critique of autonomous law and passive courts. Yet, a more engaged court on social rights may fall into the same trap – advantaged groups may be unwittingly the primary beneficiaries of a court's largesse, especially if they are better equipped to beat a path to the court's door. However, a reflexive court is arguably alert to this potential, and some courts discuss or address the problematique directly.[27] Judicial techniques in both common law and civil law systems also allow courts a degree of control over the distribution of judicial goods.

[25] See discussion of cases in Sections 4 to 6. See also Charles F. Sabel and William Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1015–1101; Varun Gauri, 'India: Compliance with Orders on the Right to Food – The Strength of Weak Remedies', in Langford, Rodríguez-Garavito and Rossi (eds.), *Making It Stick*, p. 288; Olman Rodriguez Loaiza, Sigrid Morales, Ole Frithjof Norheim and Bruce M. Wilson, 'Revisiting Health Rights Litigation and Access to Medications in Costa Rica: Preliminary Evidence from the Cochrane Collaboration Reform' (2018) 20 *Health and Human Rights Journal* 1 (online June 2018, forthcoming in print).

[26] In my view, in the case of *democratic legitimacy*, it is arguable that strong forms of judicial review are justified when (1) there is a clear legal precommitment; (2) there is greater space for post-judgment constitutional adjustment; and (3) the social rights of marginalised groups or the minimum core is threatened. Moreover, the case for stronger forms of review may grow over time. This includes cases of lethargic realisation, persistent asymmetries with public opinion, a bias of judicial review to civil and political rights, and the need for courts to maintain open doors for future litigation.

[27] See, e.g., *Soobramoney* v. *Minister of Health*, KwaZulu-Natal, 1998 (1) SA 765 (CC) (Constitutional Court of South Africa); Case No. 2009–43-01 *On Compliance of the First Part of Section 3 of State Pensions and State Allowance Disbursement in 2009–2012) Insofar as It Applies to State Old-Age Pension with Article 1, Article 91, Article 105 and Article 109 of the Satversme (Constitution) of the Republic of Latvia* (Constitutional Court of Latvia).

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Table 3.1 *Equality Measures for Legal Impact*

Equality Measures	Description
Strong	
Radical Equality	All benefits accrue to the most disadvantaged.
Weighted Equality	The most disadvantaged gain the most benefit.
Moderate	
Proportional Equality	All groups gain equally in absolute or proportionate shares – immediately or over time.
Equality of Opportunity	The disadvantaged gain less overall than the advantaged but secure key capabilities or substantive equality.

Determining whether social rights adjudication does lead to distributive inequity is, however, complicated by a conceptual problem. What do we mean by equality? When is inequality a problem? Who are the 'advantaged' and 'disadvantaged'? Equality is a deeply contestable concept in both theory and practice. However, drawing on equality theory, we can consider four different equality benchmarks that might be acceptable (see Table 3.1).

The *strongest* benchmark is radical equality. Here, all benefits must accrue to disadvantaged groups. This yardstick is most apparent in the work of Ferraz. In chastising Brazilian courts for granting access to medicines to the middle classes, and authorities for distributing legal aid across multiple income deciles, he argues that all judicially generated benefits should be directed to the most disadvantaged.[28] An alternative and more flexible strong form is *weighted equality*. This standard does not bar the advantaged from benefitting from social rights adjudication – the primary concern is simply with compressing rather than exacerbating disparities. Such a benchmark might include a Rawlsian measure in which inequalities are tolerated as long as the system of adjudication maximises the position of the least advantaged among the different options for the most advantaged.[29]

[28] Octavio L. Motta Ferraz, 'Brazil: Health Inequalities, Rights and Courts', in Yamin and Gloppen (eds.), *Litigating Health Rights*, p. 76.

[29] John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), §16.1. The acceptable level of inequality may vary greatly across time and societies. The Rawlsian difference principle could support a very high or low level of inequality due to the contextual variance in possible social arrangements. If it results in a very high level of inequality though, Rawls simply states that the gap should be narrowed through intervention to prevent political dominance by the most advantaged.

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Agnosticism over social disparities is more apparent in the moderate forms of equality. The principal concern is with regressivity. The benchmark may simply require *proportionality* consistently (equal benefit to all groups). Alternatively, diachronic equality only requires equal benefits over time. For instance, disadvantaged groups 'piggyback' on litigation by advantaged groups by taking follow-up cases or sharing in the fruits of court-inspired policies.[30] An alternative moderate version, and drawing on Sen, is that adjudication should deliver at least equality of opportunities capabilities, which maximise individual well-being and freedoms even if advantaged groups may gain a greater share of the outcomes.[31] The sole concern here might simply include ensuring substantive equality in the realisation of non-comparative thresholds, such as an adequate standard of living or education.[32]

Parsing these measures, the radical equality demand seems too extreme: it risks ignoring the moderately poor, the working poor and the vulnerable working/middle class – even Marx did not ascribe to it.[33] The weighted form of equality seems more attractive in representing the transformative vision of social rights. As Marshall stated, in the most renowned article on social rights, inequality 'should not cut too deep'.[34] Instead, greater equalisation should be driven through the creation of 'an image of ideal citizenship against which the achievement can be measured'[35] with the reminder that '[e]quality of status is more important than equality of income'.[36]

[30] See Florian Hoffmann and Fernando Bentes, 'Accountability for Social and Economic Rights in Brazil', in Brinks and Gauri (eds.), *Courting Social Justice*, p. 100; Daniel Brinks and Varun Gauri, 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (2014) 12 *Perspectives on Politics* 375–393.

[31] Amartya Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009). For instance, Ferraz is critical of Brazilian courts for ordering expensive medicines for middle-class litigants while poorer litigants tend to use courts to secure very basic medicines and medical goods. This is problematic when viewed in the aggregate and in monetary terms and could be seen as enhancing inequality. But when looked at through the lens of basic capabilities or utility, the poor may have secured more. Note that this might mean a higher increase in utility for disadvantaged groups because they value the gains more highly.

[32] For a defence of social rights (as human rights) on the basis that provide only an adequate standard of living, see James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008); Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009).

[33] Stefan Gosepath, 'Equality' (2007) *Stanford Encyclopedia of Philosophy*.

[34] T. H. Marshall, 'Citizenship and Social Class', in T. H. Marshall (ed.), *Class, Citizenship and Social Development* (Westport, CT: Greenwood Press, 1964), 1–75.

[35] Ibid., p. 84.

[36] Ibid., p. 103.

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However, a significant caveat must be registered. More moderate approaches might be acceptable under certain conditions. This is because strong social citizenship approaches (which most critics favour)[37] emphasise universalist modes of social policy, and these benefit both the poor and middle class. Social welfare regimes are usually grounded on the conditional reciprocity of a cross-class social contract. They promote individual autonomy as much as equal respect. Thus, the middle class pay higher taxes but claw back significant benefits in the form of effective social services.[38] Any cursory analysis of social insurance schemes in developed states reveals the remarkable flow of state resources to the middle class.

Moreover, welfare states were advanced and built through strategic cross-class alliances that imposed costs on the capital class. The adoption of a universal logic was (and is) crucial to their political sustainability. The risk with excluding the middle class from social rights adjudication is that courts can become a targeting scheme without political legitimacy. Interestingly, and if we excluded civil and property rights judgments, the South African Constitutional Court is one of the few courts that would come close to meeting the radical equality test. Almost all its judgments *on social rights* have been targeted at the most disadvantaged, particularly slum-dwellers and those facing forced eviction. Yet, the Court has been criticised for being unresponsive to the social rights of other groups, for example in providing access to higher levels of water[39] or resisting the implication of social rights in contract law (with the exception of housing rights).[40]

To put it another way, the equality theory behind welfare states is *trichotomous* rather than binary. The upper classes are split from the middle classes in the comparison. Such a triad is nicely represented in the often-favoured Palma statistical test for inequality. The bottom 40 percent

[37] See Ferraz, 'Brazil: Health Inequalities', in Yamin and Gloppen (eds.), *Litigating Health Rights*, p. 76; Hirschl, 'The Judicialization', in Goodin, *Oxford Handbook of Political Science*, p. 253.

[38] This applies with strong force to the highly developed Nordic welfare states: Bo Rothstein, *Just Institutions Matter: The Moral and Political Logic of the Universal Welfare State* (Cambridge: Cambridge University Press, 1998); Vanessa Barker, 'Nordic Exceptionalism Revisited: Explaining the Paradox of a Janus-Faced Penal Regime' (2012) 17 *Theoretical Criminology* 5–25.

[39] See the following debate on the *Mazibuko* case.

[40] Liebenberg and Young, 'Adjudicating Social and Economic Rights', in García, Klare and Williams (eds.), *Social and Economic Rights*.

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are compared with the top 10 percent.[41] Thus, a triadic approach to equality assessments is arguably as important as any dyadic analysis. From this perspective, if the adjudicative gains for the middle class lay the basis for more a solid universalist social policy in the future, rather than ever-widening disparities, proportional equality may be attractive.

To conclude, distributive equality is challenging to define and we might have different expectations from the perspective of responsiveness. At a minimum, we might expect that inequality is not exacerbated, but it is also reasonable to suggest that courts can play *a* role in broader social transformation.

III. Theorising Judicial Behaviour

A. *Neutral but Strategic*

Why would we expect courts to behave in a responsive fashion? If we constrain ourselves to courts in which social rights are judicially enforceable, the idea of a responsive court rests essentially on two general theories of judicial behaviour. The first is liberal positivism. It is the idea judges are guided by the idea of the rule of law within a general or pluralistic 'liberal' framework. If a right is incorporated in constitutional instruments or international law, it is presumed that adjudicators will respond to their legal task in good faith and afford rights-enhancing outcomes as appropriate to the case. As Altman puts it: 'The rule of law can do this, according to liberal thought, because the law has the power to constrain, confine, and regulate the exercise of social and political power'.[42] Raz also heralds the neutrality of courts and argues that their prejudices or biases will be comparatively lower than other institutions.[43] Thus, any variance in judicial outcomes can only be explained by legal factors (the degree of recognition of a right, the seriousness of the allegation, the strength of any defence) or clear interference with their neutrality (e.g., lack of formal judicial independence).[44]

[41] Note that for some states in which 50 to 60 percent of the population live under the poverty line or on US$1–2 per day, the notion of the 'middle' class needs to be rethought.

[42] Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton, NJ: Princeton University Press, 1990).

[43] Joseph Raz, 'Disagreement in Politics' (1998) 43 *American Journal of Jurisprudence* 25–52.

[44] For a discussion on this point, see Hirschl, 'The Judicialization', in Goodin, *Oxford Handbook of Political Science*, pp. 263–266; Gloppen, 'Courts and Social Transformation', in Gargarella et al. (eds.), *Courts and Social Transformation*, p. 35.

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However, the idea of responsiveness means consequentialist behaviour – in which judges are aware of the implications of their action or inaction and would not simply remain in enforcer modus. Drawing on some strands of rational choice theory,[45] we might expect judges to act strategically to maintain the liberal ideal in nonideal circumstances. As noted earlier, this might require minimalism to maintain sociological legitimacy or, contrariwise, a more active posture to regain the trust of the public or key actors. The legacy of a cautious and corrupted past arguably explains the activism of the post–World War German court, the post-emergency Indian supreme court (from 1977), and post-authoritarian courts in Kenya (especially from 2010).

However, we can point to three counter-hypotheses that would suggest a different or more conditioned outcome – less responsiveness and potentially more distributive inequality. The first two concern an *internal* constraint (ideology and legal culture) and the third an *external* constraint (structure and politics).

B. *Realist and Ideological*

The ideological attitudes of judges are central in realist theories of judicial behaviour. In attitudinalism's strong form, judges rebuff the transformative claims of social rights because of their personal political preferences or background ideologies. O'Connell asserts that both were present in Supreme Court of Ireland's finding that social rights were largely non-justiciable.[46] The court's discourse was flavoured by neoliberal presumptions and the lead judge was affiliated to the centre-right ruling party.[47] Hirschl's early work on juristocracy predicts a similar result but for different reasons. Foregrounding history and underlying political economy, Hirschl argues that the making of constitutions was a process 'driven in many cases by attempts to maintain the social and political status quo and to block attempts to seriously challenge it through democratic politics'.[48] By entering into a 'strategic tripartite pact' with political and economic elites, judges attained enhanced

[45] See generally Epstein and Knight, 'Reconsidering Judicial Preferences', p. 11.
[46] O'Connell, 'The Death of Socio-Economic Rights', pp. 532–534.
[47] Ibid.; Katharina Müller, *Privatising Old-Age Security: Latin America and Eastern Europe Compared* (Cheltenham, UK: Edward Elgar Publishing, 2003).
[48] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004), pp. 213–214.

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symbolic and institutional power.[49] They were free to expand rights largely to the benefit of their own class.[50]

However, such a strong attitudinal hypothesis seems difficult to sustain. A more contingent version, found in later critical legal studies and attitudinalism, may be preferable. Indeed, Hirschl's recent writings suggest that a wider set of legal and strategic factors may be in play.[51] According to Duncan Kennedy, in resolving doctrinal gaps and conflicts, courts will find that their professional methods clash with their subjective preferences: the result is 'a compromise'.[52] Likewise, the attitudinalist school in political science is primarily concerned with variation in judicial political preferences across judges and over time.[53] Indeed, the rise and fall of implied social rights into the US Constitution (in the 1960s and 1970s) is significantly tied to the political preferences of the presidents who appointed the judges.[54]

Moreover, it is not immediately clear that rightward-leaning judges will be blind to distributive inequality. It may depend on their degree of libertarianism. One plank of the neoliberal Washington Consensus has been the removal of middle-class entitlements and replacement of social systems with a safety net (ironically, a radical form of equality).[55] Neoliberal ideology often points towards a minimalist welfare state.

C. *Culturally Conservative*

Sociological and historical institutionalism foreground legal culture and tradition. Ideational and institutional practices within a judiciary or broader legal community may be sticky, path-dependent and non-reflexive. Courts are not necessarily concerned with rapidly expanding

[49] Ibid.
[50] Ibid.
[51] Hirschl, 'The Judicialization', in Goodin, *Oxford Handbook of Political Science*, pp. 269–270.
[52] Duncan Kennedy, *Critique of Adjudication (fin de siecle)* (Cambridge, MA: Harvard University Press, 1997), p. 19.
[53] See discussion in introduction to Martin Shapiro and Alec Stone-Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002) for a history of attitudinalism in political science studies on the judiciary.
[54] See discussion in Cass Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York, NY: Basic Books, 2004).
[55] See Müller, *Privatising Old-Age Security*.

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their power and relevance except at rare critical junctures.[56] As Klare puts it, 'A defining property of legal cultures' is that 'its participants tend to accept its intellectual sensibilities as normal' such that they 'do not perceive the cultural specificity of their ideas about legal argument'.[57] This represents an obstacle for social rights: their long exile from legal discourse may heighten the cultural barriers to their entry within the legal community.

This legal-cultural resistance may be strengthened by idea of the *legal complex*.[58] Drawing on historical observations, Halliday, Karpik and others have argued that the legal profession – practicing lawyers, judges, prosecutors, legal academics – will only mobilise collectively and strongly to defend 'political liberalism'. Political liberalism is understood here as a moderate state and a limited set of civil rights.[59] It is presumed that the profession would most likely splinter over political *and* social rights and more expansive civil rights. While this theory fails to consider the legitimating effect of new social rights instruments, if a culture of defending 'political liberalism' is prevalent, social rights risk a delayed birth into judicial acceptability.[60] This stickiness may be also enhanced by strategic concerns of judges with reputation and leisure.[61] Staking out a new course may involve both critique and hard work.

This underlying legal culture or tradition may also generate a distributive bias in any application of social rights. According to Landau, judges will be *drawn* towards enforcement of individual (not collective) social rights and more negative obligations like non-retrogression.[62] These

[56] E.g., approaches that prize attitudinal and strategic accounts struggle to explain more cautious behaviour by courts with significant formal and informal independence: see Gunnar Grendstad, William R. Shaffer and Eric N. Waltenburg, 'Revealed Preferences of Norwegian Supreme Court Justices' (2010) 123 *Tidsskrift for Rettsvitenskap* 73–101; Tom Ginsberg and Tamir Moustafa, *Rule By Law: The Politics of Courts in Authoritarian Regimes* (New York, NY: Cambridge University Press, 2008); Gretchen Helmke and Julio Rios-Figueroa (eds.), *Courts in Latin America* (Cambridge: Cambridge University Press, 2011).

[57] Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* 146–188.

[58] Lucien Karpik and Terence Halliday, 'The Legal Complex' (2011) 7 *Annual Review of Law and Social Science* 217–236.

[59] For a full development of the idea of autonomous as well as repressive and responsive law, see Nonet and Selznick, *Law and Society in Transition*.

[60] See Malcolm Feeley and Malcolm Langford (eds.), *The Limits of the Legal Complex: Nordic Lawyers and Political Liberalism* (Oxford: Oxford University Press, 2019).

[61] Epstein and Knight, 'Reconsidering Judicial Preferences', 21.

[62] Landau, 'The Reality of Social Rights Enforcement', 401–459. However, see the following chapter by Landau and Dixon, 'Constitutional Non-Transformation: Socioeconomic Rights beyond the Poor' for a broader set of explanations.

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judicial modes mimic classical civil rights litigation and provide greater institutional comfort for courts. Yet, these doctrinal positions may be most susceptible to middle-class capture, as he seeks to demonstrate in the Colombian case.[63]

D. Structurally and Politically Constrained

Finally, the determinative factors for responsiveness may lie outside a court's remit. The combination of socio-economic conditions with legal structures and the political environment may significantly determine the extent to which social rights are actualised or equalised.

Ensuring courts adjudicate social rights may depend on potential litigants simply making it there with a reasonably argued substantiated case.[64] Courts are often at the mercy of the applicants when it comes to legal argument. Yet, there might be significant variation in who has access to good legal representation and other forms of support. According to Epp, the rise of court-based civil 'rights revolutions' was primarily predicated on strong civil society configuration: 'sustained judicial attention and approval for individual rights grew primarily out of pressure from below, not leadership from above'.[65] These civil society support structures tend to be well developed in certain common law countries but less present elsewhere. Nonetheless, these structural elements can be overcome, if the courts relax rules of standing, dispense with the need for legal representation or permit public interest claims, as has occurred in many South Asian, Latin American and increasingly African jurisdictions.[66]

[63] Ibid.

[64] It is often one of the first factors named in discussions among legal practitioners. See through the debate: Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (2006) 39 *New York University Journal of International Law and Politics* 1–155; James Cavallaro and Stephanie Brewer, 'The Virtue of Following: The Role of Inter-American Litigation in Campaigns for Social Justice' (2008) 5 *Sub-International Journal on Human Rights* 8–85.

[65] Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

[66] S. Muralidhar, 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights', in Langford (ed.), *Social Rights Jurisprudence*, p. 102; Bruce M. Wilson and Juan Carlos Rodríguez Cordero, 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics' (2006) 39 *Comparative Political Studies* 325–351; Bruce Wilson, 'Rights Revolutions in Unlikely Places: Costa Rica and Colombia' (2009) 1 *Journal of Politics in Latin America* 59–85.

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Moreover, the political environment may heavily constrain the space for courts to act strategically over time. There may be very little room for manoeuvre, particularly in fledgling democracies, anocracies or autocracies. However, and paradoxically, such a political environment may also incentivise greater activism and less reflexivity towards the state. If courts face critique from the public or political opposition for judicial timidity, then greater engagement may be politically prudent for the present and future.[67] In addition, courts may be concerned about pressure from above such as regional and international courts and quasi-judicial bodies. With an increasing number of international mechanisms covering all or many social rights, domestic courts may be more likely to adjust course to avoid international review.[68]

Turning to distributive inequality, Galanter famously argued on structural grounds that society's 'haves' are better able to leverage gains from litigation. They secure access to legal representation, strategically maximise the benefits of repeat litigation and accommodate the institutional passivity and duration of court-based procedure.[69] Carrying more 'legal capital', advantaged groups are able to overcome justiciability hurdles and more regularly capture the litigious benefits. The narrative of distributional inequalities in the Brazilian case is regularly expressed in Galanterian terms: the ease by which the middle class has access to this legal opportunity structure. The highly technical social rights cases under the new EU Charter might also be a case in point.

However, this structural prediction might be mediated in three respects. First, there may be countervailing legal mobilisation by the 'have-nots'. Second, maldistributive effects are likely to be dampened by judgments with precedential effects, such as in common law countries and civil law judgments of apex courts. Third, socio-economic structures may inflect different cases distinctively. Brinks and Gauri hypothesise

[67] See, e.g., Lee Epstein and Andrew Martin, 'Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)' (2010) 13 *Journal of Constitutional Law* 263–281; Juan-Carlos and Rodriguez-Rada, 'Strategic Deference in the Colombian Constitutional Court, 1992–2006', in Helmke and Rios-Figueroa (eds.), *Courts in Latin America*, p. 81; Theunis Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 71 *International Journal of Constitutional Law* 106–138.

[68] See discussion in Malcolm Langford, Bruce Porter, Julieta Rossi and Rebecca Brown (eds.), *The Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights: A Commentary* (Pretoria: Pretoria University Law Press, 2016).

[69] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', in Robert Cover and Owen Fiss (eds.), *The Structure of Procedure* (New York, NY: Foundation Press, 1979).

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that *regulation* cases 'almost necessarily extend to non-litigants' as the 'benefits of new forms of regulation are genuine (if not pure) public goods'.[70] Contrariwise, *obligation cases* (that modify the duties of a third party to an individual) will 'primarily benefit those who already have access to a services'.[71] Finally, in *provision* cases, benefits may be broadly extended but only if they are extended beyond individual litigants.

IV. Comparative Perspective

A. *A Future Foretold? US School Finance Litigation*

In light of these theoretical expectations as to the empirical potential for responsive adjudication, we now turn to examine practice. When examining comparative jurisprudence and experiences on social rights, the analysis is customarily narrated through individual country studies or a tour of India, South Africa, selected Latin American states and occasionally Germany or Hungary.[72] Curiously, it overlooks half a century of jurisprudence on the right to education in the United States. This phenomenon provides a fascinating comparative insight – a 'similar systems design' – into how the courts across multiple states wrestled at a much earlier stage with questions of justiciability, institutional competence, democratic legitimacy and demands for strong forms of equality. While there are some peculiarities in this American experience,[73] the context does not make for a strong exceptionalism in a global perspective.

In contrast to the US Constitution, all 50 state constitutions contain a specific section on education.[74] The provisions range from a mere 'duty to promote this important object' (Maine) to a 'paramount duty'

[70] Varun Gauri and Daniel M. Brinks, 'Introduction', in *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge and New York, NY: Cambridge University Press, 2008), 1–37, 11.

[71] Ibid.

[72] Philip Alston, 'Foreword', in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008), ix–xiii.

[73] This includes an express commitment in many constitutions to publicly provided and sufficiently funded schooling; heavily entrenched political and tax inequalities; the direct election of judges in some states; and the failure of the United States to ratify the ICESCR.

[74] 'It is the only public function that has its own article in every single state constitution in this nation.' A. Hickrod, Ramesh Chaudhari, Gwen Pruyne and Jin Meng, 'The Effect of Constitutional Litigation on Education Finance: A Further Analysis', in William Fowler (ed.), *Selected Papers in School Finance 1995* (Washington, DC: National Center for Education Statistics, 1995), p. 51. Otherwise, social rights are only occasionally and

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to make 'ample provision for the education of all children' (Washington).[75] The background was part of a broader movement to first develop free public schools and then ensure cross-subsidised funding.[76] Between 1776 and 1834, roughly half the states included more general educational clauses in their constitutions, while the remainder adopted more explicit provisions between 1835 and 1912.[77]

From the late nineteenth century onwards, courts responded with extreme caution to litigation based on these rights and duties.[78] Only if legislation was clearly irrational or arbitrary would courts feel compelled to intervene – and that was rare and limited.[79] In the 1960s, the issue was revived in the wake of the *Brown* v *Board of Education*.[80] For almost two centuries, state legislatures had been largely resistant to reducing a heavy reliance on local taxes,[81] and the quality of schooling remained highly dependent on the average wealth in a municipality,[82] yet the Supreme Court had now waded into the topic of education through the right to equal protection and articulated the importance of equal educational opportunity. The judgment held out the promise of rectifying dramatic inequality in school financing.

In the so-called first wave of school finance litigation, plaintiffs requested that statutes that authorised unequal educational expenditures violated the *civil right* of equal protection. The federal courts

randomly included in state constitutions. See generally Cathy Albisa and Jessica Schultz, 'The United States: A Ragged Patchwork', in Langford (ed.), *Social Rights Jurisprudence*, p. 250.

[75] Maine Constitution, art 8; Washington Constitution, art 9. See overview in *Pauley v. Kelly* 225 S.E.2d 859, 884 (Appendix 1, 'Clauses in State Constitutions Providing for School Systems') (1979) (Supreme Court of Appeals of West Virginia, United States).

[76] See discussion, e.g., in *Robinson* v. *Cahill* 62 N.J. 473, 507 (Supreme Court of New Jersey, 1973).

[77] P. Trachtenberg, quoted in Hickrod et al., 'The Effect of Constitutional Litigation on Education Finance', in Fowler (ed.), *Selected Papers*, p. 37.

[78] See e.g., *Landis* v. *Ashworth (School District No. 44)*, 57 N.J.L. 509, 31 A. 1017 (Supreme Court of New Jersey, 1895).

[79] *People ex rel. Russell* v. *Graham,* 301 Ill. 446, 452 (Supreme Court of Illinois, 1922); *Mumme* v. *Marrs*, 120 Tex. 383, 396 (Supreme Court of Texas, 1931); *Flory* v. *Smith*, 134 S.E. 360, 362 (Supreme Court of Virginia, 1926).

[80] *Brown* v. *Board of Education*, 347 U.S. 483 (Supreme Court of the United States, 1954).

[81] At times, the resistance may have been justified. The Court in *Robinson*, 62 N.J. at 508. Notes that wealthier communities complained that the rural areas 'deliberately' undervalued their taxable revenue in order to increase cross-subsidisation.

[82] Harold Horowitz, 'Unseparate but Unequal – The Emerging Fourteenth Amendment Issue in Public School Education' (1965–1966) 13 *UCLA Law Review* 1147–1172 at 1147.

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acknowledged the deep inequality in the financing and quality of education[83] but found the claim non-justiciable.[84] This was because the 'only possible standard' for review was the 'rigid assumption that each pupil must receive the same dollar expenditures'.[85] Legal advocates shifted strategy away from a predetermined equality formula to a justification standard, which initially produced results.[86] In the *Serrano* v. *Priest* judgment (1971), the California Supreme Court found that education was a 'compelling interest' and 'wealth' a suspect category, and thus a 'strict scrutiny' standard was required for the right to equal protection.[87] This line of reasoning was, however, short-lived. In *San Antonio School District* v. *Rodriguez*, the US Supreme Court ruled that wealth could not be a suspect class in the domain of education like race, and education, at least beyond the barest minimum, was not a federal constitutional right.[88]

This loss sparked a second wave of litigation as litigants turned to the express rights to education in state constitutions. It proved more successful. Many state courts rejected the earlier and restrictive justiciability doctrines concerning education rights, most comprehensively in *Seattle School District No. 1*.[89] In this conducive environment, a number of courts proceeded to make positive substantive rulings. In the landmark case for this second 'equity wave' of litigation, the Supreme Court of New

[83] *McInnes* v. *Shapiro*, 293 F.Supp. 327 (District Court N. D. Illinois, 1968); see also *Burress* v. *Wilkerson*, 310 F.Supp. 572 (District Court, W. D. Virginia, 1969). There were 'no judicially discoverable and manageable standards' by which 'a court can determine when the Constitution is satisfied and when it is violated' in respect of the right to equal protection and there might be good reasons for variations in expenditure (p. 335).

[84] Ibid.

[85] Ibid.

[86] William R. Andersen, 'School Finance Litigation – The Styles of Judicial Intervention' (1979–1980) 55 *Washington Law Review* 137–175 at 46.

[87] *Serrano* v. *Priest*, 5 Cal.3d 584, Part II (Supreme Court of California, 1971); see generally Molly McUsic, 'The Use of Education Clauses in School Finance Reform Litigation' (1991) 28 *Harvard Journal on Legislation* 307–340.

[88] *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (Supreme Court of the United States, 1973).

[89] *Seattle School District No. 1* v. *Washington*, 90 Wn.2d 476 (Supreme Court of Washington, United States, 1978). The Court rejected the suggestions that the provision was preambular, vague, hortatory or a policy goal; it was 'declarative of a constitutionally imposed *duty*' (p. 409). Equally the provision was not solely directed to the legislature. Subjective rights were evident by the mention of a class of persons ('all children') and plaintiffs were able to show that individual interests were affected (p. 502). Finally, it spurned claims concerning the separation of powers noting that the 'compartments of government are not rigid' (p. 502). For a more detailed overview of the two periods, see Rebell, 'The Right to Education in the American State Courts' (chapter 5).

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Jersey ruled in 1973 that the system of school financing violated the constitution. According to the Court, the legal standard was open-textured but demanding: the system must provide a 'thorough and efficient education' for all children.[90] This meant that the state was faced with achieving a particular result but there was considerable flexibility in the means to be applied.[91] Turning to whether the state's action passed constitutional muster, the Court found that the test for review was whether New Jersey could demonstrate it has 'a plan which will fulfil the State's continuing obligation'.[92] The plan 'must define in some discernible way the educational obligation' and if local schools are tasked with financing, it 'must *compel* the local school districts to raise the money necessary to provide that opportunity'.[93] Yet, it found that there was no official definition of the constitutional right and that the financing scheme 'was a patchy product reflecting provincial contests rather than a plan sensitive only to the constitutional mandate'.[94] Refusing requests for supervisory jurisdiction or specific orders, the Court granted the state nine months to develop a new plan, with the rider that equal financing would be automatically required in the absence of a plan.[95]

In the next wave of litigation, there was a decisive shift from equity to an adequacy argument: a threshold level of the right to education for all. The cause for the shift was diverse. It included the particularities of constitutional provisions,[96] the perception than adequacy claims were more justiciable,[97] a recognition that finance inequities were only one explanation of inadequate education and that the public and courts were more attuned to measures of standardised achievement.[98] In the most well-known adequacy case, *Rose* v. *Council for Better Education*, the Supreme Court of Kentucky specified that the duty to provide an efficient system of education means providing each and every child with seven

[90] Ibid., at 513.
[91] Ibid. 'Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands.'
[92] Ibid., at 519. This is not dissimilar to the widely quoted reasonableness test of the 2000 Grootboom case in South Africa, which appeared 27 years later.
[93] Ibid.
[94] Ibid., at 518.
[95] Ibid., at 480.
[96] Thompson and Crampton, 'The Impact of School Finance Litigation', 133–172.
[97] See *Olsen* v. *State*, 554 P.2d 139 (Supreme Court of Oregon, 1976), and discussion in Michael Heise, 'State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy' (1995) 68 *Temple Law Review* 1151–1176 at 1161.
[98] Heise, 'State Constitutions', 1151–1176.

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particular capacities.[99] The Court then cited a range of evidence suggesting that the Kentucky system was inadequate and financial and educational efforts were wanting. In the end, it made a single order declaring the 'entire system of common schools' unconstitutional and remitted the matter to the legislature for comprehensive reform.

These waves of education litigation (which continue) provide a number of useful pointers to the questions at hand. Many courts did display a *responsive posture* and the above New Jersey and Kansas judgments are cases in point. They overcame classical objections of justiciability and developed legal standards of review for a social right with clear positive obligations. At the same time, they displayed a sensitivity to the constraints of their institutional competence and their legitimacy vis-à-vis the legislature in the crafting of both standards of review and remedies.

However, such responsiveness was not uniform. Outcomes varied significantly between state courts. In the equity-dominated period between 1972 and 1992, more than 60 lawsuits were filed in 41 states.[100] Complainants achieved success to varying degrees in more than half of them.[101] However, the success rate improved in the first decade of the adequacy wave of litigation: from the early 1990s, 68 percent of cases were successful.[102] This variance suggests that the alternative but *conditional hypotheses* discussed in the preceding text may be prescient in understanding the uneven response of courts. A review of the literature on school finance litigation suggests that the variation was partly attitudinal (courts were more responsive when there was a majority of Democrat-appointed judges) and partly strategic (more responsive when parent's and teacher organisations were mobilised, or executives needed to judicial support to push school finance reforms through a hostile congress). Legal culture may have also mattered. According to Hickrod,

[99] *Rose* v. *Council for Better Education*, 790 S.W.2d 186 (Supreme Court of Kentucky, 1989).
[100] Berry, 'The Impact', in West and Peterson (eds.), *School Money Trials*, p. 213.
[101] 'At present, 17 states have successfully defended their statutes against constitutional challenges and more will likely do so in the future', Hickrod et al., 'Constitutional Litigation', in Fowler (ed.), *Selected Papers*, p. 50. Rebell found that 47 percent of surveyed cases in this period were successful: Michael A. Rebell, *Courts and Kids: Pursuing Educational Equity through State Courts* (Chicago: University of Chicago Press, 2009).
[102] Rebell, *Courts and Kids*, p. 23. The sample size for the first period was 15 cases; the second period 22 cases.

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'Traditions of court deference to legislative bodies in this area are quite strong in a number of states'.[103]

It is equally important to inquire about *distributive impact*. The litigation waves have produced an enormous but contradictory literature on its effects.[104] There is consensus that court orders did *increase funding* for schools over time. Controlling for different factors, the presence of a positive judgment provided 'roughly $450 per pupil in additional revenue' which 'represents about 14 per cent of mean per-pupil state education revenue'.[105] There is much less evidence that the quality of education has improved,[106] but critics are willing to concede that 'school finance has received heightened scrutiny as a result of litigation'.[107] Turning to distributive inequality specifically, initial studies pointed to modest or negligible change.[108] Yet, in a longitudinal perspective, it is possible to observe a narrowing of inequalities, even with adequacy-based litigation. In chapter 5 in this volume, Rebell reports on the various low-income schools closing achievement gaps after litigation; and Berry demonstrates quantitatively that litigation reduced the Gini gap by about 16 percent while the bulk of the financing gains have accrued to low-income districts with median-income districts partly benefiting.[109] While this number is not particularly high, it is worth recalling that middle-class and wealthier school districts long resisted heavily any equalisation of financing.

[103] Hickrod et al., 'Constitutional Litigation', in Fowler (ed.), *Selected Papers*, p. 50.

[104] One systemic review study counted more than 200 scholarly articles, addressing either individual states or national patterns. Thompson and Crampton, 'The Impact of School Finance Litigation', 133–172.

[105] Berry, 'The Impact', in West and Peterson (eds.), *School Money Trials*, p. 213. Moreover, this is only partially offset by a decrease in local funding or other changes in state-local funding. However, the debate on the effect of quality of schooling and political effects vary. See ibid.

[106] Thompson and Crampton, 'The Impact of School Finance Litigation', 133–172; Margaret E. Goertz, 'School Finance in New Jersey: A Decade after Robinson v. Cahill' (1983) 8 *Journal of Education Finance*, 4, 475–489.

[107] Eric Hanushek and Aldred A. Lindseth, *Schoolhouses, Courthouses, and Statehouses: Solving the Funding-Achievement Puzzle in America's Public Schools* (Princeton, NJ: Princeton University Press, 2009).

[108] Berry, 'The Impact', in West and Peterson (eds.), *School Money Trials*, p. 213 on the equity effects of *Robinson*, 62 N.J. at 473, in the first decade after the decision.

[109] Ibid.

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B. A Cross-National Review: Judicial Abdication

A similar picture on the degree of *judicial abdication* arguably emerges when we consider jurisprudence across the world. In a back-of-the-envelope calculation of doctrinal responsiveness in 54 countries, with an even spread across different regions with the exception of the Middle East, I found the following.[110] Each country's apex court was coded (with a score between 1 and 8) for its doctrinal stance on positive obligations for social rights and the standard of scrutiny for its application. The variance was substantial across and within regions and archetypal countries and are discussed in the following text. An initial multivariate test was then run for many of the explanatory theories together with controls for region, development level and legal system. The preliminary results suggested that judicial neutrality and strategic accounts were the most relevant.[111] Two 'justiciability variables' – denoting the degree of constitutional recognition of enforceable social rights – were positive and close to significance. Moreover, and especially, robust doctrines emerged in countries with a long experience of high-income inequality, suggesting that courts were sensitive to executive policy failures and/or public opinion. Moreover, the most consistently conservative region was Africa, suggesting either strategic judging (vis-à-vis strong executives) or entrenched legal cultures.

However, these estimates were very rough. A more rigorous approach is being taken to building a comparative database of social rights judgments. For instance, judgments on the right to water from 35 countries were recently coded. In terms of success, 67 percent of the discrete claims were fully successful and 13 percent partially successful.[112] In this chapter, a qualitative approach will be taken to the question. The analysis

[110] See Langford, 'Social Rights Adjudication: Interdisciplinary Perspectives', in PhD thesis, Faculty of Law, University of Oslo (2014). The coding was based on the country studies in Langford, *Social Rights Jurisprudence*, secondary literature and selected interviews. It is currently being revised through an expert survey.

[111] The civil society variable is weak, which possibly downplays Epp's version of the exogenous important of support structures. While the data for this indicator is not particularly strong, it suggests that court-driven open-access procedures may be equally important: Wilson, 'Rights Revolutions in Unlikely Places', 59–85. Interestingly, common law countries were slightly less likely to provide rights-enhancing outcomes, which confirms the dubious nature of this expectation.

[112] There were 99 discrete claims in the 79 cases. Information was missing on the success of 20 of these claims and these were removed from the calculation. See Malcolm Langford and Anna Russell, 'Introduction: The Right to Water in Context', in Malcolm Langford and Anna Russell (eds.), *The Human Right to Water: Theory, Practice and Prospects* (Cambridge: Cambridge University Press, 2017), 1.

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divides up jurisdictions according to three broad archetypes and investigates the casual patterns in a number of them.

1. Classical Archetypes

The first group is 'classical' courts. In the case of formal doctrine, it is possible to observe a range of countries that have hardly budged at the justiciability stage. In this category, we could include Ireland, Netherlands,[113] Denmark, Uganda, Philippines and, partly, Norway and France.[114] The archetypal example is the Supreme Court of Ireland. In *Sinnott Minister for Education*, which concerned the right of a man with autism to primary education, the court established the principle that it should refrain from using its powers to enforce positive constitutional rights, unless there were very exceptional circumstances.[115] The leading judgment by Justice Hardiman cites all the standard objections to the justiciability of social rights: it would force judges into 'ranking some areas of policy in priority to others', 'lead the courts into the taking of decisions in areas in which they have no special qualification or experience', result in the inappropriate use of individual-based adversarial procedures to solve 'issues of policy' and would permit courts to make decisions that 'they are not, and cannot be, democratically responsible for'.[116] Ultimately, such a practice would 'offend' the constitutional separation of powers because there is a 'proper sphere for both elected representatives of the people and the executive elected or endorsed by

[113] *'Right to Strike Case'*, 6 December 1983, NJ 1984, 557 (Supreme Court of Netherlands). In addition, the Court places emphasis on the explanation given by the Dutch government at the time of ratification as to whether a treaty is justiciable. See also 6 September 2000, *Rawb* 2001, 55 (District Court of the Hague, Netherlands), and 31 March 1995, *JB* 1995, 161 (Central Court of Appeals, Netherlands), and discussion in Frank Vlemminx, 'The Netherlands and the ICESCR: Why Didst Thou Promise Such a Beauteous Day?', in Fons Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp, Belgium: Intersentia and Maastrict Centre for Human Rights, 2006), p. 60.

[114] See discussion in Laurent Pech, 'France: Rethinking *Droits-Créances*', in Langford (ed.), *Social Rights Jurisprudence*, p. 267. For examples of the exceptions, see *Loi portant diverses mesures relatives aux prestations de vieillesse* CC, May 28, 1983, No. 83–156DC (Constitutional Council, France); *Loi relative à la lutte contre le tabagisme et l'alcoolisme* CC, January 8, 1991, No 90–283 DC (Constitutional Council, France). The Constitutional Council has begun to shift over the last decade, applying international treaty provisions, and the Council of State has enforced the right to housing in some concrete cases: see, e.g., Ministre de l'immigration c/ M Conseil d'État, Juge des référés, 13/08/2010, 342330 (Council of State, France).

[115] *Sinnott* v. *Minister for Education* [2001] 2 IR 545 (Supreme Court of Ireland).

[116] Ibid., at 710–711.

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them in the taking of social and economic and legislative decisions, as well as another sphere where the judiciary is solely competent'.[117]

What explains such judicial conservatism? Does the Irish court's behaviour reflect the neoliberal zeitgeist as argued by O'Connell? I am doubtful. For a start there is a dissent by the Chief Justice. It is thoughtful, positivist and responsive: 'Where, as here, the State have conspicuously failed in their constitutional obligation to provide the education to which a citizen is entitled the courts will ensure that the right is given full legal effect by whatever remedy is appropriate'.[118] Moreover, the precedent upon which the majority liberally quotes for its position, *O'Reilly* from 1989, precedes Ireland's rightward shift.[119] More likely, other factors are at play. The first is attitudinalism given some of the political affiliations of *some* of the judges. Second, there is a dynamic interplay between classical legal culture and the arrival of new cases. Judges seem to respond differently to this initial challenge to the paradigm. For instance, within the Irish High Court, we see a more responsive shift over time,[120] including by the original author of the *O'Reilly* judgment.[121] Indeed, if we look at judgments from other countries named above – Norway, Netherlands and Uganda – the role of legal culture seems particularly strong. Third, the legal argument by the plaintiffs in *Sinnott* was somewhat rigid – to which at least one justice took umbrage. The plaintiffs relied on a strict construction of the right to education, an absolute interpretation requiring that all persons had a right to education with no space for discretion. One wonders whether the advocacy of a proportionality or balancing test might have been more strategic.[122]

However, it is important not to connect too quickly to countries with similar outcomes. The Norwegian Supreme Court's cautiousness might be explained as much by responsiveness as tradition. While the Court has adjudicated civil rights since the nineteenth century, it has been cautious

[117] Ibid., at 710.
[118] Ibid., at 640.
[119] *O'Reilly* v. *Limerick Corporation*, [1989] I.L.R.M. 181 (High Court of Ireland).
[120] See, e.g., *O'Donoghue* v. *Minister for Health*, [1996] 2 IR 20 (High Court of Ireland); *Sinnott*, 2000 IEHC 148 (High Court of Ireland); *O'Carolan* v. *Minister for Education*, (2005) IEHC 296 (High Court of Ireland). See discussion of the cases in Aoife Nolan, 'Ireland: The Separation of Powers Doctrine vs. Socio-economic Rights', in Langford (ed.), *Social Rights Jurisprudence*, p. 295.
[121] The case also involved positive obligations concerning accommodation for travellers with resource consequences.
[122] *Sinnott* (2001), para. 694. The state would have to strongly justify why primary education would not be provided to certain adults and demonstrate that alternatives did not exist.

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in applying the ICESCR (incorporated in superior legislation in 1999), adopting a classical legal position with doubts over the justiciability and self-executing nature of social rights. Beyond tradition, what might partly explain the current equilibrium[123] is that no serious case of violations has emerged in constitutional law. In the few cases in which the ICESCR has been invoked, social rights were either not immediately relevant (it concerned the content of religious education)[124] or there was clearly no significant deprivation (a challenge to the rule that new farm owners must initially reside on their property on the basis that it frustrated alternative job opportunities).[125] Given that the Court has been responsive on an important social rights case in administrative law, it is not yet known how it would respond to a more serious social rights claim (of which there could be a number in Norway).

2. Enforcer (and Responsive) Archetypes

At the other end of the spectrum, we find courts that might fit the enforcer picture, although many with responsive dimensions. In this category, we could include apex courts in Costa Rica, Colombia, Nepal, Portugal, Latvia or local courts in Finland.[126] In most cases, these courts have relied on express social rights, occasionally implied social rights. Some of these courts have displayed clear 'enforcer' tendencies at times (Portugal in the early 1980s, Colombia Court in the early 2000s) and could be considered purely activist – the extent to which they recognise and articulate their institutional limits and success rates varies.

Many might place the Colombian Constitutional Court as the archetype in the responsive category, although it has not always been reflexive as will be discussed later. This Court has required that the state 'must devise and adopt a plan of action for the implementation of the rights' even if obligations concerning social rights are progressive in

[123] It is thus 'responsive' is being largely deferential to legislation designed to fulfil social rights or other social objectives.

[124] Rt. 2001–1006 (Supreme Court of Norway).

[125] Rt. 2011 s.304 (Supreme Court of Norway). Note that there is a right to inherit farm property at a below-market price. The Court emphasised that the applicant's social rights were not at stake as he could have chosen to sell the farm and live close to his place of employment instead of having to commute.

[126] See, e.g., Wilson, 'Rights Revolutions in Unlikely Places', 59–85; Malcolm Langford and Ananda Bhatterai, 'Constitutional Rights and Social Exclusion in Nepal' (2011) 18 *International Journal on Minority and Group Rights* 387–411; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008), p. 146.

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character.[127] It has intervened to immediately enforce such rights by broadly interpreting the right to life, dignity and security and enforcing 'minimum conditions for dignified life'. Procedurally, the court accepted that claims for violations by public or private actors of the minimum core of social rights could be litigated under the *accion de tutela*, which permits an individual to secure a summary proceeding and judgment within ten days of filing the writ.[128] And, it has issued structural judgments where it finds an 'unconstitutional state of affairs'. If there are systematic and widespread violations of a number of constitutional rights, which cannot be attributed to only one state authority, the Court has stepped in to make wide-ranging orders.[129]

The Latvian Constitutional Court is perhaps the most consistently responsive court. The ICESCR is incorporated in the Constitution and the Court has ruled a number of times on the right to social security. For example, structural adjustment legislation that was enacted to fulfil terms of a loan bail-out from the International Monetary Fund and European Union in 2009 was found to have substantively violated the individual's right to social security.[130] The decision is remarkable given Latvia experienced the largest fall in GDP during the global financial crisis of 2007–2008. While the Court affirmed that states must be granted '[r]easonable freedom of action' to take swift and concerted action in a major economic recession,[131] it found that the cuts failed a proportionality test. After inviting and assessing submissions from 19 different government and non-government actors, the Court held that neither the Cabinet nor the Parliament 'had carried out an objective and well-balanced analysis' of the 'consequences' nor had they considered 'less restrictive means for the attainment of the legitimate end'.[132] On the evidence, the Court found that the minimum core of the right was threatened for poorer pensioners, and the choice of social benefits resulted in an arbitrary distribution of social security benefits. Yet, the

[127] SU-111/97 (Constitutional Court of Colombia).
[128] See discussion in Tushnet, *Weak Courts, Strong Rights*, p. 146.
[129] See e.g., T-760 of 2008 (Constitutional Court of Colombia).
[130] Case No. 2009–43-01 On Compliance of the First Part of Section 3 of State Pensions and State Allowance Disbursement in 2009 – 2012) insofar as it Applies to State Old-Age Pension with Article 1, Article 91, Article 105 and Article 109 of the Satversme (Constitution) of the Republic of Latvia.
[131] Ibid., para. 27.2.
[132] Ibid., para. 30.2.2.

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court was reflexive in its remedy, providing the government five years to repay pensioners (although priority was to go to the poorest pensioners).

Another fascinating court is the Nepal Supreme Court. It has witnessed a slew of successful public interest litigation on civil, political, property and economic, social and cultural rights in the last decade. For example, in *Prakashmani Sharma and Others*, the Supreme Court responded to evidence that uterus prolapse was affecting at least 600,000 women, especially in remote and poor districts,[133] and ordered the adoption of the necessary laws and measures to create a satisfactory and conducive environment for fulfilment of the right to reproductive health. However, applicants do not always succeed and perhaps justifiably so. In *Mohan Kumar Karna*,[134] the petitioners argued that a law permitting a school management committee to levy fees beyond the monthly and readmission fees violated the right to equality and education. The Supreme Court disagreed and observed that education was a matter to be realised subject to the availability of economic resources. It also observed that free education was being given to students from families below the poverty line and to Dalits, ethnic communities and girl students up to lower secondary and secondary level.

What explains why these courts emerge as responsive is challenging. The Nepali Supreme Court is particularly puzzling as the court possessed a deeply legal conservative culture and the country was buffeted by poor economic development and a civil war. Despite the turmoil of Nepal, the judiciary and legal profession has maintained its distinct autonomy, and while judges have clear personal political preferences, they appear muted in the judicial arena.[135] The explanation might be strategic and structural. The Court needed to play a more active role in order to retain public legitimacy: it was stung by widespread criticism of its deference to the monarchy in the early 2000s.[136] Moreover, the rise

[133] *Prakash Mani Sharma & Ors.* v. *GON, Office of Prime Minister and Council of Ministers & Ors* (June 2008), Writ No. 064-WO-0230 (Supreme Court of Nepal).

[134] *Mohan Kumar Karna & Ors.* v. *Ministry of Education and Sports*, SCN, March 2003, N.K.P. 2060 No 7/8 p 551 (Supreme Court of Nepal).

[135] For instance, both left-wing and right-wing parties have recruited Attorneys General from the upper echelons of the judiciary.

[136] Similar to the Indian Court's deference to the executive in the late 1970s. Manoj Mate, 'Public Interest Litigation and the Transformation of the Supreme Court of India', in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds.), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge: Cambridge University Press, 2013), 262–288.

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of political competition, a highly divided legislature and a shifting executive created a certain degree of political latitude. To this, one could add changing responsive legal cultures and judicial leadership. Many senior judges undertook postgraduate training in India (and were thus informed about their neighbour's public interest litigation model), and one of the sharpest and bravest judges on the court, Khalyan Shrestha, was also well read in and sensitive to comparative rights jurisprudence.

3. A Mixed Global Picture: Deferentialism

Complicating further this picture are those courts that evince more moderate or conflicting stances. The South African Constitutional Court provides a classificatory dilemma – with one scholar judge labelling it 'deferentialism light'. In its landmark *Grootboom* judgment, the Court established the reasonableness test for the evaluation of governmental policy and action, generating significant optimism about the potential for the use of constitutional strategies.[137] The follow-up judgment in *Treatment Action Campaign* appeared to confirm this potency.[138] The Court held that a policy that limited access to antiretroviral treatment that prevented mother-to-child transmission of HIV to a few pilot sites was irrational in light of medical evidence and the costs involved.

However, the Court soon attracted its fair share of critics. It was slated for failing to enforce a minimum core obligation,[139] avoiding the definition of the content of the rights,[140] evincing a reticence to supervise implementation of the remedies[141] and adopting an overly depoliticised proceduralism in its reasoning mimicking the neoliberal demands of 'good governance'.[142] These sceptical arguments appear vindicated by two later cases. In *Mazibuko*, the Court found that the City of Johannesburg's policy of prepaid water meters did not constitute a form of

[137] The amicus curiae noted it was a 'watershed moment in our constitutional democracy' and showed 'the power of desperately poor people to leverage assistance from the state', Legal Resources Centre, *Annual Report for the Period 1 April 2000 to 31 March 2001* (Johannesburg: Legal Resources Centre and Legal Resources Trust, 2002), p. 4.

[138] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (TAC).

[139] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007).

[140] Stuart Wilson and Jackie Dugard, 'Constitutional Jurisprudence: The First and Second Waves', in Langford et al. (eds.), *Symbols or Substance?*, p. 35.

[141] Christopher Mbazira, 'Non-Implementation of Court Orders in Socio-economic Rights Litigation in South Africa' (2008) 9 *ESR Review* 2–7.

[142] Danie Brand, 'Courts, Socio-Economic Rights and Transformative Politics' (2009) *Stellenbosch University*.

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'disconnection or limitation', that the rollout of these meters in exclusively poor black areas was not indirect discrimination and that a policy of providing 25 litres per person per day (on the assumption that a household had eight persons) was reasonable even though it resulted in only eight litres per person in large households and international standards pointed towards 50 litres per person per day. In *Nokotyana*, the Court rejected claims for a free-standing right to basic sanitation and access to improved ventilated pit latrines in informal settlements.[143] These critiques have attracted some pushback, and it may be still too early to forecast the future pattern of jurisprudence.[144] In *Nokotyana*, the applicant only raised the positive rights issue in the final hearing and the claim was not well-argued. In addition, the court has been very robust in cases concerning negative obligations for social rights, especially forced evictions. As Wilson and Dugard conclude in their critique, the forced eviction cases reveal 'the power and the peculiarity of the interpretive approach the Court adopted in *Grootboom*'.[145]

Explaining South African deferentialism is as difficult as characterising it.[146] Brand argues that the Court reveals an affinity with neoliberalism.[147] The argument is attractive and the Court certainly does possess a rather idealised conception of governance, but it is not consistent in doing so. My sense is that the South African legal profession's culture of classical legal liberalism, identified earlier by Klare, seems to cast a long shadow.[148] The *Mazibuko* decision, authored by Justice O'Regan, is an illustrative example. Her reciting of the *Grootboom* decision seems selective and amounts to almost a reinterpretation such that *Grootboom* represents in her retelling a more classical autonomous model of law.[149]

[143] *Nokotyana and Others* v. *Ekurhuleni Municipality* 2010 (4) BCLR 312 (CC), paras. 29–31, 45.

[144] Mbazira, 'Non-Implementation of Court Orders', 24.

[145] Wilson and Dugard, 'Constitutional Jurisprudence', in Langford, Cousins et al. (eds.), *Symbols or Substance?*, p. 35.

[146] Indeed, some critics acknowledge that it may be too early to forecast the pattern of jurisprudence: Patrick Bond, 'Fighting for the Right to the City: Discursive and Political Lessons from the Right to Water' (2010), presented to The Right to Water Conference at Syracuse University

[147] Ibid.

[148] See generally, Liebenberg, *Socio-Economic Rights*.

[149] She stated: 'Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it

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This partially regressive move is notable because the government has criticised the Court at times for being too cautious on social rights.[150] Given that the Court's sociological legitimacy is lowest amongst black South Africans,[151] a responsive stance on social rights would presumably offer a helpful strategy in building the reputation of the judiciary in the post-apartheid era.

Jurisprudential variation can also be found across time. In China, between 2001 and 2008, the Court issued 27 decisions in which it directly applied constitutional rights, including the right to education in the *Qi Yuling* case.[152] However, in 2008, seemingly under political pressure, the Court repealed their legal interpretation in all these cases.[153] Things went the other way in Kenya. The adoption of a new constitution in 2010; a period of judicial education and pressure from the public; and a new progressive chief justice to show responsiveness has ushered in a new era of social rights jurisprudence. Slum communities and tenants traditionally fared badly in court[154] but have found in a rush of recent cases a more receptive judicial audience;[155] while courts have ventured into

makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No 2*, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised' (para. 67).

[150] Indeed, the Ministry of Justice and Constitutional Development tendered for an assessment of the Court's jurisprudence and whether it contributed to 'social transformation'. Compared to civil rights, the Court has issued fewer decisions and, in the *Mazibuko* case, the Johannesburg municipality, not the High Court, was strongly criticised by national members of the ruling party after the initial judgment.

[151] James Gibson and Gregory Caldeira, 'Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court', (2003) 1 *The Journal of Politics* 1–30.

[152] *'Qi Yuling', Interpretation* (2001) No. 25 Official Reply of the Supreme People's Court on Whether the Civil Liabilities Shall Be Borne for the Infringement upon a Citizen's Fundamental Right to Education (Supreme People's Court of China).

[153] *Zhushi* [2008] 15 (Supreme Peoples' Court of China).

[154] See overview in Lawrence Baum, *The Puzzle of Judicial Behaviour* (Ann Arbor: University of Michigan Press, 1977).

[155] 'The argument that social and economic rights cannot be claimed ... ignores the fact that no provision of the Constitution is intended to wait until the State feels it is ready to meets its constitutional obligations. Article 21 and 43 require that there should be "progressive realization" of social economic rights, implying that the State must begin to take steps, and I might add, be seen to take steps, towards realization of those rights.' *Satrose Ayuma & Ors* v. *The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Ors*, High Court of Kenya, Petition No. 65 of 2010, Judgment of 17 February 2011. Likewise, the same judge ordered an injunction against eviction in

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positive obligations after social rights were declared justiciable.[156] The Kenyan experience thus shows that a long-standing legal culture can dissolve swiftly in a new institutional environment.

4. Reflections

The preceding analysis suggests that the intensity and spread of social rights jurisprudence varies within and across states and that no single explanation suffices. The potential responsiveness of courts is mediated by internal and external constraints. However, the brief case studies also reveal some factors that seem to shift a court into a more responsive or less responsive modus. It might be new judges with a different ideology, it might be shifts in legal culture occasioned by comparative learning, or it might be new political pressures from governments or publics. To a large extent, many of these factors are exogenous to those who wish to advance social rights litigation, but some endogeneity is present. As some of the case studies reveal, well-framed legal arguments, judicial education or campaigns for constitutional reforms can push courts in a more responsive direction.[157]

V. Distributive Inequality

No scholarly effort provides a systematic picture of the extent to which court rulings are distributively fair. Until recently, the most common approaches have been qualitative and longitudinal studies of a single court or jurisdiction over time.[158] This has been supplemented by comparative studies – usually four to five countries – that compare the trends across countries in an abbreviated or anthological form.[159] A few authors have gone beyond doctrinal outcomes and quantitatively broken down

Kariuki & Ors. v. *The Town Clerk, Nairobi City Council & Ors.* High Court of Kenya, Petition No. 65 of 2010, Judgment of 17 February 2011.

[156] *Mitubell Welfare Society* v. *Attorney General and Two Others*, Petition No. 164 of 2011 (High Court of Kenya).

[157] Easier access to the courts is not included as this factor seems to falter when applied to the United States and South Africa, where very liberal rules of standing do not always translate into progressive outcomes.

[158] Liebenberg, *Socio-Economic Rights*; Brand, 'Courts, Socio-Economic Rights and Transformative Politics'; András Sajó, 'Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court', in Gargarella et al. (eds.), *Courts and Social Transformation in New Democracies*, p. 83; Pablo Rueda, 'Legal Language and Social Change during Colombia's Economic Crisis', in Javier Couso, Alexandra Huneeus and Rachel Sieder (eds.), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2010); Langford (ed.), *Social Rights Jurisprudence*; O'Connell, 'The Death of Socio-Economic Rights', 532.

[159] Yamin and Gloppen (eds.), *Litigating Health Rights*.

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litigant profiles: that is, identifying whether advantaged or disadvantaged groups are benefitting from the outcomes.[160] However, two comparative quantitative studies (three- and five-country) have identified whether the types of goods and services ordered by courts in certain periods are oriented towards the poor or middle class.[161]

It can be said with some certainty that Landau's early prognosis – that distributive bias is the default for social rights adjudication – is not correct. Even if the Colombian Court is understood to be the most progressive in the world, it doesn't mean it will be the most distributively fair. That would probably mistake the volume of litigation for the quality of litigation. The US state courts that did issue orders in the school financing litigation fall within the 'radical equality' category, given their direct and indirect focus on equity. The Nepal Supreme Court represents the model of weighted equality with social rights judgments benefitting a wide range of disadvantaged groups in society; as does Latvia, Germany and Kenya and to a large extent Portugal. In Kenya, for instance, courts have rejected requests for expensive medicines but proactively intervened on the behalf of slum communities and people living with HIV/AIDS.

The more appropriate question is whether distributive inequality is a significant or isolated problem and what its causes are. The remainder of this section provides an analysis of five (hard case) countries that are often at the centre of this debate and stand accused of bias.

A. Hungary

Whereas the Hungarian Constitutional Court was initially eulogised or demonised as 'activist' on constitutional social rights,[162] later interpretations have given way to critiques of middle-class majoritarianism.[163] This critique seems further surprising given that the Constitutional Court has adopted a

[160] See Ferraz, 'The Right to Health in the Courts of Brazil', 33–45; Varun Gauri, 'Public Interest Litigation in India: Overreaching or Underachieving?' (2010) 1 *Indian Journal of Law and Economics* 71–93.

[161] Ole Frithof Norheim and Siri Gloppen, 'Litigating for Medicines: How Can We Assess Impact on Health Outcomes?', in Yamin and Gloppen (eds.), *Litigating Health Rights*, p. 304.

[162] Namely the right to work, rights to trade union and other associations, including the right to strike, the right to highest attainable standard of physical and mental health, the right to social security, the right to education and rights to cultural and scientific freedoms, and protection of children. See Articles 70/B-70/G, Article 67 and Article 54.

[163] See Sajó, 'Social Rights as Middle-Class Entitlements in Hungary', in Gargarella et al. (eds.), *Courts and Social Transformation in New Democracies*, p. 83; and Langford 'Hungary: Social Rights or Market Redivivus?'.

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restricted view of the subjective justiciability of social rights: one is limited to challenging discrimination, arbitrariness and protection of the minimum core.[164] However, the Court also possesses the power of abstract review and has evaluated the consistency of various laws with constitutional rights. It is here that the controversy primarily has arisen.

In its most muscular defence of social rights entitlements in legislation, the Court drew on property rights (both express and implied) and infused them with socio-economic content. In the face of structural adjustment packages in the early-to-mid 1990s, which radically reduced a range of social entitlements from a universal-based to a needs-based system,[165] the Court initially observed that the reforms would not take affected individuals below a minimum essential level of various social rights. Instead, the Court found the fact that the reforms changed benefits 'without transition' and 'degrad(ed)' them from insurance to a form of assistance affects legitimate expectations and thus the rule of law and fundamental rights.[166] Social insurance also constituted a form of property, and any interference required a proportionality analysis.[167] The Court's remedy was temporary and limited,[168] but it paved the way for a finding of unconstitutionality of other measures such as the partial shifting of the burden of insurance for sickness benefits to the insured and employers[169] and the increase in the subsidised housing interest rate to 25 percent.[170]

The decision was overwhelmingly supported by the public.[171] It clearly benefitted the middle and working classes: that is, those employed in the

[164] Decision No. 28/1994 (Constitutional Court of Hungary), para. 29(b). See also discussion of the Court's approach on the justiciability of social rights by the former Chief Justice in Sólyom László, 'Introduction to the Decisions of the Constitutional Court', in László Sólyom and Georg Brunner (eds.), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor, MI: University of Michigan Press, 2000).

[165] This included the family allowance, child-care benefit, child-care fee, pregnancy allowance, maternity benefit and child-care allowance.

[166] Decision 43/1995 (Constitutional Court of Hungary), para. 1.

[167] Decision 64/1993 (XII.22): MK 1993/184 (Constitutional Court of Hungary) at 11078 quoted in Decision 43/1995.

[168] The acquired rights were to accrue to children already born or who would be born within 300 days of the date of promulgation of the Act, of 15 June 1995.

[169] Which violated the acquired rights of both according to the Court: Decision No. 56/1995 (Constitutional Court of Hungary).

[170] Decision 66/1995 (XI. 24), ABH, 1995, 333 (Constitutional Court of Hungary).

[171] See Kim Lane Scheppele, 'Democracy by Judiciary: Or, Why Courts Can Be More Democratic than Parliaments', in Martin Krygier, Wojciech Sadursk and Adam Czarnote (eds.), *Rethinking the Rule of Law after Communism* (Budapest: CEU Press, 2005).

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formal sector and holding mortgages – the overwhelming majority of the population. It partially protected a universalist rather than targeted approach to social security and arguably helped forestall full privatisation of social security.[172] However, the Court left itself open to the charge that it is more concerned with protecting the social rights entitlements of the middle class than the poor.[173] It is a charge it might have avoided easily had it been willing to use less deference in cases concerning the very poor and applied its various doctrines to them. But in Decision 32/1998, the court forestalled deciding on a petition challenging the adequacy of unemployment benefits in the Welfare Act,[174] and in Decision 42/2000, avoided any meaningful remedy on whether, in the face of growing homelessness, there had been an unconstitutional omission by the state to legislate on account of its failure to create an adequate regulatory and institutional system to ensure sufficient access to housing.[175]

The same asymmetry can be observed if we compare other cases concerning respect and non-retrogression. In *Freedom of Enterprise on the Licensing of Taxis*,[176] the Court found that the decision by Budapest's local authority to restrict the number of taxi drivers was an interference with the right to work and right to freely choose one's occupation without objective justification. On the same basis, it invalidated the powers of the Medical Association to reject properly qualified

[172] Müller, *Privatising Old-Age Security*.

[173] See Sajó, 'Social Rights as Middle-Class Entitlements in Hungary', in Gargarella et al. (eds.), *Courts and Social Transformation in New Democracies*, p. 83.

[174] Decision 32/1998 (VI.25) AB (Constitutional Court of Hungary).

[175] The petitioners pointed to the asymmetric legislative design of housing programmes: local municipalities were tasked with managing social housing, e.g., but resources were not evenly or adequately distributed to them. The Court dismissed the claim for an implied right to housing but examined compliance with the right to social security. It acknowledged that the state must organise and operate a system of social security and benefits but that '[i]t does not follow . . . that citizens would have a subjective right to state support in acquiring a flat, nor is the State obliged to secure a *specific form and system* of support for housing'. It noted the concern that it might reduce the liberty of the legislature to define the tools in guaranteeing social security within 'the capacity of the national economy'. The Court did affirm the importance of securing the minimum level of the right to social security that would guarantee human dignity and, over the objections of two judges, that in the case of homelessness, 'the State obligation to provide support shall include the provision of shelter when an emergency situation directly threatens human life'. The Court noted that this would be an 'extreme situation', and, after briefly examining the current legislative framework, it simply exhorted the government to 'endeavour to increase the level of support and to expand the scope of social benefits in line with' economic capacity. ABH 1995, 801, 803 (Constitutional Court of Hungary), cited in Decision No. 42/2000, Part IV.

[176] Decision No. 21/1994 (Constitutional Court of Hungary).

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foreign doctors.[177] Yet, while the Court has been responsive on access to social housing (striking down municipal decrees with unreasonable conditions),[178] it has declined to find conditional social assistance programmes unconstitutional[179] and ruled that the requirement to evict prevails over the best interests of the child, even if a child would be automatically remanded into state care.[180] While courts struck down some local decrees affecting Roma social housing applicants, they have also shied away from addressing the claims of discrimination against this particularly marginalised ethnic minority.

On the one hand, the preceding tour through the Court's jurisprudence makes it tempting to view it as somewhat juristocratic, displaying middle-class favouritism – more willing to defend the entitlements and freedoms of more advantaged groups (a solid middle) but cautious on interrogating the levels and conditions of the protection for the poorest. On the other hand, these conclusions are somewhat superficial. They fail to consider two important factors. In the *first decade*, from the 1990s, the Court was caught between the post-communist (and partly elitist) impulse of providing the legal foundations for a market economy and paying heed to a relatively strong public consensus for continuing some version of the communist welfare state.[181] The fusion of property rights and social programmes represented one way of sewing together these two discordant threads to both protect rights and secure its sociological legitimacy. In the *second decade*, from 1998, the Court was staffed with *new* and *pro-executive* judges.[182] This

[177] Decision No. 39/1997 (Constitutional Court of Hungary).

[178] Decision No. 47/1996 (Constitutional Court of Hungary) (applicants to pay a deposit with their application and to have worked or resided in the city for ten years) and Decision No. 20/2000 (Constitutional Court of Hungary) (conditions that had no bearing on the applicant's 'social, income and financial' situation).

[179] Decision No. 32/1998 (VI. 25) AB (Constitutional Court of Hungary). Section 37/C(1) of the Welfare Act permitted local municipalities to require beneficiaries to participate in designated programmes (e.g., family support service or other institutions) corresponding to their social and mental health situation. The organisations challenged the requirement that persons in need of care, who had rights under section 93 to 'personal care on a voluntary basis' were required to participate in a mental health programme.

[180] Decision No. 4/2005 (Constitutional Court of Hungary), Part III, para. 2. See ERRC, *Hungarian Constitutional Court Strikes Down Discriminatory Housing Decree.*

[181] See B. Gero, 'The Role of the Hungarian Constitutional Court', Working Paper, Institute on East Central Europe (1997); Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht, The Netherlands: Springer, 2005).

[182] Scheppele, 'Democracy by Judiciary', in Krygier et al. (eds.), *Rethinking the Rule of Law*, p. 25.

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was partly a response to its earlier robust judgments on various constitutional rights, particularly civil rights. But it is *in this period* that all the cases concerning disadvantaged groups arose: those concerning unemployment benefits, housing support, social assistance and so forth.

This nuance reveals the importance of a strategic perspective. It is a mistake to speak of a single court. One has to disaggregate periods and phases in a court's jurisprudence and institutional position. The Hungarian case study arguably tells us two other things. The first is that a court can be responsive to citizens' social rights. As Domingo notes, in discussing the social benefit cases of 1995, '[T]his is a noteworthy example of court action being resorted to by social groups to challenge the premises of economic liberalisation which in the case of post-communist countries includes attempts to reduce state welfare obligations'.[183] The second is that executive pressure and ideological-oriented appointments can severely restrict the scope of sustainable social rights adjudication, highlighting the importance of courts maintaining sociological legitimacy.

B. *Latin America: Brazil, Colombia and Costa Rica*

The second archetypal case for distributive bias is the Latin American states with individualised *tutelas/amparos* for social rights. In Brazil, the judiciary has been generally cool towards collective action claims but more responsive to direct individual entitlement claims. As Hoffmann and Bentes note:

> Whereas in individual (access to medicine and treatment) actions the mere showing of prima facie evidence of medical need is usually accepted as sufficient for a claim to stand, courts are very reticent to appear to directly influence executive policy administration by conceding *erga omnes* claims.[184]

This asymmetry is said to be motivated by institutional and legitimacy concerns over engaging directly with public policy or trying to ensure compliance with collective claims.[185] According to some scholars, the result is that the primary beneficiaries of this Brazilian 'rights revolution' are the middle class. Ferraz shows that the claims are highly concentrated

[183] Pilar Domingo, 'Introduction', in Gargarella et al. (eds.), *Courts and Social Transformation in New Democracies*, p. 1.

[184] Hoffmann and Bentes, 'Accountability for Social and Economic Rights in Brazil', in Brinks and Gauri (eds.), *Courting Social Justice*, p. 141.

[185] Ferraz, 'Brazil: Health Inequalities, Rights and Courts', in Yamin and Gloppen (eds.), *Litigating Health Rights*, p. 76.

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in the wealthier states and municipalities, and within these localities there is a 'very low prevalence of claims originating in the poorest districts'.[186] The bulk of the litigants are concentrated in the 'middle of the social spectrum', neither disadvantaged nor wealthy.[187] He concludes:

> Rather than enhancing the provision of health benefits that are badly needed by the most disadvantaged – such as basic sanitation, reasonable access to primary health care, and vaccination programs – this model [of health rights litigation] diverts essential resources of the health budget to the funding of mostly high cost drugs claimed by individuals who are already privileged in terms of health conditions and services.[188]

Similar empirical arguments have been mounted in the case of Colombia and Costa Rica.[189] As to the former, critics point to the middle-class capture of the *tutela* system. Rueda concedes that the fusion of the minimum core doctrine and the right to an immediate constitutional remedy (*tutela* action) favoured the most disadvantaged in the 1990s, but during the economic crisis in the 2000s the middle class was able to leverage the courts to consider its concerns.[190] The Latin American experience thus reveals the risks of a system of adjudication that is based on individual entitlements.

However, this picture of distributive bias is disputed and requires nuancing. First, Brinks and Gauri come to different quantitative findings on the Brazilian medicines litigation. In their sample, they include indirect beneficiaries given 'the states stop opposing the claims and begin supplying the medication through the public health system'.[191] Drawing on 7,000 cases, they find that the pattern of distribution meets, in essence, the diachronic proportionality benchmark:

> [N]ot only is the income distribution among indirect beneficiaries close to the income distribution in the population, but it is also reasonably close to the income distribution of SUS users – 36% compared to 43%. This is not, of course, pro-poor, according to our definition – indeed, it is slightly regressive, though close to neutral, even when compared to the public health system, which is itself not terribly pro-poor by this measure.
>
> (p. 21)

[186] Ibid.
[187] Ibid.
[188] Ibid. See also Ferraz, 'The Right to Health in the Courts of Brazil', 33–45.
[189] On Costa Rica, see Norheim and Gloppen, 'Litigating for Medicines', in Yamin and Gloppen (eds.), *Litigating Health Rights*, p. 304.
[190] Pablo Rueda, 'Legal Language and Social Change during Colombia's Economic Crisis', in Couso et al. (eds.), *Cultures of Legality*, pp. 25–50.
[191] Brinks and Gauri, 'The Law's Majestic Equality?', 383.

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A number of other papers including a systematic review have also cast doubts on the extent of the pro-middle class bias of Brazilain courts.[192] In the case of Colombia, Rodríguez-Garavito points out that *tutelas* have been used as frequently with the non-contributory *publicly managed* plan as for those on the contributory *privately managed* health plans.[193] Moreover, a significant share of litigation has concerned 'gray zones', where medicines and other accessories necessary for a funded treatment are not included.[194] This does not dispute the distributive bias in some of the Colombian cases, particularly the ordering of some expensive medicines with limited utility.[195] However, any distributive bias is restricted to a particular set of cases.

Second, the critical focus is only on the 2000s. In the 1990s, litigation in these states was largely pro-poor or universalist. Individual applicants were able to secure a range of basic social rights, and courts in all three countries forced the state to take the HIV/AIDs crisis seriously, benefitting groups across the socio-economic spectrum. Any assessment of the Latin American experience needs to consider this changing scenario. Moreover, it is arguably a scenario that could be righted. Notably, the Colombian Constitutional Court, in a reflexive modus, has attempted to rein in this problem: tightening evidentiary requirements in 1997 and issuing structural judgments requiring the state to rationalise the procedures in 2008. The second intervention had the effect of slightly moderating the use of its procedure, but the problem has continued, suggesting that its interventions may have been too mild.[196]

[192] Izamara Catanheide, Erick Lisboa and Luis Fernandes de Souza, 'Physis: Revista de Saúde Coletiva' (2016) 26 *Physis: Revista de Saúde Coletiva* 1335–1356; 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', (2016) 18(1), *Health and Human Rights Journal* 209–220.

[193] César Rodríguez Garavito, 'The Judicialization of Health Care: Symptoms, Diagnosis, and Prescriptions', in Randall Peerenboom and Tom Ginsberg (eds.), *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (New York, NY: Cambridge University Press, 2014).

[194] Ibid. See also discussion on this aspect by Ferraz, 'Brazil: Health Inequalities, Rights and Courts' p. 76.

[195] See Norheim and Gloppen, 'Litigating for Medicines', in Yamin and Gloppen (eds.), *Litigating Health Rights*, p. 304.

[196] See Katharine Young and Julieta Lemaitre, 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa' (2013) 26 *Harvard Human Rights Journal* 179–216.

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Third, a focus on right-to-health cases occludes numerous decisions on other social rights that have been made for disadvantaged individuals.[197] In right-to-education litigation in Brazil, Gauri and Brinks find that 'at least 78 percent of the beneficiaries of education litigation came from the lower two income quintiles, so that the poor were overrepresented in Brazil's more collective right-to-education litigation by about 2 to 1'.[198] Moreover, Brazilian courts have sometimes been quite proactive in protecting the rights of slum dwellers.[199] This is not to suggest that all other judgments in these countries are progressive in equality terms. Among the many pro-poor judgments in Colombia, there are also collective cases directed towards the social rights of the middle class and other privileged groups. For instance, in three seminal cases in 1999, the Colombian Constitutional Court struck down a market-based formula for determining interest rates for social housing schemes.[200] While prohibitive interest rates threatened more than a quarter of the 800,000 individuals or families with excessive levels of debt,[201] Yepes queries the distributive implications of the cases given the cost of the new financing system.

C. *India*

The Indian Supreme Court has also been critiqued on distributive grounds despite some of its more progressive decisions.[202] The Court

[197] Wilson and Dugard, 'Constitutional Jurisprudence', in Langford et al. (eds.), *Symbols or Substance?*, p. 35.

[198] Brinks and Gauri, 'The Law's Majestic Equality?', 384.

[199] See, e.g., the *Maceio Municipality case*, Proc. N°. 4.830/07, 10 September 2007 (District Court for Children and Adolescents, Brazil) and discussion in Olivier De Schutter, 'Countries Tackling Hunger with a Right to Food Approach' (2010) *UN Special Rapporteur on the Right to Food*; Valéria Burity, Luisa Cruz and Thaís Franceschini, *Exigibiladade: Mechanisms to Claim the Human Right to Adequate Food in Brazil* (Rome: FAO, 2011).

[200] 'UPAC I' (1999); 'UPAC II' (1999); 'UPAC III' (1999). The Court found that the formula violated the right to dignified housing, a right that was to 'be progressively realised by the law through an "adequate financing system."' See discussion in Manuel José Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 *Washington University Global Studies Law Review* 529–699.

[201] Rodrigo Uprimny Yepes, 'Should Courts Enforce Social Rights? The Experience of the Colombian Constitutional Court', in Fons Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp: Intersentia and Maastrict Centre for Human Rights, 2006).

[202] For an overview see Muralidhar, 'India', in Langford (ed.), *Social Rights Jurisprudence*, p. 102; Shylashi Shankar and Pratap Bhanu Mehta, 'Courts and Socio-Economic Rights in India', in Brinks and Gauri (eds.), *Courting Social Justice*, p. 146.

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demonstrates distributive responsiveness in its judgments on emergency and primary health care,[203] access to basic education,[204] elimination of exploitative child labour,[205] occupational health,[206] environmental rights[207] and, in the last decade, the right to food.[208] The relevant rights were recognised, implementation was scrutinised and detailed orders were issued with extensive supervision occurring in two cases concerning environmental pollution and starvation.

Yet, this court has faced considerable criticism for its deference to the state in the area of housing, land and, to some extent, labour rights. In the much-cited decision *Olga Tellis* v. *Bombay Municipal Corporation*,[209] it opined that the right to life included the right to livelihood and found a violation of due process in the eviction process of pavement dwellers. Yet, it refused to find that eviction would deprive the most marginalised of urban residents of their livelihood and only weakly recommended the provision of alternative accommodation (which was not provided and the evictions were carried out in mid-winter).[210] This coolness to the urban poor continued in *Municipal Corporation of Delhi* v. *Gurnam Kaur*, where the Court held that the municipality had no legal obligation to provide evictees with alternative space for livelihoods,[211] and reaffirmed it in *Sodan Singh* v. *NDMC*.[212] In rural and forest areas, the Court has displayed a similar reluctance to halt or

[203] E.g., *Paschim Banga Khet Majoor Samity* v. *State of West Bengal* (1996) 4 SCC 37 (Supreme Court of India).

[204] E.g., *Unnikrishnan J.P.* v. *State of Andhra Pradesh*, (1993) 1 SCC 645 (Supreme Court of India).

[205] E.g., *M.C. Mehta* v. *State of Tamil Nadu (No. 2)*, (1996) 6 SCC 772 (Supreme Court of India).

[206] E.g., *Consumer Education and Research Centre* v. *Union of India*, (1995) 3 SCC 42 (Supreme Court of India)

[207] *M.C. Mehta* v. *Union of India (Taj Trapezium Case)*, WP 13381/1984 (1996.12.30) (Supreme Court of India).

[208] E.g., *People's Union for Civil Liberties* v. *Union of India*, (2001) 5 SCALE 303 (Supreme Court of India). Note that a further 70-plus orders followed.

[209] *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 SCC 545 (Supreme Court of India).

[210] Ibid., p. 579: 'No one has the right to make use of a public property for a private purpose without the requisite authorisation and, therefore, it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon . . . If a person puts up a dwelling on the pavement, whatever may be economic compulsions behind such an act, his use of the pavement would become unauthorised.'

[211] *Municipal Corporation of Delhi* v. *Gurnam Kaur*, (1989) 1 SCC 101 (Supreme Court of India).

[212] *Sodan Singh* v. *NDMC*, (1989) 4 SCC 155 (Supreme Court of India).

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regulate displacement of millions of small farmers and indigenous peoples in dam catchment areas or in forests coming under environmental protection.[213] In these cases, the Court reverted to classical institutional reasoning. In *Narmada Dam*, the majority stated: '[W]hether to have an infrastructural project or not and what is the type of project to be undertaken and how it is to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken.'[214]

Evaluating this array of decisions is challenging. A distributive assessment would have to reckon with cases across the range from radical equality to straight-out regressivity. This is borne out in quantitative work. Brinks and Gauri find that '77 of the beneficiaries of the litigation stream on AIDS were not from disadvantaged classes' while 100 percent of the beneficiaries of the court-ordered midday meal scheme (almost ten million children) were disadvantaged. A similar asymmetry arises in Gauri's breakdown of the litigant profiles before the Indian Supreme Court.[215] He finds that disadvantaged groups were more likely to attain success in the 1990s than advantaged groups, while the reverse was the case in the 2000s. His conclusion is that ideological factors (neoliberalism) may be important in explaining this development (confirming perhaps McConnell's hypothesis). Yet, the Court's most extensive use of supervisory jurisdiction for social rights has been during the 2000s in the right to food case, which seems to rub up against this conclusion. The most likely over-arching explanation is structural. With only three judges required to make up a bench, the outcomes can be random. If a judge is convinced of a marginalised petitioner's case and willing to invest extra time, disadvantaged litigants may fare better; if not, the result may be otherwise.

[213] *Narmada Bachao Andolan* v. *Union of India*, (2000) 10 SCC 664. See also *T.N.-Godavarman Tirumulkpad* v. *Union of India*, (1997) 2 SCC 267 (Supreme Court of India) and *T.N.Godavarman Tirumulkpad* v. *Union of India*, (2000) 6 SCC 413 (Supreme Court of India) concerning eviction of forest dwellers.

[214] Ibid., p. 762. They also reference a conflict of rights: '[C]onflicting rights had to be considered. If for one set of people namely those of Gujarat, there was only one solution, namely, construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural land would be submerged in water' (p. 764).

[215] Varun Gauri, 'Public Interest Litigation in India: Overreaching or Underachieving?' (2010) *Indian Journal of Law and Economics*, 1, 71–93.

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VI. Conclusion

The charge of judicial abdication and distributive bias challenges the constitutional optimism surrounding the legal recognition of social rights. This chapter has argued that these critiques do possess some bite but that they are often overstated. There is significant variance among judicial outcomes across countries and across time. This variance is evident in the early US school finance litigation and continues in multiple national jurisdictions in which social rights have been claimed in court.

Importantly, the causes of non-responsiveness are not necessarily fixed. For judicial abdication, the causal answer seems to lie in a range of conditioning factors – the nature of judicial ideology, internal legal culture and background political economy. However, more case-level factors such as the seriousness of violations and framing of arguments can be highly important. Most of these general and case-specific factors are malleable to various degrees, which suggests why we see variations in judicial review over the *longue durée* and possibly a brighter future if these drivers are taken seriously. What should concern us are those countries in which the legal culture constraint is so strong that it is highly resistant to evidence of serious violations of social rights, holding all other factors equal. What will be most difficult to address, though, is the pattern of judicial appointments – that is usually the subject of mega-politics as the Hungarian example poignantly shows. Nonetheless, the case studies from Kenya, Nepal and India show how public pressure can be placed on courts to improve their performance.

As to distributive bias, it was argued that the benchmarks for distributive assessment require greater discussion. Proportional measures of equality may be appropriate, particularly if they contribute to strengthening or sustaining social welfare states. As to explaining distributive outcomes, the structure of adjudication seems most important (although conditioned by judicial culture and strategic decision-making). Courts that permit direct individual entitlement claims are more prone to middle-class capture, requiring judicial vigilance and reflexivity. However, the overall evidence remains disputed. Moreover, those courts that do meet strong equality benchmarks need to be evaluated as to their overall contribution on social transformation. Social rights is only one element of constitutionalism that affects social transformation.

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