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Finding Their Way by Conceptualizing Their Role: Court Orders and Social Rights in South Africa

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CONSTITUTIONAL SOCIAL RIGHTS AND THE SOUTH AFRICAN JUDICIARY'S NEW MANDATE

The adoption of the South African Constitution, and its Bill of Rights in particular, heralded the beginning of an important experiment. The Bill of Rights explicitly enshrined justiciable rights to housing[1], health care services[2], sufficient food and water[3], basic education[4], and social security[5], among other social and economic rights.[6] These objectives of economic and human development were compounded into a structure of constitutional legal rights and constitutional legal obligations[7]: the South African State was constitutionally bound to realize these rights progressively, subject to its available resources[8] and South African residents were vested with a legal right to claim before a court that the State had failed to do so.

Many of the parties elected to the Constitutional Assembly in 1994 – not least the African National Congress[9] – had believed in a post-apartheid South African State

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[1] *Constitution of the Republic of South Africa,* 1996, c 2 section 26 (1) [*Constitution*].

[2] *Ibid* at section 27 (1) (a).

[3] *Ibid* at section 27 (1) (b).

[4] *Ibid* at section 29 (1) & (2).

[5] *Ibid* at section 27 (1) (c).

[6] That is not to say that social and economic rights had not registered a presence in other constitutions prior to 1996. Most notably, the Indian Constitution contained a section of State directives which included certain social and economic guarantees, although these were explicitly non-justiciable. The Irish and Canadian Constitutions have also provided for certain minority language and education rights.

[7] The term 'constitutional legal rights or obligations' connotes that these rights have been entrenched under the Constitution. Unlike rights posited under ordinary legislation, these rights can only be repealed or amended by a two-thirds majority of both houses of the South African national parliament. On a symbolic level, constitutional obligations signal a State's fundamental priorities.

[8] The Bill of Rights qualifies the right to housing and the right to health care services, sufficient food and water and social security, with the following: "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." See *Constitution*, *supra* note 1 at section 26 (2) and 27 (2).

[9] The Freedom Charter, adopted by the Congress of the People on 26 June 1955, had even then contained a variety of provisions addressing the social and economic needs of the South African people. See Etienne Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 South African Journal on Human Rights 464 at 466.

committed, at its core, to the redistribution of resources with a view to "facilitat[e] social transformation and the deepening of civic equality and democratic participation".[10] This support was compelled by that "indigenously African" insight: simple autonomy, guaranteed by the classic canon of civil and political rights, is a mere luxury, if that "autonomous" human being is starved for food or water, is unsheltered, at the total mercy of illness, or wholly uneducated.[11]

The African National Congress, amongst other parties, wished to involve the judicial system in this transformative project.[12] The courts that had remained deferential and dormant during the worst of apartheid[13] would be transformed and empower to help guarantee the basic conditions in which individuals could actualize their capabilities, meaningfully participate in their communities and ultimately lead a dignified life.[14]

And yet, these constitutional debates shed little light on how exactly courts were meant to fulfill this new function. The South African Constitutional Court has groped its way towards a satisfying approach to judicial review of government policies ever since.

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[10] Mureinik, *supra* note 9 at 476.

[11] This "fully belly thesis" was intended to be one of the African "fingerprints" on the human rights discourse made by the African Charter on Human and Peoples' Rights (Banjul Charter). The preamble of the of the Banjul Charter provides that "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as their universality" and later adds that "the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights". See Edem Kodjo, "The African Charter on Human and Peoples' Rights" (1990) 11 Human Rights Law Journal 3-4 271 at 274 and El-Obaid Ahmed El-Obaid and Kwadwo Appiagyei-Atua, "Human Rights in Africa – A New Perspective on Linking the Past to the Present" (1996) 41 McGill LJ 819 at 846. On this "fully belly thesis", see Rhoda Howard, "The Full-Belly Thesis: Should socio-economic rights take priority over civil and political rights? Evidence from Sub-Saharan Africa" (1983) 5 Human Rights Quarterly 467 at 468.

[12] Both Etienne Mureinik and Sandra Liebenberg describe the Constitutional Assembly's positive response to a Petition made by the Ad Hoc Committee for the Campaign on Socio-Economic Rights, presented on July 19, 1995. See Mureinik, *supra* note 9 at 468 and Sandra Liebenberg, "South Africa: Adjudicating Social Rights Under a Transformative Constitution" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 74 at 78 [Liebenberg, "Adjudicating Social Rights"].

[13] Liebenberg, "Adjudicating Social Rights", *supra* note 12 at 80.

[14] This expanded vision of human rights brings the human rights vision into parallel with the theory of capabilities initially developed in the study of welfare economics by Amartya Sen. Put simply, a capabilities approach insists that rather than simply raising income levels, governments should be geared towards affording individuals substantive freedoms, which in turn hinges on, amongst other factors, adequate health, living conditions, education and economic opportunity. From its origins in welfare economics, the capabilities approach has deeply influenced political theorists, development theory, as well as human rights discourse. See, *inter alia*, Martha C. Nussbaum, "Capabilities and Human Rights (1997) 66 Fordham L Rev 273, Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000) at 72 et seq. and, of course, Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

Unfortunately, as the highest and most authoritative court presiding over constitutional matters, it has not yet got the formula right. Specifically, that Court has adopted an unduly restrained approach to "remedies" – the orders of the court made after a rights violation has been established. As a result, its leading judgments have had little practical effect: the South African government's response to *Grootboom*[15] was disheartening, and a generally positive result in the aftermath of the *Treatment Action Campaign*[16] judgment was secured only through an extended lobbying effort undertaken by the TAC itself, one of South Africa's largest and well-financed NGOs.[17]

Drawing on South African law and the writings of South African human rights lawyers, this paper advances a detailed, model judicial approach to responding to systemic social rights deprivations. I propose to do so in the following way. This paper's first part details the history of the South African government's response to the *Grootboom* and *TAC* judgments, and will distill the inhibitors that prevented the Court's "programmatic remedies"[18] from being effective. The second part takes a step back and considers, in abstract terms, how courts can tailor their orders to increase the likelihood of prompt and sufficient compliance. This part draws on the insights of political scientists who have studied State compliance with international law, and then attempts to contextualize that analysis within the context of South African electoral politics and governance. This paper's third part returns to the details and combines and modifies certain South African remedies to forge a model judicial response to systemic social rights deprivations. This model approach will seek to balance the constitutional imperative for effective, policy-level relief for the severely destitute with the need to respect a sensible allocation of powers between State institutions, all the while enabling the meaningful involvement of civil society.

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[15] *Government of the Republic of South Africa and Others v Grootboom and Others,* 2001 SACC 46 [*"Grootboom"*].

[16] *Minister of Health and Others v Treatment Action Campaign and Others* 2002 SACC 703 [*"TAC"*].

[17] Liebenberg, "Adjudicating Social Rights", *supra* note 12 at 85.

[18] For the purposes of this paper, the term "programmatic court order" or "programmatic remedy" will refer to a court order that commands a government body, whether legislature or executive, to adopt and implement a program.

PART I. DEATH BY COLD FEET

Palpable Hesitancy Amongst the Un-Tested Justices

The South African Constitutional Court proceeded warily in adjudicating the landmark social rights cases *Soobramoney*[19], *Grootboom* and *TAC*. The Court refused to guarantee the fulfillment of the "minimum core" of the constitutional social rights through court orders leveled against the South African State.[20] The Court imagined the judiciary's role as being more restrained. Courts would only subject the "reasonableness" of State measures to evaluation.[21] If the government's approach represented a reasonable attempt to progressively realize the social entitlements entrenched in the Constitution, lower courts were instructed not to interfere.[22] The Court proclaimed great deference for government policies taken in good faith by the competent public bodies.[23] In addition, the judges of the Court evinced a sincere apprehension for issuing orders with significant budgetary implications, out of fear that such an order might divert needed resources from other important public programs.[24] For the Constitutional Court, these were the demands of a sensible separation of powers, an "appropriate constitutional balance".[25]

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[19] *Soobramoney v Minister of Health (Kwazulu-Natal*), 1997 ZACC 17 [*Soobramoney*].

[20] In an illustrative instance, in the oral argument in the *TAC* case, Justice Albie Sachs – voicing the concerns of his colleagues on the bench – took issue with the theory that the State had to satisfy, irrespective of consequences, the "minimum core" of every social right. Justices Sachs demanded to know if the counsel thought the State should provide one tap for a single, mountain-dweller at the expense of ten thousand taps for residents of the low-lying plains. See Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009) at 177-179.

[21] See *TAC*, *supra* note 16 at 740.

[22] Ibid.

[23] Chaskalson J., wrote, on behalf the majority opinion, that a "court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters". See *Ibid* at para 29.

[24] This has become apparent on two occasions. In *Soobramoney*, *supra* note 19 at para 19, Chaskalson J. dismissed Soobramoney's contention that his right to emergency health care services had been violated because, were he to have accepted that argument, a significant portion of the provincial health budget would be diverted towards providing emergency services, to the detriment of all those individuals who currently benefit from preventative healthcare or treatment for conditions that are not life threatening. In the oral argument in the *TAC* case, Justice Albie Sachs took issue with the theory that the State had to satisfy, irrespective of consequences, the "minimum core" of every social right. Justices Sachs demanded to know if the counsel thought the State should provide one tap for a single, mountain-dweller at the expense of ten thousand taps for residents of the low-lying plains. See Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009) at 177-179 [Sachs].

[25] *Ibid.*

The Lingering Bugbears of the Constitutionalization Debate

These landmark cases showcase a cast of judges who had conceded, at least in part, the "democratic legitimacy" and "judicial competency" arguments that had been marshaled by the very opponents to the constitutionalization of social rights.[26]

These opponents had feared the power that judges would wield in the event that social rights were made constitutional rights. In issuing remedies to established systemic rights violations, judges would be required to make sweeping decisions that risked the interests of an "unknown but potentially vast number of interested parties"[27] and that could have "many complex and unpredictable social and economic repercussions which inevitably vary for every subtle difference in the decision".[28] But judges are ill-suited to rule over these "polycentric" matters, they felt. Judges are not policy experts. They are trained in law and may have very little sense of what repercussions, if any, their orders may have. Evidence tendered in an adversarial judicial proceeding is limited, and the nature of juridical reasoning imposes its own epistemological constraints on the judge's ability to attend to a plethora of interconnected or competing interests. Legislative and executive bodies are generally better informed, and better structured to consider all the direct and incidental effects of a proposed policy or a major reallocation of the public purse.[29] A version of this argument was wielded by opponents who believed that constitutional social rights would permanently tie the South

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[26] These objections were not always put in these terms, but they did represent the most common objections circulated at the time. See Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012) at 111-116.

[27] In so arguing, opponents drew on – sometimes knowingly, most of the time unknowingly – on ideas developed by Lon Fuller and Kenneth Wilson, who had argued for why these "polycentric" matters were unfit for resolution through adjudication.

[28] *Ibid*.

[29] This argument is developed in full in Mitra Ebadolahi, "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 New York University Law Review 1565 at 1582 [Ebadolahi].

African national government down to an over-sized, growth-crippling welfare state.[30]

In addition, programmatic court orders would suffer from a lack of democratic legitimacy and accountability. Democratic legitimacy requires democratic approval or, at the very least, the accountability of the responsible decision-makers. Judges are not only un-elected, they are insulated from public accountability in the name of judicial independence.[31]

The Aftermath of the Court's Unimposing Orders

The justices of the Constitutional Court mitigated these concerns with vows of deference and the issuance of unimposing remedies. In *Grootboom*, a community of landless persons had been evicted from private property and had re-settled on the edge of a sports field. Due to deplorable living conditions, Irene Grootboom, on behalf of a community counting some 2,800 residents[32], applied to the Western Cape Provisional Division of the High Court for relief. The matter, at both the Provisional Division and at the High Court, focused on the need to provide specific relief for the Grootboom community itself.[33] The case was appealed to the Constitutional Court. But before that hearing occurred, the Western Cape provincial authority and the Municipality of Oostenberg settled with the Grootboom community. The province and municipality promised to provide temporary accommodation on the Wallacadene sports field until dwellings or land became available to

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[30] This argument was developed one of Cass Sunstein's well-known articles, where he lambasted the new Eastern European and South African constitutions for entrenching social rights. See Cass Sunstein, "Against Positive Rights: Why social and economic rights don't belong in the new constitutions of post-communist Europe" (1993) East European Constitutional Review 35 at 35-38. He may have specifically feared that judges would thwart certain desired reforms – particularly reforms marshalling greater fiscal restraint, privatization of State enterprises and the liberalization of inward foreign direct investment – promoted at the time as the "Washington Consensus" for economic development.

[31] Ebadolahi, *supra* note 29 at 1580.

[32] Kameshni Pillay, "Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights" (2002) 6 Law, Democracy & Development 1 [Pillay, "Implications"].

[33] Specifically, the matter at trial and on appeal centered around the trial judge's order for the Oostenberg municipality to provide free and immediate shelter – within the Wallacadene Community hall itself – to the children of the community, and to one parent supervisor per child. See Pillay, "Implications", *supra* note 32 at 4-5.

the members of the community.[34] The "residential" portion of the sports field would be marked off, and the community would be supplied with temporary waterproof structures as well as basic sanitation, water and refuse services.[35]

With the needs of the Grootboom community apparently resolved, the Constitutional Court focused on whether the government's general housing policy satisfied the demands of the new Bill of Rights, an argument raised by the Community Law Center of Western Cape University, which had entered proceedings as an *amicie curae*.[36] The Court accepted that remaining claim. To the mind of the presiding judges, South Africa's housing legislation did not reasonably attempt to progressively realize the right to access to housing, because it provided no relief or support for the most destitute and landless, those who have no access to land, no roof over their head, and who therefore face a state of crisis.[37] The Court's open-textured order provides as follows:

> It is declared that:
>
> (a) Section 26 (2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated program progressively to realize the right of access to adequate housing.
>
> (b)The program must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Program, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations. [38]

This declaration marked the beginning and end of the Constitutional Court's involvement in the matter. The Constitutional Court only issued a declaration, and not an

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[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] *Grootboom*, *supra* note 15 at para 52.

[38] *Ibid* at para 99.

actual mandatory order against a given governmental body or set of governmental bodies. The Constitutional Court did not detail which level or branch of government was specifically responsible for fulfilling the declaration's demands. The Court merely hoped to highlight that the State had not fulfilled its obligations, without imposing itself any more than that. After this, the judiciary was divested of this issue and the national, provincial and municipal governments – all represented in the principal pleadings – were left to themselves to determine what was specifically required to comply with the judgment.

The Court's severely hesitant court order failed to secure much positive development. Pursuant to the settlement agreement, the Grootboom community was initially provided with a lump cash sum, which it used to purchase windows, doors and zinc-sheet roofs for every dwelling.[39] The municipality erected twenty toilets and many taps on the sports field,[40] but neglected to assume responsibility for maintenance.[41] Members of the Grootboom community have not since been provided with access to land or adequate housing.[42] Eight toilets broke down within a year forcing the community of almost 3,000 to share twelve toilets.[43] The sports field does not drain rainwater, and that stagnant water incubates diseases that are passed onto local children. Neither the municipality nor the provincial governments provided equipment to clear human refuse, which is, as a result, dumped near taps and in vacant land adjoining the sports field.[44] The close proximity of each dwelling and the frequent use of candlelight creates a significant fire risk, and fires have repeatedly swept

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[39] Pillay, "Implications", *supra* note 32 at 8.

[40] *Ibid.*

[41] This had been observed by South Africa's Human Rights Commission: Human Rights Commission, *Fifth Economic and Social Rights Report 2002/2003* at 42-43.

[42] Liebenberg, *supra* note 12 at 90.

[43] Pillay, "Implications", *supra* note 32 at 7-8.

[44] *Ibid.*

through the Grootboom community, killing five people in 2004.[45] The situation – dire even in 2001 – does not appear to have improved. Irene Grootboom died in 2008 at age 39 in her dwelling in Wallacadene.[46]

The Court's order has also failed to instigate national housing policy reform. Since the declaration did not specify which level of government was responsible for the adoption of emergency housing policy, progress was stalled as the different tiers of government attempted to pin compliance responsibility on every public body but itself.[47]

Responsibility finally settled. In 2001, the amended *Division of Revenue Act* bound provinces to commit 0.5%-0.65% of their total budget to address "Grootboom-like" crises.[48] This was complemented in 2004, when the National Housing Code was amended to include the new "Housing Assistance in Emergency Circumstances" program[49], which sought to provide emergency relief to those who had lost dwellings in natural disasters or who faced imminent eviction.[50] That program roughly followed the allocation of governmental responsibility charted in the National Housing Code[51] by inviting municipalities to assess and define their own emergency housing needs, and then to file a request for funding from the provincial department of housing.

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[45] Bonny Schoonakker, "Treated with contempt: Squatters' precedent-setting victory has gained them only stinking latrines", *Sunday Times* (21 March 2004).

[46] Francis Hweshe, "Irene Grootboom dies without a house" *Carpe Argus* (4 August 2008) online: Abahlali baseMjondolo < http://www.abahlali.org/node/3860>.

[47] This responsibility-dodging behaviour was noted by the South African Human Rights Commission in its letter to the Constitutional Court, filed on 14 November 2001. See Pillay, "Implications", *supra* note 32 at 8.

[48] *Ibid* at 10.

[49] See Liebenberg, *supra* note 12 at 99.

[50] This is documented in "South Africa: Justice Sector and the Rule of Law", *Open Society Foundation for South Africa* (2005) online: Open Society Foundation <http://www.opensocietyfoundations.org/sites/default/files/afrimapreport_20060223.pdf> at 31-32 [Open Society].

[51] The National Housing Code had long preferred an arrangement giving primary programming responsibility to municipalities – or whichever political bodies were "closer to the ground" – for these were understood to be better placed to assess housing needs and tailor housing programs. The national government, by contrast, developed a framework policy in the form of the National Housing Code at provided financing.

These reforms, in addition to being grossly overdue, are also insufficient, and their implementation has been laggard. They are, firstly, under-inclusive, for they provide no emergency relief for communities, like Grootboom's, that have already been evicted and which have re-settled in squalor. Secondly, the new legislation does not *compel* municipalities to assess their own emergency housing needs. As a result, many municipalities have simply failed to submit requests for emergency housing funding.[52] Thirdly, the provincial funding scheme provides for a fixed proportion of each province's budget to be reserved for housing emergencies, despite the fact that each province does not face housing crises in equal proportion.[53] There is therefore a risk that some provinces under-spend their emergency housing budgets, while others receive excess demand.[54] The National Department of Housing suggested that the national government should assume administration of the financing for emergency housing and could release funds to the provinces according to perceived need.[55] For no apparent reason, the national government simply failed to follow through on that suggestion.[56] As a result of these defects, little emergency relief has been provided under these State programs,[57] which were themselves grossly overdue. The national and provincial governments, however, now believe themselves to be divested of the issue.

The Constitutional Court's order in *TAC* was only slightly more imposing. In that case,

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[52] This became a matter for subsequent litigation in a few instances. In the *City of Cape Town v Rudolph and Others* 2004 SA 5 39, the Cape Provincial Division of the High Court ordered the City of Cape Town to comply with its obligations under both the National Housing Code and the Bill of Rights by being proactive in assessing and defining its emergency housing needs. This kind of litigation was rare, although similar cases were heard against the City of Johannesburg.

[53] Western Cape Province, for instance, already suffered a severe housing shortage crisis before the Western Cape floods in 2002.

[54] Pillay, "Implications", *supra* note 32 at 10.

[55] It is unclear whether this view has been made broadly public, as it was gathered in an interview with Louis van Der Walt, Director of Housing Policy and Strategy for the National Department of Housing in January 2002. See Pillay, "Implications", *supra* note 32 at 10.

[56] Pillay, "Implications", *supra* note 32 at 10.

[57] While not unanimous – the "escr-net" summary provides a favourable review of the follow-up to *Grootboom* – this statement does reflect the view of the majority of observers. See, for instance, Liebenberg, *supra* note 12 at 101 , Pillay, *supra* note 32, Kameshni Pillay, "Implementing *Grootboom*: Supervision Needed" (2002) 3 Economic Social Rights Review 1, the South African Human Rights Commission's series of reports on the matter, *supra* note 41, and Ebadolahi, *supra* note 29, amongst others.

the national government's policy restricted access to anti-retrovirals for pregnant women, and the Constitutional Court found the relevant legislative scheme to be an un-reasonable attempt to progressively realize the right to healthcare.[58] The government[59] was ordered to, without delay:

a) Remove the restrictions that nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.
b) Permit and facilitate the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics […]
c) Make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counseling necessary for the use of nevirapine to reduce the risk of mother-to-child transmission of HIV.[60]

Because the Court in *TAC* issued an order, and not merely a declaration, governmental non-compliance could have been sanctioned with a ruling in contempt of court.[61] The effectiveness of the Court's order, however, was crippled by the Court's reluctance to supervise compliance,[62] either through future court proceedings or by requiring the South

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[58] Specifically, government lawyers marshaled the number of policy reasons that justified the government's position, and insisted that the Court should afford government bodies deference in the decisions they make with regards to their realm of expertise. The Constitutional Court responded by dismissing all of those developed policy reasons as unreasonable.

[59] The diligent Treatment Action Campaign impleaded the Minister of Health, and the respective Members of the Executive Council for Health in each of South Africa's provinces. This would have allowed it to institute an action in contempt of court against any of these officials in the event that they did not comply with the judgment.

[60] TAC, *supra* note 16 at 75-77.

[61] Treatment Action Campaign pleaded for an order, and not a declaration, and included the national Minister of Health and the Ministers of Health of each province in its proceedings so that it could compel compliance with an action in contempt of court. See Pillay, *supra* note 32 at 12.

[62] See *TAC*, *supra* note 16 at para 129, where the Court explicitly considered and declined to assume supervisory jurisdiction on the grounds that it had every faith that the order was going to be complied with: "The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the court to enable it to satisfy itself that the policy was inconsistent with the Constitution **...** In appropriate cases they should exercise such power if it is necessary to secure compliance with a court order. That may be because of the failure to heed declaratory orders or other relief granted by a court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case."

African government to submit period reports.

While the South African government proved to be more proactive in implementing the order issued in the *TAC* case, this success is credited to a post-judgment campaign undertaken by the TAC itself. Both provincial and national governments had initially stalled in expanding access to nevirapine, despite the national Minister of Health's announcement that the Court's ruling would be complied with.[63] The TAC responded with a letter writing campaign to government officials, threatening renewed legal action.[64] A complaint to the South African Human Rights Commission was then filed in December 2002, which was followed by the filing of a motion for contempt of court against the national Minister of Health and the Member of the Executive Committee for Health of the Mpumalanga province.[65] The threat of repeated legal action led the Department of Health to begin reporting on its compliance efforts,[66] while the proceedings in contempt incited the obstinate province of Mpumalanga to expand access to nevirapine at tertiary hospitals.[67] Traditional enforcement techniques like supervision and threats of renewed legal action proved to be effective, but depended on the resources and know-how of one of South Africa's most well-financed NGOs.

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[63] Mia Swart, "Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor" (2005) 21 South African Journal on Human Rights 215 at 223 [Swart].

[64] A few days after judgment was rendered, the TAC sent letters to all nine provinces and to the national Ministry of Health, demanding that they provide information regarding what steps would be taken to comply with the judgment, and for when. That letter received partial responses from the offices of several provincial ministers. See Mark Heywood, "Contempt of Compliance? The TAC Case After the Constitutional Court judgment" (2003) 4 ESR Review 7-10 [Heywood].

[65] *Ibid.*

[66] Swart, *supra* note 63 at 223-224.

[67] The full extent of the campaign is described aptly in Mark Heywood, "Shaping, Making and Breaking the Law in the Campaign for a National/HIV Treatment plan" in Peris Jones & Kristian Stokke, eds, *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (Leiden: Martinus Nijhof Publishers, 2005) at 181.

The After Aftermath: Towards a Constructive Role for Judicial Review

In some sense, these judgments are promising. Social policy discourse has often portrayed causes like access to housing as being endemically hindered by crippling poverty, rampant corruption and deeply rooted social, cultural, legal or economic circumstances.[68] The case studies advance a different narrative, one where simpler governance failures – like a lack of comprehensive planning, a dearth of intra-governmental coordination or a simple un-willingness to act – thwart vital relief for destitute or marginalized populations and where simple incentives – like an aversion to being legally chastised in renewed litigation – were sufficient to cure those government officials of their own defective governance.

This insight presents one key to conceiving a functional role for South African courts in adjudicating social rights claims. While South African courts have neither the power nor the expertise to tackle certain macro barriers to development and economic growth, courts may nevertheless marshal the law to assist governmental decision makers in overcoming the occasionally simple governance failures that deny vulnerable populations vital relief.

Part 2. Now What? The Guiding Considerations of Judicial Effectiveness

The Basic Conditions of Judicial Effectiveness

Emboldened by this restrained yet constructive vision for judicial review, the guiding issue then becomes: how *can* South African courts tailor their remedies in order to assist or compel decision makers into overcoming their governance shortcomings?

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[68] One example, close at least to my heart, is the paper on the justiciability of housing rights in Cameroon, by former intern Ludovic Langlois-Therien, who argued that courts were ill-placed to adjudicate matters relating to housing rights because that whole field of social policy was so mired in historical, legal and cultural complexity. Ludovic Langlois-Therien, "The Justiciability of Housing Rights: From Argument to Practice" (2012) Journal of Human Rights Practice 1 [Langlois-Therien].

A new approach to judicial remedies must satisfy three criteria. Firstly, the court orders must be clear to those who are bound to comply.[69] Secondly, the orders of the court must be capable of securing the intended relief if the government complies. These two conditions are obvious. The third condition – certainly the least obvious, and yet most vital – demands that courts craft orders that will likely be complied with in a prompt and sufficient manner. Specifically, courts ought to employ remedies that multiply positive compliance incentives while mitigating compliance costs. It is through manipulating the policy-making process and the policy-maker's incentive structure that courts can assist public bodies in overcoming governance shortcomings. The following section details a myriad of compliance incentives identified by political scientists and international lawyers, and then particularizes these incentives to the context of South African electoral politics.

What Political Scientists Have to Say About State Compliance with International Law and International Court Judgments

Compliance with programmatic court orders[70] can never be taken for granted, especially since legislative or policy reform, even if it implies little financial expenditure, may

[69] A lack of clarity can – and often has – delayed or thwarted full and prompt compliance. Recall that following the *Grootboom* case, there was initial uncertainty as to which tier of government was responsible for complying with the order, and that in the follow-up to the *TAC* case, there was initial confusion amongst lawmakers as to whether judgment simply required removing State-imposed access barriers to nevirapine, or whether the judgment required the State to take it upon itself to make nevirapine widely available to pregnant mothers. This finding has been reproduced in the context of the Inter-American Court of Human Rights. See Jeffrey K. Staton and Alexia Romero, "Clarity and Compliance in the Inter-American Human Rights System" (2007) Constitutional Courts – Advocates or Notaries of Democracy Working Paper Series, available online: < http://saopaulo2011.ipsa.org/paper/clarity-and-compliance-why-states-implement-orders-inter-american-court-human-rights>.

[70] Recall that, for the purposes of this paper, a programmatic court order or a systemic court order are those which seek to provide systemic relief – through the adoption of legislation and/or administrative and executive policy – for a widespread deprivation of human rights. This may involve institutional reform, the adoption of legislation, the reform of certain established policies or practices, the training of public authorities or general awareness raising through educational programs.

entail significant compliance costs[71] for governmental decision makers.[72] In each case, the likelihood of prompt and satisfactory compliance will be swayed by the pro- and anti-compliance incentives at play.

Political scientists studying State compliance with international court judgments have identified a myriad of pro-compliance incentives. A government may wish to comply with an international court order in order to establish or maintain its rule of law credentials,[73] or it may simply wish to avoid being publically condemned for failing to respect basic human rights.[74] Alternatively, a government may wish to seize the opportunity to implement unpopular legislation under the pretense of judicial compulsion.[75] These political incentives will vary according to the levels of accountability to the public[76] or to affluent constituents[77], and the extent to which these groups demand the respect of human rights and the rule of

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[71] For the purposes of this paper, a "compliance cost" is simply any dis-incentive to proceed with timely and sufficient compliance with an order of the court. In some cases, financial costs associated with compliance will be prohibitive. Due to the Constitutional Court's significant measure of deference, however, this is not likely to be the case. In South Africa's case, it is more likely that compliance costs will include opportunity costs, coordination costs, political costs, and even "normative" costs associated with marshalling reform that decision-makers object to in principal. This is explained in this section.

[72] Basak Cali and Alice Wyss document how State compliance with human rights judgments – whether it be in a domestic, Constitutional context, or in the context of supra-national human rights litigation – is often imperfect. While it is seldomly a question of the State refusing to comply, States can drag their feet in complying with international law or with a court order, and may comply, in the end, only partially with what was ordered. See Basak Cali and Alice Wyss, "Why Do Democracies Comply with Human Rights Judgments? A Comparative Analysis of the UK, Ireland and Germany" (2009) SSRN Working Paper Series, online: Social Science Research Network <http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=985793> [Cali and Wyss].

[73] This was apparently an important motivation instigating Turkish compliance with judgments of the European Court of Human Rights, when Turkey hoped to gain full membership to the European Union. See Basak Cali, "The Logics of Supranational Human Rights Litigation, Official Acknowledgment and Human Rights Reform: The Southeast Turkey Cases Before the European Court of Human Rights, 1996-2006" (2010) 35 *Law and Social Inquiry* 311 at 316.

[74] The classic "naming and shaming" technique. See Cali and Wyss, *supra* note 81 at 6.

[75] In these cases, the responsible decision-makers can simply claim that they wish to respect the authority of the court, the constitution, and the rule of law, which will (typically) be a more publically defendable position than championing the unpopular cause in question.

[76] Levels of public accountability may hinge on freedom of speech and expression guarantees as well as the accessibility of information regarding governmental performance to the average South African resident, which in turn depends on the independence, freedom and health of the press, as well as general literacy and wealth levels.

[77] Basak Cali and Anne Koch have documented some cases where narrow constituencies – such as religious or nationalist communities or corporations – exert considerable pressure on decision makers and on their compliance efforts, or lack thereof. See Basak Cali and Anne Koch, "Lessons Learnt From the Implementation of Civil and Political Rights Judgments" (2011) Social Science Research Network Working Paper Series, available online: <http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=985793> at 14 [Cali and Koch].

law.[78] Thus, accountability might be severe where State compliance is perceived to be a matter of national identity or foundational collective ideology.[79]

Internalized norms may also serve as powerful incentives.[80] Decision-makers may have internalized the values of the rule of law, the legitimacy of the judicial function, and the human rights project. They may therefore seek to comply with judicial decisions simply because they believe it is right to do so.[81] In either case, these norms may be deeply engrained and may therefore be capable of withstanding electoral pressures.[82]

Of course, these pro-compliance incentives are tempered by identified anti-compliance incentives or "compliance costs".[83] These may be normative: decision-makers may consider a court order – particularly a daring, progressive and demanding court order[84] – to be democratically illegitimate. Decision-makers may also object, in principle, to what the order calls for.[85] This appears to have been the case during the initially laggard

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[78] Cali and Wyss, *supra* note 72 at 6.

[79] National identities refer to a "self-image", while collectively ideology represents a strong national consensus over basic postulates, usually refined and hardened over the course of history. Decision-makers who fail to act so as to fulfill the public's "self-image" or a collective ideology does so at his own peril. See Cali and Wyss, *supra* note 81 at 13.

[80] This insight reflects a body of international relations literature as it applies to compliance with international law. Traditionally, compliance was only understood in terms of perceived State incentives. More recently, writers have stressed the importance of internalized norms. See Dennis Beach, "Why Governments Comply: An Integrative Compliance Model That Bridges the Gap Between Instrumental and Normative Models of Compliance" (2005) 12 *Journal of European Public Policy* 113.

[81] Cali and Koch, *supra* note 77 at 14-15.

[82] *Ibid* at 6.

[83] This term is used widely in international law and international relation literature.

[84] Morse Tan and Douglass Cassel discuss certain (perhaps unduly) demanding orders of the Inter-American Court of Human Rights and the resulting defiant State reactions. See Morse Tan, "Member State Compliance with the Judgments of the Inter-American Court of Human Rights" (2005) 33 International Journal of Legal Information 319 at 321 and 326 [Tan].

[85] In the European context, the most notable example was the European Court of Human Rights in the *Norris v Ireland* case, the European Court of Human Rights had condemned a law criminalizing homosexuality in Ireland in 1988, but the Irish government only amended its Sexual Offences Act to reflect the ECtHR's judgment in 1993.

implementation of the *TAC* order.[86] It is not surprising: elite members of the ANC had, after all, publically professed their belief that AIDS was a myth intended to stigmatize black male sexuality and that anti-retroviral medication was a "Big Pharma" conspiracy conjured up to exploit African consumers.[87]

Compliance costs might also be political: court-ordered reform might be hotly contested by the general public, or by affluent interest groups.[88] Thus, the presence of regular elections does not guarantee better compliance: the extent and timeliness of compliance will be instead influenced by the preferences and norms held by affluent constituencies.[89]

Moreover, systemic reform always imputes some financial cost,[90] which entails siphoning resources away from other public purposes. Decision makers will be unlikely to promptly comply when that opportunity cost is high.

Lastly, there are coordination costs, those costs associated with governing a large, modern, bureaucratic State. These cannot be exaggerated: coordinating systemic policy initiatives may require harmonizing disparate legislative, executive and judicial bodies at the federal, provincial or municipal level, as well as with different public agencies or corporations. That process of collective coordination will delay compliance in most cases,

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[86] See Steven Robins, *From Revolution to Rights in South Africa: Social Movements, NGOs & Popular Politics After Apartheid* (Scottsville: University of Kwazulu-Natal Press, 2008) at 100-102 [Robins, *Popular Politics*].

[87] Ibid.

[88] In Cameroon, for instance, the reform of the Code of Family has stalled for roughly a decade because legislators have proved averse to opening up contentious issues, such as the minimum age to marry. Cali and Koch, *supra* note 77 at 16, note that these kinds of decisions have made States more reluctant compliers or more prone to contest some of the measures ordered.

[89] This finding has been consistently documented in the related literature. See, for instance, Xavier Dai, "The Conditional Nature of Democratic Compliance" (2006) 50 Journal of Conflict Resolution 690.

[90] This is most obviously the case for reform that calls for an expansion of social services, but it also holds true for many other kind of systemic reform as well. In a South African case where the Constitutional Court held that the State was obliged to provide the means for prisoners to vote, the implementation of that decision would have involved a number of (admittedly smaller) implementation and supervision costs.

and will typically require the expenditure of significant effort and political capital in order to forge consensus.[91]

Contextualizing the Analysis: South African Electoral Politics and State Governance

All of these compliance incentives remain relevant in a domestic, South African setting. The analysis must be contextualized, however, in two principal respects. Firstly, in view of the considerable centralization of political power within the national government – and within the dominating ANC party, in particular – we should expect coordination costs to be lower than in other, less centralized States. Secondly, the ANC's electoral dominance at the national, provincial and municipal levels complicates the dynamics of accountability.

Firstly, then, political power in South Africa remains remarkably centralized. The national government possesses sweeping legislative, taxation and budgetary powers.[92] Provinces are left largely to depend on the national government to allocate their budgets and provinces typically serve as the mere administrative wing of the national government.[93] This is not by accident. The ANC, which had been the dominant negotiating party within the Constitutional Assembly during the drafting of the permanent Constitution, desired a strong centralized

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[91] Cali and Koch, *supra* note 77 at 14.

[92] Jessica Piombo observes how, in principle, provincial and national governments share many concurrent powers but that, in practice, this "cooperative governance" has meant that "the national tier completely dominates the provincial in all aspects: policy initiatives, taxation and spending allocations. See Jessica Piombo, *Institutions, Ethnicity and Political mobilization in South Africa* (New York: Palgrave Macmillan, 2009) at 40-42. [Piombo]. According to Piombo, the provinces have, in practice, been relegated to the status of mere administrative arms of the national government: while they regularly spend approximately 2/3 of the national budget and employ the bulk of the country's civil servants, the provinces virtually lack all budget-making power and taxing power, these powers being possessed and exercised by the national government, over the provinces. The national government also dominates with regards to policy initiatives.

[93] *Ibid*, see note 102.

government capable of leading an ambitious social, political and economic transformation of the polity.[94]

This concentration of political power is then furthered by the clout held by political parties and the relative un-importance of individual elected representatives. Pursuant to South Africa's Constitution, seats in national and provincial parliaments are allocated by a closed-list proportional representation system.[95] Political parties are allocated seats according to their share of the national vote[96] and candidates are "deployed" to seats and to important executive positions – including premierships – after the election is concluded, according to a candidate list that is compiled confidentially and only made public after the results of the election have been announced.[97] This arrangement has had the effect of vesting significant influence in the senior echelons of the ANC, which is said to wield "life or death" control over party members.[98] Naturally, party policies are rarely criticized by members, many of whom wish to avoid the ire of senior officials at all costs.[99]

This considerable concentration of power within the ANC elite should ensure low coordination costs. Effective party dominance over the national, provincial and municipal spheres of government[100] ensures that dramatic action may be taken quickly, if need be.

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[94] The ANC, after all, had hoped for a unitary federal State but conceded that goal during constitutional negotiations. But ever since, it appears the ANC has proved reluctant to devolve genuine powers to the provinces. See Piombo, *supra* note 92 at 43.

[95] *Ibid* at 104.

[96] Ibid, at 44.

[97] Ibid, at 70. Jessica Piombo has noted how these measures have further centralized control within the party, and have helped to keep "radical" politicians in line and these measures have also prevented charismatic personalities from dominating the stage.

[98] One Mr. Holomisa was expelled from the ANC after he explicitly accused Stella Sigcau, an influential pfigure in the party, of corruption in the Eastern Cape.

[99] Piomba, *supra* note 92 at 46.

[100] Indeed, this concentration of power is so severe an ANC Youth League president once informed an audience of South African business leaders that the South African government "is only a subcommittee of the ANC". See Karl Beck, "South Africa: Democracy, Rule of Law and the Future" (March 29, 2012) online: Freedom House <http://www.freedomhouse.org/blog/south-africa-democracy-rule-law-and-future> [Beck].

Secondly, as a matter of electoral accountability, the ANC's dominance provides some insulation against mild electoral pressures. The ANC has captured every national election and nearly every provincial election in the history of South Africa's democracy.[101] In the 2004 round of provincial and national elections, the ANC captured a 2/3 majority and won control of all nine provinces. It held 279 of the 400 seats in the lower house of parliament and the remaining 121 seats were divided by thirteen opposition parties. Similarly, in the 2009 federal and provincial elections, the ANC captured 65.9% of the popular vote. The Democratic Alliance, the ANC's "closest" competitor, captured 16.7% of the popular vote while the Congress of the People captured 7.4% of the popular vote.[102] No present party presents a threat to its virtual electoral hegemony.[103] Moreover, criticism from civil society has often been stymied by the close links between civil society leaders and the ANC and anti-apartheid movement.[104]

That is not to say that the National Executive Committee of the ANC is inoculated against public accountability or other compelling pro-compliance incentives. Leading members of the current government, after all, played a dominant role in drafting the Bill of Rights, in creating the Constitutional Court and in appointing its judges.[105] They have an interest in setting a standard of court compliance, for they presumably wish to ensure that successor governments respect the Bill of Rights and the rejuvenated judiciary that many of the current senior members of ANC helped breathe life into. Furthermore, as a party that

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[101] Ibid.

[102] General Election Results for the Republic of South Africa's National Assembly, reported on April 22, 2009 and available at <http://electionresources.org/za/provinces.php?election=2009>.

[103] More recently, current President Jacob Zuma has been known to say that the ANC will govern "until Jesus comes". See Beck, *supra* note 100. See also Piombo, *supra* note 92 at 65-71, where the author notes the extent to which no other political parties have succeeded in launching a credible challenge to the ruling party, nor can any other party match the ANC's election machine. For Piombo, the ANC also benefits from incumbency: a new black middle class has emerged in South Africa and credit much of their opportunities and success with ANC policies.

[104] Piombo, *supra* note 92 at 64.

[105] Section 174 of the Constitution provides for the appointment and removal of all judicial officers (including both judges and magistrates). In the case of judges, appointments are made by the president, after consultation with a specially constituted body called the Judicial Services Commission (JSC).

sees itself firmly planted in the human rights movement[106] and at the helm of a societal transformation, adhering to court orders that command the provision of basic social entitlements likely goes to the heart of the party's identity.

Moreover, the ANC is sensitive to traditional forms of court-sanctioned shaming. Recall that the South African Constitution is very much the ANC's Constitution.[107] The constitutional commitments to social and economic rights are *its* commitments, and the judges seated at the Constitutional Court are the judges *its* Presidents have appointed.[108] Failure to comply with a programmatic social order issued by *that* Court would provide potent election-season ammunition to the Congress of the People or to the United Democratic Movement, two left-leaning parties that hope to corrode the ANC's claim to be the best party for advancing the interests of the disaffected poor and working class.[109] The ANC's perceived non-compliance might also help confirm the sense that the ANC that has grown lethargic and corrupt in its dominance.

With these compliance incentives and costs clarified, a model approach to judicial relief might be designed to optimize the likelihood that a clear and effective order will be promptly complied with.

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[106] This is, after all, the party that led the charge against apartheid and that championed the most inclusive and progressive Bill of Rights in constitutional history. Its self-generated identity as a transformative and progressive party has even led party officials to describe critics as racist, not committed to the transformative project and, more broadly, "un-South African". See Piombo, *supra* note 92 at 92. Piombo refers to, *inter alia*, Kaiser Nyatsumba, who describes an instance where certain citizens had critiqued the Mandela government's insistence that crime was declining. Nelson Mandela responded to these critics by claiming that they were "un-loyal" and uncommitted to the government's transformative project. See Kaiser Nyatsumba, "Mandela: First Among Equals", *Johannesburg Star* (2 March 1999).

[107] Recall that, by virtue of its initial electoral success, the ANC held a majority of seats in the Constitutional Assembly that drafted and adopted the Constitution and Bill of Rights.

[108] See note 116.

[109] Piombo, *supra* note 92 at 79.

Part 3. A Model Approach To Remedialism For Established Deprivations of Social and Economic Rights in South Africa

Remedies and Court Orders as the Practical Manifestation of the Legal Right

Remedies, it is worth repeating, are judicial commands designed to vindicate a successful legal claimant's rights. Since litigated matters cannot be re-litigated, all a successful claimant can rely on, after a judgment has been rendered, is the court order. In a sense, that court order is the morsel of the claimant's right that survives the judicial process; it is the practical, "real world" manifestation of the underlying right. For instance, since the order in *Grootboom* was declaratory and did not, strictly speaking, order the South African government to do anything, we might say that South Africans do not enjoy a universal right of access to adequate housing, but only a right *to put government on notice* that its policy for providing access is unreasonable. [110]

The Constitutional Court's remedial approach to established violations of constitutional social rights needs to be emboldened. Courts should not feel constrained by their history of traditionally adjudicating simple disputes that could be resolved "once and for all" by a single court order. Complex rights claims do require a more sophisticated remedial response, regardless of whether they are "civil and political" or "social and economic" in nature. Thankfully, the open-textured wording of the Constitution empowers South African courts to discern what this remedial process might look like. And, indeed, judges and lawyers have already started. This section begins by charting certain remedies that South African courts are familiar with awarding. These uncontroversial South African remedies can be modified

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[110] Jonathan Klaaren, "A Right to a Cellphone? The Rightness of Access to Information" in Richard Calland and Allisson Tilley, eds, *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Cape Town: Open Democracy Advice Center, 2002) at 20.

and combined to build a model approach to judicial relief that balances the need for effectiveness with the recognition of the judiciary's limited role in a complex constitutional democracy.

A Primer on Court Orders Under South African Law

The South African Constitution affords courts considerable latitude to fashion a myriad of creative remedies. Section 172 (1) (b) empowers courts to make *any* orders that are "just and equitable", while section 38 of the Bill of Rights instructs courts to grant any "appropriate relief" to an established rights violation. For the Constitutional Court, "appropriate relief" has meant effective relief. In the early case of *Fose v Minister of Safety and Security*,[111] the Court observed that:

> In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.[112]

In a subsequent case, the Constitutional Court added that "appropriateness…require[s] 'suitability' which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violation of rights".[113]

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[111] *Fose v Minister of Safety and Security*, 1997 BCLR 851 (CC) [*Fose*].

[112] *Ibid* at 888-889.

[113] *Sanderson v Attorney-General of Eastern Cape*, 1997 BCLR 1675 (CC) at 1691.

What kind of court orders have been deployed by South African courts?

The courts of South Africa have already familiarized themselves with a host of different orders, both declaratory and mandatory.

Declaration

In *Grootboom*, the Constitutional Court limited itself to issuing a mere declaration.[114] A declaration announces that the claimant has been deprived of his legal right, and outlines – in broad strokes – the kind of action a State might undertake to align itself with the demands of its Constitution. The declaration's function is strictly pedagogical and it respects the prerogative of the legislative and executive branches to divine their own desired method of relieving a systemic rights deprivation.[115] But because the government is not ordered to do anything, the judiciary cannot subsequently punish the government for being in contempt of court in the event that it refuses to comply.[116] It is the Hail Mary pass of court orders; judges can only hope that the relevant public bodies will respond promptly and acceptably.

Mandatory orders

A mandatory order, by contrast, is simply an order to undertake or not to undertake certain actions. Amongst the many possible mandatory orders a South African court can award, this paper highlights three: a programmatic mandatory order, an emergency order,

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[114] *Grootboom*, *supra* note 15 at para 99.

[115] For the Constitutional Court in *Grootboom*, this distinctive feature was the signal advantage of the declaration as a judicial remedy. Recognizing the judiciary's own ability to fashion emergency housing policy, the decision-making burden was foisted onto the legislative and executive branches of the different tiers of government. But, in so doing, the courts also concede any significant ability to determine what *constitutes compliance*. See Kent Roach, "The Challenges of Crafting Remedies for Violations of Socio-Economic Rights" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) at 52-53 [Roach].

[116] Swart, *supra* note 63 at 221.

and an order to pay costs.

Programmatic Mandatory Orders

Programmatic mandatory orders are commands to adopt and implement legislation or an executive or administrative policy. These have been un-controversially issued in South Africa;[117] The *TAC* judgment is but one example.[118] Typically, they are articulated in a general matter, like the order in *TAC*. But because they are "orders", they are enforceable by a subsequent trial finding the State in contempt of court.[119]

Lastly, these orders are heavy-handed, in so far as *detailed* programmatic court orders risk usurping the legislative and executive prerogative for the judiciary. Indeed, some critics of constitutional social rights feared that activist judges would overdose legislative and executive bodies with programmatic mandatory orders providing for inflexible social entitlements with little attention paid to the long-term, growth-inhibiting effects of such government *largesse*.[120]

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[117] In the important decision in *August and Another v Electoral Commission and Others,* 1999 BCLR 363 (CC) [*August v Electoral Commission*], the Constitutional Court ordered the State to make all necessary and reasonable arrangements allowing prisoners to exercise their right to vote. This mandatory order was received un-controversially by the legal community.

[118] See note 68.

[119] Enforcement of a judgment via contempt of court is standard procedure in many common law jurisdictions. See Roach, *supra* note 115 at 54. That possibility has been explicitly recognized in the context of enforcing social and economic rights in South Africa. Justice Froneman of the High Court of Eastern Cape has even recognized the possibility that government officials may be fined or imprisoned in a personal capacity, where they are personally responsible for stalling or for willfully obstructing State compliance. Justice Froneman has also recognized the possibility that a governmental body not involved in initial the initial judicial proceedings or which was not cited in the original court order may still nevertheless be held in contempt for failing to comply. See, amongst others, *Kate v Ministry of Eastern Cape Department of Welfare, Eastern Cape,* 2005 SA 141 at para 18-22.

[120] See Sunstein, *supra* note 30.

Emergency mandatory orders

South African courts have issued emergency orders, commanding the State to adopt whatever measures are necessary to prevent grave and irreparable harm, particularly the loss of life. In the *Modderklip* case[121], for instance, an emergency mandatory order was issued prohibiting State authorities from evicting squatters from privately owned land. These orders only provide relief for the claimants, and do not seek to instigate policy-level change.[122]

Order for Costs

In South Africa, an order for "costs" compels one party in a legal action to compensate another party for all the costs associated with the judicial proceedings, including reasonable fees for legal counsel and expert witnesses.[123]

Structural interdicts

Through what South African jurists call a "structural interdict", a court requires the State to submit its compliance efforts to future judicial supervision.[124] The seized court may seek to oversee and influence the development of the governmental program itself, or it may limit its

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[121] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*, 2005 8 BCLR 786 (CC).

[122] The issuance of remedies that attempt to both instigate systemic, policy-level change, while providing immediate relief for the claimants, has been termed a "two-track" approach to judicial remedialism. See Roach, *supra* note 115 at 55.

[123] Michael Bishop, "Remedies" in Stu Woolman and Michael Bishop, eds, *Constitutional Law of South Africa* (Johannesburg: JutaLaw, 2004) at 56-57.

[124] A structural interdict was issued by the Constitutional Court itself, for instance, in *August v Electoral Commission, supra* note 117, and had been issued by the High Court in both *TAC* and *Grootboom*.

supervision to the implementation stage.[125] In *August v Electoral Commission*[126], for instance, the Constitutional Court issued a mandatory order commanding the State to undertake all necessary arrangements to enable prisoners to register as voters and to vote in upcoming national elections. In addition, the Court directed the State to submit a proposal, on a fixed date, detailing a program that would satisfy the Court's mandatory order. A program was accordingly developed, proposed, accepted by the Court and implemented promptly. [127]

Contempt of court

Contempt of court is a judicial condemnation reserved for litigating parties who have deliberately ignored or willfully failed to comply with a previous order of the court.[128] In some cases, a party's contempt of court may be simply declared. More often, it is paired with a fine or term of imprisonment for those found in contempt.[129] South African public law permits courts to fine the State – or any public body, for that matter –for being in contempt. Certain jurisprudential developments have also explicitly recognized the possibility that individual public officials – in their personal capacity – can either be fined or imprisoned for

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[125] This method of supervision will be standard where the government action required by the court judgment is relatively simple, as it was in *TAC*, where the government was ordered to simply make nevirapine more accessible to pregnant mothers.

[126] See *supra* note 117.

[127] Liebenberg, *supra* note 12 at 98.

[128] Contempt is recognized in most Anglo-American jurisdictions, and is of course recognized and frequently resorted to in South Africa. In *Townsend-Turner and Another v Morrow*, 2003 ZAWCHC 53, Knoll J. outlined what has been since considered the standard test for determining contempt under the law of South Africa. Firstly, an order must be granted against the person said to be in "contempt". Secondly, that respondent must have been served with the order or had been informed of the grounds of the order and did not have any reasonable grounds for disbelieving the information. Thirdly, the respondent had either disobeyed or neglected to comply with such order. Once these requirements were met, the courts will maintain a rebuttable presumption that such lack of compliance was either willful or in bad faith.

[129] Swart, *supra* note 63 at 241.

deliberating ignoring court orders that made demands on their political office.[130]

A Model Judicial Response to Established, Systemic Social Rights Deprivations

These South African court orders provide the basic building blocks for a model approach to judicial remedialism. As provided above, this approach to judicial remedialism seeks primarily to assist (or to compel) governmental bodies in overcoming basic governance shortcomings. In order to do so, the court orders must be clear and must be capable of providing needed relief; they must be tailored to multiply or amplify pro-compliance incentives while curtailing compliance costs; and they must respect the boundaries of the judiciaries' institutional and policy-making competences. With these guidelines in mind, the following suggestions may be made.

Courts Should Not Rely Solely on Open-Textured Declarations

Mere declarations are weak guarantees that the South African government will reform existing policies in a sufficient and timely manner. Open-textured declarations leave it to governmental decision makers to decide how to comply, and even what constitutes compliance. It is a risky strategy. The legislative and executive branches might simply misunderstand what the order calls for, or they might respond to a general declaration slowly and meekly. In either case, the judicial system is no longer seized with the matter, and proceedings cannot be re-instituted to clarify the order or to castigate the South African government for its poor compliance. This is what occurred in *Grootboom*, where an un-specific declaration left different tiers of government with an un-clear sense of which body

[130] This possibility has, however, been hotly contested. While the possibility has been rejected by several courts in South Africa, it has been endorsed elsewhere. See Swart, *supra* note 63 at 235-239.

was obliged to do what. The ultimate reform was unduly narrow in scope and has not been implemented. And yet, for all intents and purposes, it appears that the South African national government believes it has discharged its obligation under the declaration.

Courts Should Instead Shepherd the Prompt Development of a Reasonable Government Program

Rather than order the government to implement a judge-made social policy, South African courts should instead rely on the "structural interdict" and order the relevant State bodies to develop the required social policy reforms themselves, and then subject that proposal to court scrutiny. For the benefit of the governmental decision makers, the court's structural interdict should outline, in general terms, what reforms are required to bring the State in line with its own constitutional obligations, and should specify which tiers and branches of government are bound to contribute to the formulation of that reform.[131] The government's proposal should also include suggested steps for prompt execution. This represents an important first step, and is endorsed by many South African human rights lawyers.[132]

In a move departing from (admittedly underdeveloped) South African precedent, courts should attempt to harness the advantages of court-room adversarialism in scrutinizing proposed governmental reforms. The government submission ought to be critically evaluated by at least the opposing party, who should be invited to propose alternative reforms, or more discrete amendments to the government's plan.[133] South African courts

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[131] These were suggestions that had been made as early as 1996, the year the Constitution was permanently adopted. See Wim Trengove, "Judicial Remedies for Violations of Socio-Economic Rights" (1999) 1 ESR Review 32 at 36.

[132] See endorsement recited in Craig Scott, "Towards a Principled, Pragmatic Judicial Role" (1999) 1 ESR Review 1 at 6 [Scott].

[133] While, in broad strokes, supervision remains an un-qualified demand by authors in the field, the details of supervision are often not clarified. The model sketched above most resembles the approach suggested by Ebadolahi, *supra* note 29 at 1595.

should also enable and encourage the effective participation of civil society, established NGOs and the South African Human Rights Council (SAHRC) in these proceedings. Without the tribunal's assistance, however, NGOs face informational and financial obstacles to constructive participation. In order to overcome these barriers, the seized court should issue "access to information orders", obliging the State to provide the opposing parties and intervening parties with all relevant (and non-sensitive) State information, including budgets, different departmental proposals, draft policies, meeting minutes or correspondences.[134] This would represent an important innovation. In addition, the seized court should also invite participating NGOs or the SAHRC to hire policy experts to draft critical reviews of State proposals and to propose alternative reforms. Courts should, in these cases, order the government to finance the reasonable expenses accrued in hiring or retaining said expert by issuing an order for costs.[135] This innovation is also significant. Many established South African NGOs are simply under-funded, while others have noted that championing these highly contentious "political matters" risks compromising some of their private donor funding, a deterrent that might be mitigated by judicially-commanded State financing[136]. Taken together, these suggestions would make for an enlivened adversarial process and the resulting debate between State proponents and the informed and policy-versed critics would, to a certain degree, compensate for the judiciary's lack of policy-making expertise.

Of course, principles of judicial deference remain applicable. Where the State submits a good faith proposal, the seized court should afford the government's decisions due deference. Judicial proceedings at this stage are primarily meant to compel implicated governmental bodies to come together and develop a coherent framework policy, ready for implementation. Ideally, these hearings will also serve to clarify the precise demands of the Constitution, to expose clear policy oversights or manifestly poor governmental decisions.

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[134] This is a novel idea, although based on South African courts' generally applicable jurisdiction to command evidence from the State in pleadings against it.

[135] This too is a novel idea, and is made possible by the doctrine of costs, whereby the losing party in a suit may be compelled to compensate the opposing party for the costs of undergoing judicial proceedings. This includes lawyer's fees, where reasonable.

[136] Piombo, *supra* note 92 at 58.

Had this approach been adopted in *Grootboom*, these proceedings may have signaled to the government the need to legislate on behalf of communities like Grootboom's, which had already been evicted and subsisted without shelter. These proceedings may have also highlighted the unfortunate oversight of having emergency housing fund administered by a fixed percentage of each province's budget, as opposed to being administered by the national government, as suggested by the national Department of Housing.[137] They may have also drawn the government's attention to the need to *require* municipalities to assess their emergency housing needs, and to supervise the municipalities' efforts to implement their proposed emergency housing programs.[138]

But, on the whole, the court should remain highly deferential to the general thrust of the government's proposals, and the final approved version should not, under ordinary circumstances, deviate significantly from the government's desired policy.

Once the government's detailed proposal is exposed and scrutinized, the seized tribunal should approve a final version of the program and issue a sweeping, programmatic court order that includes the entirety of the proposed reforms, including the proposed stages of implementation.[139] Identified governmental bodies will be judicially commanded to comply with the demands of this sweeping order within an approved deadline.[140]

This approach is highly desirable. Firstly, as was seen in the follow-up to *Grootboom*, the policy-making process might be improved and expedited by clearly designating responsible governmental actors and requiring them to, within a fixed deadline, coordinate amongst each other to develop a comprehensive framework policy whose implementation is

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[137] See Pillay, "Implications", *supra* note 32 at 10.

[138] See *supra*, page 12.

[139] This suggestion has been advanced forcefully by Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (Johannesburg: Juta & Co, 2005) at 217-219 [Currie and De Wall].

[140] Ibid.

measurable and attainable. By both compelling and directing cooperation between implicated public bodies, courts reduce the kinds of coordination costs that delayed compliance in *Grootboom*. There is, moreover, little room for the government to be confused as to its own constitutional obligations, because the government and judiciary are brought together in constant dialogue over the ambit of the government's constitutional obligations.[141]

Secondly, this approach respects a sensible separation of powers. It affords the legislative and executive branches the ability to exert significant control over what kind of government programs will be adopted in response to an established deprivation of constitutional social rights.[142] This respects a sensible allocation of policy-making competences and thus serves to legitimize the resulting court order. Fashioning this space for the contribution of non-judicial governmental actors may also avert charges that the South African judiciary is unduly activist and ought to be reigned in by the executive.[143]

Thirdly, this approach marshals a lively exchange of policy ideas. Parties to the matter are invited to present and defend their own suggestions. While deference is due, if fresh proposals are manifestly superior – where even government lawyers fail to muster a half-convincing rebuttal – then those fresh proposals may be included in the ultimate programmatic court order. The government may even accept good proposals on its own accord, or perhaps to persuade the presiding judge that it is cooperating with the proposal process in good faith. These fresh ideas are particularly valuable in South Africa's stale policy-making environment, where the provincial and national governments are dominated by the narrow elite that presides over the National Executive Committee of the ANC.[144]

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[141] Recall that in the *TAC* case, there was initial confusion as to whether the government was only obliged to remove existing restrictions to nevirapine or whether, instead, it was obliged to take positive steps to increase its availability.

[142] Liebenberg, *supra* note 12 at 30, and Roach, *supra* 115 at 59.

[143] A growing executive apprehension for the judiciary is an apparently growing problem worth keeping note of. See Open Society, *supra* note 50 at 27-30.

[144] See Xolela Mangcu, *The Democratic Moment: South Africa's Prospects Under Jacob Zuma* (Sunnyside: Jacana Media, 2009) at 118-121.

Courts should arrange for effective supervision during the implementation phase

The *Grootboom* and *TAC* experiences demonstrated the importance of continued supervision. In *Grootboom*, the un-supervised Oostenberg Municipality was allowed to neglect its settlement agreement with the Grootboom community, which led to fast-deteriorating health and safety conditions within that settlement.[145] The TAC, by contrast, corrected a laggard State response to a court order through a campaign of correspondences and threats to undertake further legal action.[146]

A model remedial approach should follow suit. Alongside a court's sweeping programmatic order, the court should order a structural interdict, requiring government to present and justify its record of implementation in periodic judicial proceedings.[147] This is already established practice in certain "civil and political" rights cases, and is universally endorsed amongst South Africa's activist lawyers.

In addition, the court should appoint an independent monitor who will supervise government compliance. Mitra Ebadolahi argues that the South African Human Rights Commission is best-placed to serve as that independent monitor, for it is an established State institution constitutionally mandated to monitor human rights deprivations in South Africa.[148] The SAHRC is even legally vested with the right to perform a search and seizure of government files, improving its ability to monitor progress.[149] However, the SAHCR is not fully independent. Its members are appointed, after all, by the national government[150], and

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[145] See *supra* pages 9-11.

[146] See *supra* pages 13-15.

[147] This idea is forcefully advanced by many South African authors, but perhaps most forcefully by Ebadolahi, *supra* note 29.

[148] *Human Rights Commission Act*, RSSA 1994, no 2095, preamble [*Human Rights Commission Act*].

[149] Ibid at s 9 (c).

[150] Ibid at s 3.

they do not benefit from independence guarantees, such as security of income and tenure, to the extent that judges do.[151] In the event a court doubts the integrity of the SAHCR, it might order a reputed NGO or private firm to monitor State execution. In these cases, the seized tribunal should issue an order an award for costs, financially compensating firms for monitoring expenses, and an order granting access to relevant State files.

These periodic supervisory proceedings would strengthen compliance incentives by intensifying and prolonging public accountability. Where the governmental body fails to comply, it will be publically acknowledged and condemned by a respected State institution. And, because supervisory proceedings are periodic, accountability will be relentless. If such supervision was ordered in *Grootboom*, for instance, decision makers may have faced a steep public rebuke for abandoning the *Grootboom* declaratory judgment after only meek first steps at compliance.

The public, in these circumstances, would be repeatedly reminded of the government's failure to adhere to the rule of law and to the demands of human rights. The ANC would continue to taint its own image and left-leaning opposition parties would be gifted this potent ammunition.

Moreover, the independent monitor's supervisory reports may actually serve to fill the *lacunae* in the government's understanding of its reform's ground-level implementation. This data would assist the complying public body in tailoring its implementation strategy for optimal results.

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[151] Dwight Newman, "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda" (2003) 19 SAJHR 189 at 193.

Courts Should Threaten Restrictive and Punitive Actions in the Event of Non-Compliance

Finally, deliberate non-compliance, at any stage in these proceedings, should be punishable by a ruling in contempt of court.[152] The threat of this punitive action increases the likelihood of compliance by leveraging the threat of public stigma, fines or other penalties to exact the cooperation of public officials. This threat might be employed to specifically coerce elite ANC executives, for they can, in turn, wield their considerable clout to reign in subordinates. Given the significant centralization of power in South Africa, this tactic may prove to be particularly effective. Recall, for instance, that the TAC's threat to sue the Minister of Health of the Mpumalanga province was critical in inducing submission.[153] Moreover, where reform requires coordinated intra-governmental action, the threat of punishment reduces coordination costs by compelling the submission of maverick officials.

Rulings in contempt must, however, remain an exceptional enforcement measure. Its overuse might lead to a chilling effect. Public officials might shy away from proposing robust reforms in fear that they may be fined or imprisoned in the event that their bold program is difficult to implement. If only resorted to in palpably clear cases of non-cooperation, however, a ruling of contempt would hang (usefully) over the heads of decision-makers, prompting sufficient and expedient compliance.

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[152] Currie and De Wall, *supra* note 139 at 222.

[153] Heywood, *supra* note 64 at 7-10.

Where To Go From Here?

Paul O'Connell has argued that constitutional social rights have petered out under the weight of the hegemonic neo-liberal economic agenda.[154] And while, in South Africa, social rights do appear to have lost their potency, it is hard to find any traces of the corrupting neo-liberal influences in the jurisprudence. The problem is simpler. The South African judiciary fears the tremendous power that flows from these revolutionary and largely un-tested social rights.

In order to fulfill its constitutional mandate, the Constitutional Court must discern the role it wishes to play in contributing to State policies related to the realization of fundamental social interests. Unfortunately, the Court's ability to experiment – to grope its way towards an acceptable approach – has been stunted by a dearth of social rights cases. In the place of jurisprudential experience, academics and lawyers have been called on to supply that vision.

Simply put, this paper has attempted to contribute to that discussion. It has argued that some of the significant impediments to effective relief in the aftermath of *Grootboom* and *TAC* were not the intractable problems of development, but rather simple – and correctable – governance shortcomings. Because judicial remedies should aim to be *effective*, this paper has insisted that court orders must be tailored to assist public bodies in overcoming simple governance deficiencies and in coercing obstinate State officials into cooperating. In order to do so, a model court order must be clear, it must be capable of providing vital relief if complied with, and, most importantly, the orders must be crafted so as to multiply and intensify known pro-compliance incentives while reducing indentified compliance costs.

With these insights in mind, this paper has forged a model remedial approach that is

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[154] Paul O'Connell, "The Death of Socio-Economic Rights" (2011) 74 (4) The Modern Law Review 532.

more comprehensive and attentive than alternatives advanced in the South African literature. This model approach would serve the cause of clarity, coordination, proactive scrutiny of government proposals, the meaningful contribution of civil society as well as the effective supervision of government implementation. This model approach to judicial relief attempts to do so while still affording legislative and executive actors the prime responsibility of crafting social policy.

As demonstrated, this model of judicial review can contribute to the fulfillment of the most fundamental social interests, like basic education, emergency healthcare and access to adequate housing. Admittedly, Courts can do little about the intractable problems of development and political economy. And yet this contribution – limited as it is – may still be significant.

Basic governance shortcomings are regularly identified as barriers to improving access to housing, for instance. In his paper, Ludovic Langlois-Therien argued that some of the significant constraints on access to public housing in Cameroon are not strictly financial, but are rather related to legislative inconsistencies and coordination problems between responsible government agencies.[155] Of course, it is indulgently optimistic to even *dream* of the Cameroonian judiciary contributing to the systematic relief of fundamental social interests. The judiciary in Cameroon remains so deeply corrupted[156], and suffers from a total lack of independence as it is headed by no less a dominating figure than the maligned chief executive, President Paul Biya.

Thus, the principal reason I decided to write on South Africa: as far as judicial

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[155] Langlois-Therien, *supra* note 68.

[156] Transparency International, Global Corruption Report 2007: Corruption of Judicial Systems, (Cambridge:CUP 2007) at 11. On an interesting aside, however, I managed to become friendly with several judges while there. One close friend – an eminently reasonable human being and a respected first instance judge – described how he very routinely solicits and accepts bribes from litigants. In the same conversation, his wife, a University lecturer in international law, in her own right, would inform me that he was almost single handedly financing her NGO, which advocates for the rights of the child and provides emergency relief for orphan children.

contribution goes, South Africa presents far more optimistic conditions. The State is not cripplingly poor, is relatively respectful of the rule of law and benefits from an expansive administrative infrastructure. The judiciary is relatively uncorrupted, especially at its highest echelon.[157] And the national and provincial governments, while laggard, are persuaded by the need to realize those fundamental social interests enshrined in the Bill of Rights. In these conditions, South African courts can make a meaningful contribution to the effective realization of *certain* fundamental social interests. It becomes now a question of judicial courage.

[157] Transparency International, Global Corruption Report 2007: Corruption of Judicial Systems, (Cambridge: Cambridge University Press 2007) at 11-16.

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