

A Defense of Structural Injunctive Remedies in South African Law

By Danielle Elyce Hirsch¹

Abstract: This Article argues that the use of structural injunction remedies by South African courts is appropriate, and, in light of demonstrated government inaction, often necessary in order to give meaning to the protection of socio-economic rights, which is mandated by their Constitution. The Article draws upon numerous United States judicial decisions where structural injunctions have been successfully implemented to address systemic institutional inaction and violations of the equal protection and due process clauses of the United States Constitution. In numerous instances, the South African government has not acted to effectively give meaning to the socio-economic rights which were broadly declared by the South African Constitution. Because of this demonstrated inaction, structural injunction orders make sense for South Africa courts to provide on-going supervision and require compliance with Constitutional mandates. Structural injunction orders are one tool that courts should use to help ensure that the socio-economic rights intended by the Constitution are realized by all South Africans.

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“Indeed, the greatest benefit of legitimating judicial remedial power may not be that it permits the court to act, but rather that it may force the political bodies to perform their functions.”²

Judges are more than social critics. The power of the law and justice lies in actions, not just pronouncements. After finding a constitutional violation by a state institution, judges should act upon the belief that simply declaring a practice unconstitutional is not the limit of their duty as a judge. If a state has a function to perform and does not perform that function, so that people are injured in their constitutional rights, it is the duty of the courts to intervene to protect those rights. Given a sworn oath to uphold their constitution, judges are compelled to eliminate any practices contrary to it by any means necessary. In this sense, the exercise of judicial remedial discretion is not a good in itself; it is rather the necessary price of upholding the constitution.

This Article will explore the use of the structural interdict/injunction (“structural injunction”) remedy for breaches of socio-economic rights violations by South African courts drawing on the lessons of numerous United States judicial decisions which included structural injunctive relief to address systemic institutional violations of the equal protection and due process clauses of the United States Constitution. In light of the demonstrated need for ongoing supervision by the courts because of government inaction, employing structural injunctions makes sense because, through each of these orders, the state will be ordered to devise and present to the court a plan of action to remedy the violation and to report back to the court at

² William A. Fletcher, “The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy,” 91 YALE L.J. 635, 696 (1982) (“The Discretionary Constitution”).

regular intervals on its implementation progress.³ To give meaning to South Africa's constitutional protection of socio-economic rights, this Article will argue that structural injunction remedies are appropriate and often necessary.

This Article views socio-economic rights through the lens of remedies. Although socio-economic rights in the South African Constitution⁴ and law are discussed, the Article focuses on the institutional structural injunction remedy to give meaning to these rights. Declared rights are often abstract; they are announced without a clear sense of how they will be received or implemented. Through the process of remediation and enforcement, however, courts give effect to those rights by seeking to reform deficient or recalcitrant state institutions. Put another way, socio-economic rights guarantees may well amount to very little if they are not enforced strictly and with the necessary institutional mechanisms. A decision by a court to supervise the implementation of its order does not necessarily involve excessive interference with the workings of other branches of government, but can be designed to foster compliance with what they are constitutionally mandated to do.⁵

³See, e.g., Mia Swart, "Left out in the cold? Crafting Constitutional Remedies for the Poorest of the Poor," 21 SAJHR 215, 215-19 (2005) (criticizing the relief granted in the Constitutional Court's socio-economic jurisprudence because the government has not fully complied with any of the Court's orders) ("Left out in the cold?"); Dennis Davis, "Socio-economic rights in South Africa: The record of the Constitutional Court after ten years," VOL. 5, NO. 5 ESR REVIEW (DEC. 2004) (contending that the Constitutional Court's reluctance to grant structural relief in socio-economic rights violation cases has resulted in continued government inertia to take any action to improve the lives of successful litigants); Kameshni Pillay, "Implementing *Grootboom*: Supervision needed," VOL. 3, NO. 1 ESR REVIEW (JULY 2002) (arguing that the orders handed down by the Constitutional Court in *Grootboom* were a disappointment because they lacked time frames for action and no court-ordered supervision to ensure government compliance).

⁴ When the South African Constitution is referenced, it is understood to mean the Final Constitution of 1996, unless otherwise noted.

⁵ As Bilchitz explains, "[s]uch supervision seems necessary to ensure the effectiveness of socio-economic rights, any worries about the legitimacy of the Court's role in this area seems misplaced. A failure to retain a supervisory element in the order rather displays an undue deference by the Court to the other branches of government and evinces an unwillingness on its part to retain responsibility for the effectiveness of its orders." David Bilchitz, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundation for Future Socio-Economic Rights Jurisprudence," 19 SAJHR 1, 25-26 (2003) ("Towards a Reasonable Approach to the Minimum Core").

The most effective means of remedying systemic violations of socio-economic rights would be for a court to exercise supervisory jurisdiction in the form of a structural injunction order, a power that the Constitutional Court has thus far declined to invoke.⁶ The Constitutional Court has granted only limited forms of structural injunctions in prisoners' voting rights cases, directing steps to be taken to allow prisoners to register and vote in elections.⁷ In contrast, the Constitutional Court has, so far, refused to grant structural injunctions over the implementation of socio-economic rights judgments; instead, providing the state with broad guidelines and allowing the state itself to determine how to proceed, without any court-ordered monitoring.⁸ When court orders themselves are ambiguously worded or fail to include any detailed affirmative requirements to provide accountability for the state to

⁶ The Constitutional Court has come the closest to ordering injunctive relief in *Minister of Health v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) ("*Treatment Action Campaign*") by ordering that the government needed to, without delay, "remove the restrictions" that prevent the use of Nevirapine, to "permit and facilitate" its use, and to "take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV." *Id.* at para 135. However, the Court declined to monitor the implementation of its order, removing any accountability for the government to comply with the Court's order.

It is perhaps relevant that the order requiring the provision of Nevirapine in all public hospitals would not be an expense to the state, "[t]he cost of Nevirapine for preventing mother-to-child transmission is not an issue in the present proceedings. It is admittedly within the resources of the State Therefore this aspect of the claim and the orders made will not attract any significant additional costs." *Id.* at para 72 (Italics added.).

⁷ See *August v Electoral Commission* 1999 (3) SA 1 (CC); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 (5) BCLR 455 (CC).

See also *Sibiya and Others v The Director of Public Prosecutions: Johannesburg High Court and Others* 2005 (8) BCLR 812 (CC) (where the Constitutional Court required the state to furnish a report to the Court as to the steps taken, and progress made, as to the process of the replacement of the sentence of death for all prisoners on death row with another appropriate sentence in light of the Constitutional Court's previous holding that the execution of the death penalty was inconsistent with the Constitution [*S v Makwanyane and Another* 1995 (3) SA 391 (CC)]).

⁸ For example, in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (1) SA 46, the Court extended significant discretion to the state in relation to the state's subsequent implementation of the judgment. On this issue, Yacoob J stipulated that the state had a number of options towards compliance with the Court order, "[t]he precise contours and content of the measures to be adopted" are, he argued, "primarily a matter for the legislature and the executive." *Id.* at para 49. In addition, "[i]t is essential that a reasonable part of the national housing budget be devoted to [giving effect to this Court order], but the precise allocation is for national government to decide in the first place." *Id.* at para 66.

carry out the orders, there a danger that the state will choose to interpret these orders narrowly. “In considering how best to meet this difficulty, it is, however, important to see that the judgments *themselves* are not the problem. The problem is, instead, the state’s subsequent implementation of them.”⁹ Thus, if a decree is made only in general terms, an uncooperative or unresponsive state defendant may find it easy to ignore, disobey or defy the decree without fear of contempt, by making the contention that the order is too vague to guide future conduct.

Despite the reticence of the Constitutional Court to use the structural injunction as a tool for reforming the institutions of government to validate socio-economic rights, many South African high courts have granted structural injunctive relief in cases dealing with socio-economic rights.¹⁰ This is an encouraging

⁹ Murray Wesson, “*Grootboom* and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court,” 20 SAJHR 283, 306 (2004) (“*Grootboom* and Beyond”).

See also David Bilchitz, “Giving Socio-economic Rights Teeth: The Minimum Core and its Importance,” 119 SALJ 484, 502 (2002); Thomas J Bollyky, “R if C > P + B: A Paradigm for Judicial Remedies of Socio-Economic Rights Violations,” 18 SAJHR 161, 185 (2002) (illustrating that supervisory jurisdiction may result in saving resources in the long run); Jonathan Klaaren, “A Remedial Interpretation of the *Treatment Action Campaign* Decision,” 19 SAJHR 455, 466 (2003) (arguing for direct judicial remedies in respect of the minimum core obligation); David Bilchitz, Towards a Reasonable Approach to the Minimum Core, *supra* note 5; Marius Pieterse, “Coming to Terms with Judicial Enforcement of Socio-Economic Rights,” 20 SAJHR 383, 414-17 (2004) (suggesting that structural injunctive remedies may result in a “dynamic dialogue” between the courts and government and that the “pragmatic decision not to exercise supervisory jurisdiction [has] compromised the efficacy” of previous court orders); Mia Swart, *supra* note 3 at 226-28.

¹⁰ See, e.g., *City of Cape Town v Rudolph and Others*, 2004 (5) 39, 88E-H (CPD) (“*City of Cape Town v Rudolph*”) (“I do not believe that a declaration, standing on its own, will suffice. There has already been such a declaration, made by the Constitutional Court [in *Grootboom*]. It has not induced the applicant [the State] to comply with its constitutional obligations. *Something more is necessary. The circumstances, and in particular, the attitude of denial expressed by applicant in failing to recognise the plight of respondents [homeless evicted persons] as also its failure to have headed the order in Grootboom makes this an appropriate situation in which an order, which is sometimes referred to as a structural interdict, is ‘necessary’, ‘appropriate’ and ‘just and equitable’.*” (italics added.)

See also *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W); *Grootboom v Oosenberg Municipality* 2000 (3) BCLR 277 (C) (“*Grootboom – High Court*”); *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (T) (“*Treatment Action Campaign – High Court*”); *Rail Commuter Action Group v Transnet Ltd t/a/Metrorail* (1) 2003 (5) SA 518 (C); *Modderklip Boerdery (EDMS) Bpk v President Van Die RSA En Andre* 2003 (6) BCLR 638 (T), *aff’d*, *Modder East Squatters v Modderklip Boerdery*; *President of the Republic of South Africa v Modderklip Boerdery* 2004 (8) BCLR 821 (SCA).

development for the future enforceability of socio-economic rights.¹¹ Unfortunately, when these high court opinions have been reviewed by the Constitutional Court on appeal, while the spirit and object of these orders has been affirmed, the actual structural injunction orders have been overturned—replaced with aspirational declaratory orders for the state to take all appropriate action to provide the applicants with their deserved relief. This Article argues that the high courts should continue to exercise supervisory jurisdiction in socio-economic rights cases, just as United States district courts successfully did during civil rights’ institutional reform litigation. Further, and just as importantly, like the United States Supreme Court did in overseeing those same civil rights cases, the Constitutional Court should be willing to tolerate, and even encourage, such injunctive relief orders and monitoring to be undertaken by high courts to ensure that socio-economic judgments are given their full effect.

This Article is divided into four parts. Part One traces the socio-economic rights provisions in the South African Constitution, as well as the wide-ranging remedial powers bestowed upon all levels of South African courts. Given the transformative nature of the socio-economic rights contained in the South African Bill of Rights and the broad remedial powers bestowed upon South African courts, this Article suggests that when state institutions fail to measure up to what the Constitution demands to provide for the realization of socio-economic rights, South African courts must employ structural injunctive relief. Part Two defines the structural injunction remedy, drawing from seminal cases in United States’ jurisprudence where United States courts exercised supervisory jurisdiction to

¹¹ I wholeheartedly agree with Swart’s optimism that High Court judges are increasingly adventurous in their choice of remedy and that, hopefully, the Constitutional Court will soon follow suit in its support of High Court structural injunction orders to remedy institutional socio-economic rights violations, *supra* note 3 at 228-35.

successfully reform inadequate government institutions. From this exploration of United States case law, several conclusions can be drawn: (1) when a state institution defendant exhibits a stubborn resistance to change, extensive court-ordered relief is both necessary and proper;¹² (2) the converse is also true: if the government chooses to cooperate in the institutional suit and provides the court with reasonable plans to remedy constitutional violations, the court can declare the parameters of the socio-economic right while leaving policy discretion up to the government itself. Part Three explores existing South African socio-economic rights jurisprudence on socio-economic rights, focusing on those socio-economic rights cases in which a high court has ordered structural injunctive relief and where the Constitutional Court struck such relief down. Additionally, this section discusses an encouraging recent Transvaal High Court judgment, in which the High Court ordered structural injunctive relief to enforce government compliance with a Constitutional Court socio-economic rights judgment. Part Four identifies the principal criticisms of structural injunctive relief: institutional incapacity in “polycentric” decision-making, deference to the political branches of government for policy-making and separation of powers concerns. This Article concludes that unless socio-economic rights provisions in the South African Constitution are to be devoid of meaning, South African courts must order state institutions to remedy constitutional violations, which may necessitate structural injunction orders. Such remedies ordinarily will have to be more specific than a mere prohibition of an illegal activity. Structural injunctive relief will give definitive effect

¹² The state defendant may choose not to cooperate with the court if the reform the remedy seeks to bring about is politically unpopular, complicated or expensive.

Also, as Chemerinsky has explained, voluntary government initiatives to advance basic subsistence for all citizens will be inherently inadequate because “the self-interest of the majority of citizens is to counter the interests of the poor. People do not want to give up their hard earned money in tax dollars to help others. People are more likely to support programs from which they might benefit.” Erwin Chemerinsky, “Making the Right Case for a Constitutional Right to Minimum Entitlements,” 44 *MERCER L. REV.* 525, 539-40 (1993) (outlining seven steps to advance the case for a constitutional right to basic subsistence in the United States).

to socio-economic rights by seeking to reform inadequate state institutions and adequately enforce constitutionally mandated rights.

I. PART ONE: AN EXAMINATION OF THE RELEVANT SECTIONS OF THE SOUTH AFRICAN CONSTITUTION, THE MAIN SOURCE OF SOCIO-ECONOMIC RIGHTS AND COURTS' BROAD POWERS TO REMEDY CONSTITUTIONAL VIOLATIONS.

The South African Constitution codifies a comprehensive range of civil and political rights, as well as economic and social rights as directly justiciable rights in its Bill of Rights.¹³ The preamble to the South African Constitution provides, in no uncertain terms, that the Constitution was adopted, *inter alia*, to “heal the divisions of the past” and to “improve the quality of life for all citizens.”¹⁴ The Constitution thus obliges the courts to ensure that socio-economic rights provisions in the Bill of Rights are properly enforced and protected.¹⁵ The inclusion of these rights, largely

¹³ See, e.g., Albie Sachs, “Towards a Bill of Rights in a Democratic South Africa,” 6 SAJHR 1 (1992); Etienne Mureinik, “Beyond a Charter of Luxuries: Economic Rights in the Constitution,” 8 SAJHR 464 (1992) (“Beyond a Charter of Luxuries”); David Bilchitz, “Towards a Reasonable Approach to the Minimum Core,” *supra* note 5.

¹⁴ The full text of the preamble to the South African Constitution reads that the Constitution was adopted to:

“Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which the government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”

¹⁵ As de Vos argues, the South African Constitution has a transformative vision, especially as to the realization of socio-economic rights, and this places significant burdens on the state.

“[T]he Constitution explicitly rejects the social *and* economic status quo and sets as one of its primary aims the transformation of society into a more just and equitable place where the transformation of society into a more just and equitable place where people would better be able to realize their full potential as human beings. Implicit in this transformative vision of their Constitution is the assumption that such a document burdens the state with both negative and positive obligations, obligations that might sometimes be at variance or, at the very least, might have to be reconciled with one another within a specific context.” Pierre de Vos, “*Grootboom*, the Right of Access to Housing and Substantial Equality as Contextual Fairness,” 17 SAJHR 238, 260-61 (2001) (Footnotes omitted.).

influenced by social injustices of the past and the aspiration to establish a society based on social justice and fundamental human rights, require that the state meet its constitutional obligation to “respect, promote and fulfil” those rights.¹⁶

Numerous socio-economic rights are recognized in the South African Constitution. The entrenchment of economic and social rights, such as rights pertaining to housing, health care, food, water, social security and education, that bind the state and natural and juristic persons, is a unique feature of South Africa’s Bill of Rights.¹⁷

The state’s obligations to some of these rights are expressly qualified. For example, the sections dealing with the rights of access to housing, health care, food, water and social security expressly state: “[t]he State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”¹⁸ Moreover, all rights in the South African Bill of Rights, be they civil, political, socio-economic or cultural rights, are subject to a general limitations clause.¹⁹ Any limitation to a right must be made in terms of the law of general application and is only permissible “to the extent that the limitation is

¹⁶ Section 7(2) of the South African Constitution.

¹⁷ To be complete, socio-economic rights can be found in many sections of the Bill of Rights, including: labour rights (section 23); the right to an environment that is not harmful to health or well-being, and to have the environment that secure sustainable development (section 24); equitable access to land, security of land tenure and the restitution of property or equitable redress for property that was dispossessed after 1913 as a result of past racially discriminatory laws (section 25(5)-(9)); the right of adequate housing and a prohibition on the arbitrary eviction of people from their homes or the demolition of homes (section 26); the right of access to health care services, sufficient food, water and social security (section 27), the right against the refusal of emergency medical treatment (section 27(3)); the right of children to basic nutrition, shelter, health care services and social services (section 28(1)(c)); educational rights, and adequate accommodation, nutrition regarding medical treatment at the state’s expense for persons deprived of their liberty (section 35(2)(e)).

See also Sandra Liebenberg, “Socio-Economic Rights” in Matthew Chasklason et al (eds) *CONSTITUTIONAL LAW OF SOUTH AFRICA* (1999) at 41-29-41-30.

¹⁸ Sections 26(2) and 27(2) of the South African Constitution.

¹⁹ Section 36 of the South African Constitution.

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”²⁰ In practice, the initial burden of proving a violation of a particular right falls upon the applicant. If the applicant is successful, the burden shifts to the state to show the reasonableness and justifiability of any limitation to that right.²¹

Even though socio-economic rights are limited by the qualifications that they are only accessible to the extent that resources are available and the limitations clause analysis, this does not mean that these rights are empty or meaningless.²² The foundational values of equality, dignity and human freedom are, in a substantial way, linked to socio-economic rights; therefore, a limitations clause analysis can not be used to oust meritorious socio-economic rights claims from being heard by the courts.²³

²⁰ *Id.* (*supra* note 19.)

²¹ *See, e.g., S v Zuma and Others* 1995 (2) SA 642 (CC) at para 21; *S v Makwayane and Another* *supra* note 7 at paras 100-02.

See also, Pierre de Vos, “Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa’s 1996 Constitution?” 13 SAJHR 67, 71-74 (1997); Sandra Liebenberg, “Socio-Economic Rights” *supra* note 17; Marius Pieterse, “Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases? *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,” 120 SALJ 41 (2003); Kevin Iles, “Limiting Socio-Economic Rights: Beyond The Internal Limitations Clause,” 20 SAJHR 448 (2004).

²² Madala J made this point clearly and elegantly in his concurring opinion in *Soobramoney v the Minister of Health (KwaZulu-Natal)*:

“Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for the future South Africa.” *Soobramoney v the Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at para 42.

²³ “There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.” *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 23.

See also, Nelson Mandela, as quoted by Seth Nthai, “The Implementation of Socio-economic rights in South Africa,” JULY 1999 DE REBUS 41, 41 (“The key, therefore, to the protection of any minority is to put core civil and political rights, as well as some cultural and economic rights beyond the reach of

To this point, so far, this Article has only looked at what provisions in the South African Constitution create socio-economic rights. The propriety of a detailed remedy for a violation of a socio-economic right comes from the power of the court itself.²⁴ South African courts are empowered, whenever they decide “any issue involving the interpretation, protection or enforcement of the Constitution,” to make any order that is “just and equitable.”²⁵ The same message is echoed in section 38 of the Bill of Rights, providing that, whenever a fundamental right has been violated or threatened, a court may grant “any appropriate relief.”²⁶ The South African Constitution, then, gives the courts the power to make decisions that could have a

temporary majorities, and to guarantee them as fundamental individual rights. Thirdly, we must address the issue of poverty, want, deprivation and inequality in accordance with international standards which recognise the indivisibility of human rights. A simple vote, without food, shelter and health care is to use first generation rights as a smoke-screen to obscure the deep underlying forces which dehumanise people. It is to create an appearance of equality and justice, while by implication socio-economic inequality is entrenched.”); Sandra Liebenberg and Karrisha Pillay, *SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA, A RESOURCE BOOK* (2000) at 16 (“Without the right to food and health care services, your right to life as a poor person is threatened; and without the right to an education, it is difficult to effectively exercise your civil rights to an education, it is difficult to effectively exercise your civil right to express an opinion and to present a petition.”).

²⁴ With remedial powers similar to those in South Africa, the United States Supreme Court has said, time and time again, that once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the injury. *See, e.g., Maine v. Moulton*, 474 U.S. 159, 191 (1985) (stating that remedies should be tailored to the injury); *United States v. Gouveia*, 467 U.S. 180, 201 (1984) (same); *Rushen v. Spain*, 464 U.S. 114, 117 (1983) (same); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (same).

²⁵ Sections 172(1)(b) and 167(7) of the South African Constitution.

Section 172(1)(b) specifically states that “[w]hen deciding a constitutional matter within its power, a court—

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) *may make any order that is just and equitable*, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct for the defect.” (Emphasis added.)

²⁶ Section 38 provides, “Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of rights has been infringed or threatened, and *the court may grant appropriate relief*, including a declaration of rights. The persons who may approach a court are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interests of its members.” (Emphasis added.)

major impact on government policies, such as declaring government policies invalid or unconstitutional, and then subsequently changing such policies and even substituting such policies. The sweeping powers of South African courts to develop and build their own catalogue of remedies are affirmed by number of specific constitutional remedies.²⁷

Similar to its duty to say what the law is, a court has the obligation to ensure full compliance with the law.

“In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right 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 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.”²⁸

This proposition is hardly revolutionary for courts in a common law legal system, like both South Africa and the United States.²⁹ Judges in ordering structural injunctive relief have not invented the notion that an intrusive remedy is often necessary to ensure adherence to the dictates of the law. For example, in a family law dispute, a judge may restructure the most basic human relationships, with or without the consent

²⁷ These constitutional remedies include: orders of invalidity (section 172(1)(a) of the South African Constitution); the development of the common law to give effect to constitutional rights (sections 8(3) and 173 of the South African Constitution); the creation of procedural mechanisms necessary for the protection and enforcement of constitutional rights (section 173 of the South African Constitution); and procedural remedies derived from some of the substantive rights (for example, sections 32(1), 33(2) and 34 of the South African Constitution).

²⁸ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (Emphasis added.).

²⁹ For example, Chief Justice Marshall of the United States Supreme Court famously recited that “where there is a legal right, there is also a legal remedy” and that the United States government “has emphatically been termed a government of laws, and not of men. It will certainly cease to deserve this high application if the laws furnish no remedy for the violation of a vested legal right.” *Marbury v. Madison*, 5 U.S. (Cranch) 137, 163 (1803).

Cf. Barry Friedman, “When Rights Encounter Reality: Enforcing Federal Remedies,” 65 S. CAL. L. REV. 735, 741 (1992) (“When Rights Encounter Reality”).

of the parties, pursuant to fairly general standards of equity.³⁰ Courts overseeing insolvency disputes—acting through various agents such as receivers and bankruptcy trustees—have made decisions about how businesses will be run and have actually operated them.³¹ In some cases, when an enterprise or group has acquired monopoly or oligopoly power, under anti-trust law, courts are obliged to undertake direct and comprehensive restructuring.³²

The broad authority to grant “appropriate relief” gives South African courts the flexibility to adopt creative and new remedies. As Froneman J articulately explained in *Kate v MEC for the Department of Welfare, Eastern Cape*, courts must mandate necessary relief, even if the desired remedy is yet untried.

“In a new constitutional democracy such as ours [granting appropriate relief] means that courts have to devise means of protection and enforcing fundamental rights that were not recognised under the common law. In so doing the courts have to keep in mind not only that the new Executive and administration carries a greater burden than the old to provide for these rights, but that they have had to do this in the context of unifying separate structures of administration, at least in this [Eastern Cape] province, as far as the administration of fundamental social rights were concerned. The courts, in fashioning new remedies and in the enforcement of those remedies, must thus take account of the practical difficulties experienced by the new administration, and must also be extremely wary not to move into areas that, by virtue of the constitutional separation of powers, fall outside their domain. But it should be clear that these difficulties may not serve as an excuse for failing to fashion and enforce new remedies simply because they did not exist under the common law. In these situations the Judge who fails to examine the existing law with a view to ensuring the effective realisation of constitutional rights and values that were not recognised before is not, as is often presumed by proponents of this course, merely neutrally and objectively applying the law.”³³

³⁰ See Theodore Eisenberg and Stephen C. Yeazell, “The Ordinary and Extraordinary in Institutional Litigation,” 93 HARV. L. REV. 465, 479-86, 488-93 (1980); Charles F. Sabel and William H. Simon, “Destabilization Rights: How Public Law Litigation Succeeds,” 117 HARV. L. REV. 1015, 1058-59, (2004).

³¹ *Id.*

³² Sabel and Simon, “Destabilization Rights: How Public Law Litigation Succeeds,” *supra* note 30 at 1061.

Thus, to give full meaning to their remedial powers, South African courts must do more than simply declare that the law must accord a remedy—they must direct what it means to remedy a right that has been violated.

II. PART TWO: DEFINING THE STRUCTURAL INJUNCTION REMEDY, NOTING ITS APPLICATION IN UNITED STATES' JURISPRUDENCE OVER THE PAST 60 YEARS AS AN EFFECTIVE TOOL FOR REFORMING INADEQUATE STATE INSTITUTIONS, PARTICULARLY IN THE CIVIL RIGHTS CONTEXT.

The structural injunction order has long been used as a means of enforcing constitutional rights in many common law systems. Over the past sixty years in United States' jurisprudence, for instance, it has been a powerful tool for reforming institutions of government.³⁴ Before discussing the implications of the structural injunction remedy on civil rights reform in U.S. case law so as to apply them to the South African model, this Article first defines the term “structural injunction” and explores how a typical structural injunction order is framed and implemented by a court.

An injunction is an order handed down by a judge who tells a party what she must do and must not do. In particular, a structural injunction is an order that dictates how and when government officials must change their behavior and in what ways to comply with the constitutional requirements of the state. Fiss defines the structural injunction, as “the formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the

³³ *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141, 152 at para 16.

³⁴ “In numerous cases, plaintiffs have sued public institutions, seeking not compensation, but sweeping and long-term reforms of the institutions themselves. Many of these cases have been resolved not by full trials, but by consent decrees providing for broad policy changes, substantial administrative reorganizations or large increases in institutional expenditures.” Note, “The Modification of Consent Decrees in Institutional Reform Litigation,” 99 HARV. L. REV. 1020, 1020 (1986).

Constitution.”³⁵ In this kind of litigation, the judge undertakes to reform institutions by directing officials as to what actions they must take to eradicate unconstitutional conditions, and furthermore the judge typically engages in ongoing supervision of officials’ compliance efforts.

Because a positive order in relation to any constitutional right may have far-reaching policy consequences, it is certainly appropriate for the judiciary to allow discretion to the executive and legislature. However, this does not mean that the courts should relinquish all responsibility for the enforcement of constitutionally protected rights to the politically accountable branches of government.³⁶ The structural injunction order, then, allows courts to put a stop to systemic violations of a right and also to prevent its recurrence in the future.³⁷

A traditional lawsuit pits a plaintiff claiming a wrongful injury of some kind against the person who committed the injury; the point of the litigation is to make up for the past wrong and the impact of the judgment is limited to the parties. In institutional litigation which results in a structural injunction order, however, the lawsuit is undertaken in the interests of communities or classes of people, not only in

³⁵ Owen M. Fiss, “The Allure of Individualism,” 78 IOWA L. REV. 965, 965 (1993).

Fiss has also defined the purpose of a structural injunction order as one “in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements. The injunction is the means by which these reconstructive directives are transmitted.” Owen M. Fiss, “The Supreme Court, 1978 Term—Foreword: The Forms of Justice,” 93 HARV. L. REV. 1, 1 (1979) (“The Forms of Justice”).

³⁶ See Froneman J in *Kate v Minister of Welfare, Eastern Cape*, *infra* note 33.

³⁷ Indian Courts have also used the structural injunction order to determine constitutional institutional injuries and impose appropriate remedies. As Judge Krishna Iyer has observed, “Negative bans without supportive schemes can be a remedy aggravating the malady . . . Judicial engineering towards this goal is better social justice than dehumanised adjudication on the vires of legislation.” *Azad Rickshaw Pullers Union v Punjab* 1981 1 SCR 366, 366.

See also, *Bandhua Mutki Morcha v Union of India* 1984 2 SCR 67; *Rural Land and Entitlement Kendra, Dehrandun v State of Uttar Pradesh* AIR 1985 SC 652.

the interest of specified individuals, and is brought against state officials to enforce asserted constitutional norms.³⁸ The applicants have a particular interest in the enforcement of the positive duties of the state to take action towards the protection of a constitutional right.³⁹ The structure of an institutional suit tends to be massive, with a large number of parties and *amici*.

If the court does find a constitutional violation, the judge does not merely decide legal issues and put an end to the litigation. Structural injunction orders, rather, direct the legislative and executive branches of government to bring about reforms defined in terms of their constitutional obligations and the court retains a supervisory jurisdiction to ensure the implementation of those reforms.⁴⁰

The process of effectuating a structural injunction remedy is many-fold: first, the court issues an order which identifies the constitutional violation(s) and defines the reform that must be brought about in terms of the objectives to be achieved by the ordered reform. Second, the court calls upon the responsible state actor to present a plan of reform which would put an end to the violation by achieving the defined

³⁸ “The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality.” *Ngxuzza and Others v. Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (12) BCLR 1332, 1327(E) (E).

³⁹ See Wim Tremgrove, “Judicial Remedies for Violations of Socio-Economic Rights,” VOL. 1, NO. 4 ESR REVIEW (1999) (“Judicial Remedies”) (arguing that the applicants who would bring an institutional lawsuit are “usually poor and politically and socially weak. They are the ones who are dependent on the State for the provision of basic socio-economic services and who lack the political and social power to get it without judicial intervention.”).

⁴⁰ “[T]he trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge’s continuing involvement in administration and implementation.” Abram Chayes, “The Role of the Judge in Public Law Litigation,” 89 HARV. L. REV. 1270, 1281 (1976).

See also, Fletcher, “The Discretionary Constitution,” *supra* note 2 at 638 (“The finding of a constitutional violation is “only a prelude to a drawn-out and complex process of devising a decree directing the defendants to reform their institution and practices.”).

objectives. This step is significant because it gives the state actor the opportunity to suggest the means of its compliance.⁴¹ If the state defendant does propose a remedial plan, it is presented to the court for its scrutiny.⁴² Typically, the applicants and all other interested parties are given an opportunity to comment on the state's plan and to advance any alternative suggestions. Next, the court finalizes the plan of institutional reform in light of all submissions made to it.⁴³ In so doing, the court generally defers to the state's choice of means, unless it is irrational, not bona fide or, is in some other way, inadequate.⁴⁴ Finally, the court issues an order directing the state defendant to implement the finalized plan and to report back to the court on its implementation after the period allowed for execution, or if more appropriate, after prescribed deadlines set for the achievement of pre-determined milestones. If the matter returns to court, the state defendant is called to account for its implementation of the plan; all other involved parties are also heard. If the hearing reveals unforeseen difficulties or inadequacies in the court-ordered plan, suitable adjustments are made, new orders

⁴¹ The state proposed plan will usually have to be tied to a period within which it is to be implemented, or a series of deadlines by which identified milestones must be reached. *See* Tremgrove, "Judicial Remedies," *supra* note 39.

⁴² However, if the responsible state actor does not cooperate in the preparation of a plan, the court has no option but to write its own plan with the aid of the other interested parties and any court-appointed experts. This result would force the court to become increasingly involved in making policy choices ordinarily in the legislative and executive domain. But without preferred state defendant cooperation, this judicial involvement will be the only way to ensure the protection and enforcement of constitutional rights.

⁴³ As Fletcher notes, a court's structural injunction order may vary depending on what it seeks to accomplish and the means chosen.

"A decree may be extremely detailed. In a prison or mental hospital case, for instance, it may specify precise staffing ratios, the temperatures in rooms or cells, the types and quantities of food to be served, the manner of determining types of and times for isolation or solitary confinement, and a variety of other things." Fletcher, *supra* note 2 at 639.

⁴⁴ Tremgrove, "Judicial Remedies," *supra* note 39.

issued and the process is repeated until all necessary reform is satisfactorily achieved.⁴⁵

Conventional litigation and remedies are inadequate for socio-economic rights violations as monetary damages may be unable to repair the constitutional harm since the violation may be too diffuse or nebulous.⁴⁶ Declaratory orders are likely ineffectual because the constitutional violations are often too widespread to stop government inaction in a single court order; to have any meaningful effect, the court order would have to direct reform at the state institutional itself.⁴⁷ Even if there was a solution to put an end to a systemic violation with a single order, it is often inappropriate, or at least less desirable, to adopt the quick-fix solution, rather than address reform of the institution systemically.⁴⁸ These traditional remedies, though

⁴⁵ See Tremgrove, “Judicial Remedies,” *supra* note 39; Fletcher, “The Discretionary Constitution,” *supra* note 2 at 638-40; Altman, “Implementing a Civil Rights Injunction: A Case Study of *NAACP v. Brennan*,” 78 COLUM. L. REV. 739 (1978); Colin S. Diver, “The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions,” 65 VA. L. REV. 43 (1979) (“The Judge as Political Powerbroker”).

⁴⁶ For example, several academics have posited that it would be extremely difficult for a court to determine how best to compensate victims of unfair racial discrimination in education, if pervasive over a long period of time. See Fletcher, “The Discretionary Constitution,” *supra* note 2 at 651-52, and Tremgrove, “Judicial Remedies,” *supra* note 39 above.

Cf. Friedman, “When Rights Encounter Reality,” *supra* note 29 at 747 (“This problem becomes quite visible when one considers the victim of a segregated education. Although reducing this injury to money damages would pose some difficulty, the same is true in many tort cases in which the courts have been able to reduce injuries to monetary damages. Nonetheless, in this instance compensatory damages against the state [in the United States] are forbidden. The Court’s remedy, therefore, is a prospective order to desegregate, nothing to compensate the high school student who brought the suit. The right is violated; there is no remedy.”).

⁴⁷ For a discussion of relevant authorities on government inertia in South Africa in particular, see *infra* note 3.

⁴⁸ Many have given the example of overcrowding prisons – technically, an easy one-stop solution to the violation would be to release as many prisoners as is necessary to avoid the overcrowding; but this seems manifestly improper. See, e.g., Fletcher, “The Discretionary Constitution,” *supra* note 2 at 650 (“There is available, however, a much more straightforward response: the court could release on *habeas corpus* all of the prisoners being held under unconstitutional conditions of confinement. Not surprisingly, federal courts in prison reform cases rarely use a massive writ of *habeas corpus* except as a threat, to reform their prisons.”); Tremgrove, “Judicial Remedies,” *supra* note 39.

Cf. Note, “Courts, Corrections and the Eighth Amendment: Encouraging Prison Reform by Releasing Inmates,” 44 S. Cal. L. Rev. 1060 (1971); *Inmates of Suffolk County Jail v. Kearney*, 573 F.2d 98, 100 (1st Cir. 1978) (“Unless the defendants [prison officials of Suffolk County Jail] meet the terms and

extremely useful, do not address the threat of existing and on-going violations of constitutional rights by a delinquent state institution in certain contexts. It follows that the structural injunction order is the only possible way to bring about far-reaching institutional and structural reform over a period of time, in a manner ideally determined by the legislative and executive branches of government.

As illustrated above, given reasonable and cooperative parties, a court needs to initiate few remedial steps of its own when drafting a structural injunction order. It should be emphasized, however, that when confronted with an obstinate defendant, more action is required from the court.⁴⁹ In such instances, a court must affect incremental change from the state institution, by successive, more detailed supplemental decrees, until full compliance is eventually achieved.⁵⁰ If a state institution exhibits a resistance to change, extensive court-ordered relief is proper and required. Thus, the legitimate basis for a judge to take over the political function in

conditions set forth herein, the Charles St. Jail will be closed on October 2, 1978, to any inmate awaiting trial. Were the jail to close without interim arrangements being made available pending a long range solution, the public safety would obviously be threatened. The community would have been badly served by those leaders who, though long ago notified as to what must have been done, resolutely refused to take appropriate action. So that there may be no last minute claims of misunderstanding and that the burdens of responsibility be placed squarely where they belong, we state the following: [setting forth various terms and conditions].”).

⁴⁹ For instance, in the first few years after being ordered to desegregate all public schools in *Brown v. Board of Education II*, *infra* note 51, the practices of many states and local schools were so obstructionist in their opposition to carrying out desegregation that they could be classified as absolutely defiant, *Cooper v. Aaron*, 358 U.S. 1 (1958) (where the Supreme Court refused to permit a two and a half year delay in desegregating schools in Little Rock, Arkansas); *St. Helena School Bd. v. Hall*, 368 U.S. 515 (1962) (in which the Supreme Court invalidated a Louisiana statute permitting local school boards to close the public schools and rent out the buildings for use as private schools); *Griffin v. County School Bd.*, 377 U.S. 218 (1964) (where the Supreme Court held that a district court could validly order that the public schools be reopened after the school board closed them to avoid integration).

See also, discussions about the lack of government cooperation in socio-economic rights cases *supra* note 3.

⁵⁰ A recalcitrant state agency may also drag its proverbial feet or simply refuse to comply with the court order for the implementation of the plan. Then, the court may hold the responsible state agency in contempt of court and impose a fine on it to exact compliance, or, as a last resort, it may hold the responsible state officials in contempt of court and fine or imprison them to compel their cooperation. *See, e.g., Kate v Minister of Welfare, Eastern Cape supra* note 33 (holding government officials in contempt of court for failing to obey court orders).

devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body to undertake necessary reform.

First used in the United States in 1955, in *Brown v. Board of Education of Topeka, Shawnee County, Kansas* (“*Brown I*”), the Supreme Court has expanded the definition of equity power to include the imposition of affirmative obligations upon states, and the on-going judicial involvement and supervision of the remedy.⁵¹ Since then, numerous courts have employed structural injunction remedies in a variety of ways to foster public school desegregation,⁵² to reform state prisons⁵³ and mental

⁵¹ *Brown v. Board of Education of Topeka, Shawnee County, Kansas* (“*Brown I*”), 347 U.S. 483 (1955).

The Court took up the question of how the federal courts were to desegregate the schools in accordance with the mandate of *Brown v. Board of Education* (“*Brown I*”), decided the year before. The relevant questions asked were:

“4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice; or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general distinctions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?” *Brown II*, 347 U.S. at 298, fn 2 (quoting *Brown I*, 347 U.S. 495, 495-96, fn. 13) (Internal quotations omitted.).

To be complete, the *Brown v. Board of Education* litigation ended in 1999, see *Brown v. Unified School Dist. No. 501*, 56 F. Supp. 2d 1212 (D. Kan. 1999).

⁵² See, e.g., *Cooper v. Aaron*, *supra* note 49; *St. Helena Parish School Bd. v. Hall*, *supra* note 49; *McNeese v. Bd. of Educ.*, 373 U.S. 668 (1963); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963); *Griffin v. County School Bd.*, *supra* note 49; *Green v. County School Bd.*, 391 U.S. 430 (1968); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Keyes v. School Dist. No. 1*, 396 U.S. 1215 (1969); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *United States v. Jefferson County Bd. of Educ.*, 372 U.S. F.2d 836, 860 (5th Cir. 1966) (describing challenges posed by 128 school desegregation cases filed in district courts in Alabama, Florida, Georgia, Louisiana, Mississippi and Texas between 1956 and 1966), *adapted in relevant part*, 380 F.2d 385 (5th Cir. 1967) (en banc).

⁵³ See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978); *Holt v. Sarver*, 300 F.Supp. 825 (E.D. Ark. 1969), 309 F.Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Newman v. Alabama*, 349

hospitals,⁵⁴ to address legislative reapportionment⁵⁵ and other institutional reform of housing authorities⁵⁶ and employment discrimination⁵⁷. Many government institutions throughout the United States have been, or continue to be, subject to the supervision of district courts.⁵⁸ These many institutional reform cases support the proposition that in United States' remedial jurisprudence, "[o]nce a right and a violation have been shown, the scope of a court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."⁵⁹

F.Supp. 278 (M.D. Ala. 1972), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert denied*, 421 U.S. 948; *Taylor v. Perini*, 413 F.Supp. 189, app. A (N.D. Ohio 1976) (reprinting 1972 order); *Battle v. Anderson*, 376 F.Supp. 402 (E.D. Okla. 1974), 447 F.Supp. 516 (E.D. Okla. 1977), *aff'd*, 564 F.2d 388 (10th Cir. 1977); *William v. Edwards*, 547 F.2d 1206 (5th Cir. 1977) (affirming unpublished district court order); *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979), 492 F.Supp. 650 (W.D. Mo. 1980); *Palmigiano v. Garrahay*, 443 F.Supp. 956 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert denied*, 449 U.S. 839 (1980); *Groseclose v. Dutton*, 609 F.Supp. 1432 (M.D. Tenn. 1985), *vacated and remanded*, 829 F.2d 581 (6th Cir. 1987); *Ruiz v. Estelle*, 503 F.Supp. 1265 (S.D. Tex. 1980), *rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *cert denied*, 460 U.S. 1042 (1983).

Cf. *Bell v. Wolfish*, 441 U.S. 520 (1979) (where the Supreme Court reversed an extensive remedial order in which the district court judge had required a four-year old federal prison to change a number of its practices); *Rhodes v. Chapman*, 101 S.Ct. 2392 (1981) (in which the Supreme Court reversed a district court order requiring that only one person be confined to a cell).

Fletcher suggests that *Wolfish* and *Chapman* hold that "even if prison conditions are arguably unconstitutional, a district court may not move too quickly supplant the normal political control over a prison; for the alacrity with which the district courts acted in *Wolfish* and *Chapman* stands in marked contrast to the district courts' patience in *Hutto*." Fletcher, "The Discretionary Constitution," *supra* note 2 at 688.

⁵⁴ See, e.g., *Wyatt v. Stickney*, 334 F.Supp. 1341 (M.D. Ala. 1971), 344 F.Supp. 373 (M.D. Ala. 1972), *aff'd in part and rev'd in part sub nom.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *New York State Assoc. for Retarded Children v. Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973), *New York State Assoc. for Retarded Children v. Carey*, 393 F.Supp. 715 (E.D.N.Y. 1975).

Cf. *Pennhurst State School and Hospital v. Holderman*, 101 S.Ct. 1531 (1981) (where the Supreme Court held the federal statute in question did not confer any substantive rights to 'minimally adequate habitation.'").

⁵⁵ See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁵⁶ See, e.g., *Gautreaux v. Chicago Hous. Auth.*, 296 F.Supp. 907 (N.D. Ill. 1969); *Adams v. Richardson*, 356 F.Supp. 92 (D.D.C. 1973).

⁵⁷ See, e.g., *Kirkland v. New York State Dept. of Correctional Servs.*, 374 F.Supp. 1361 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 420 (2d Cir. 1975).

⁵⁸ See, e.g., David Zaring, "National Rulemaking Through Trial Courts: The Big Case and Institutional Reform," 51 U.C.L.A. L. REV. 1015, 1021 (2004) ("National Rulemaking Through Trial Courts").

⁵⁹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Swann").

Federal courts are, thus, not only to prohibit the enforcement of unconstitutional laws, they are to engage in affirmative reform that will eliminate the continuing effects of past constitutional violations.

Initially, the United States Supreme Court acknowledged the primacy of local school officials in making the educational decisions necessary to implement *Brown I*.⁶⁰ This preference for local control proved to be the ground for remanding the desegregation cases to the federal district courts, who “because of their proximity to local conditions and the possible need for further hearings, could best monitor local officials’ compliance with *Brown I*.”⁶¹ This does not mean, however, that state and

In its companion cases, *Davis v. School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971), the Supreme Court further explained, “[h]aving once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation The measure of any desegregation plan is its effectiveness.”

Kanner views this passage from *Davis v. School Commissioners* above to mean that a federal district court “should seek to achieve the maximum level of integration that [is] practical.” Stephen Kanner, “From Denver to Dayton: The Development of a Theory of Equal Protection Remedies,” 72 *Nw. U. L. Rev.* 382, 382 (1977).

⁶⁰ “School authorities have the primary responsibility for elucidating, assessing, and solving these problems.” *Brown II*, *supra* note 51 at 299.

⁶¹ *Brown II*, *supra* note 51 at 299.

Also, the Supreme Court authorized the lower courts to enter orders, as they saw fit, that could reach all levels and details of school administration:

“[T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.” *Brown II*, *supra* note 51 at 300-01.

Despite the granting of these sweeping remedial powers, the Supreme Court predicted that desegregation would not come swiftly or easily: “[o]nce such a start [towards desegregation] has been made, *the courts may find that additional time is necessary to carry out the ruling in an effective manner.*” *Brown II*, *supra* note 51 at 300 (Italics added.).

Consequently, the Supreme Court permitted the lower courts to implement remedies slowly to take account of public resistance or need. They stated, “

Courts of equity may properly take into account the public interest in the elimination of such obstacles [to desegregation and integration] in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.”

local state institutions were cooperative in or amenable to these desegregation lawsuits. In many southern states, quite the opposite was true: for more than a decade after the *Brown* decision, school desegregation remained largely a promise unfulfilled, obstructed on all fronts by massive resistance.⁶² Bolstered by the inherent vagueness of the Supreme Court's initial mandates, southern legislatures invoked the historic—though entirely discredited—doctrines of nullification and interposition, and declared the Supreme Court's orders and decisions null and void.⁶³ Consequently, many southern states obdurately ignored *Brown* and its progeny, and had to be strong-armed by district courts into compliance with desegregation schemes.

As district courts in segregated areas began to apply *Brown II*, the Supreme Court did not impose too many limitations on their discretion, which allowed the local district courts to tailor the remedies to fix the constitutional violations directly.⁶⁴

Thus, while placing district courts in the position of administering segregation school systems in order to achieve desegregation, the Supreme Court also allowed the courts to consider the public interests of the segregating states when remedying the harm done to the plaintiffs. *See also*, Yarbrough, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA, *infra* note 62 at 151 (“In 1971, the Supreme Court approved extensive use of busing to achieve desegregation. But in 1974, Judge Johnson rejected two plans calling for substantial busing of Montgomery schoolchildren, adopting instead a school board plan that allowed most students to attend the school nearest their homes and thus, given the city's strict patterns of residential segregation, did not completely eliminate the system's predominately black schools.”).

⁶² For several examples of Southern resistance to desegregation, please see *supra* note 49.

Also, for an excellent discussion of Southern racial animus and resistance to civil rights reform and two judges' experiences with structural injunction relief during that time, see both Tinsley E. Yarbrough, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA (University of Alabama Press, 1981) at 47-90; Frank R. Kemerer, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY (University of Texas Press: Austin, 1991).

⁶³ *See, e.g.*, Yarbrough, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA, *supra* note 62 at 91-99 (for a thorough discussion of Governor George Wallace's extreme resistance to implementing Judge Johnson's public school desegregation order in Montgomery, Alabama).

⁶⁴ The recognition that the elimination of legal segregation would not itself lead to integrated schools did not make its way into a Supreme Court opinion until *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968) (“*Green*”). In *Green*, the county school board adopted a freedom-of-choice plan that allowed students to choose which of two schools they wished to attend. In the three years the plan had been in operation, some black children had chosen to attend the previously all-white school, but no white children had chosen to attend the previously, and still, all-black school. The Supreme Court held that this plan was constitutionally insufficient. The school board had to be

Some academics have posited that the district courts were “abandoned to their own devices in determining appropriate methods of compliance” and given little concrete direction from the Supreme Court.⁶⁵ The Supreme Court recognized the appropriateness of remedial orders “must rest [only] upon their serving as proper means to the end of restoring victims of discriminatory conduct to the position that they would have occupied in the absence of that conduct and their eventual restoration of ‘state and local authorities to the control of [a state institution] that is operating in compliance with the Constitution.’”⁶⁶ Although their remedial powers are broad, there are limits on district court discretion, however.⁶⁷

required to formulate a new plan that would “promise realistically to convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.” *Id.* at 442.

Then, in *Swann*, *supra* note 59, the Supreme Court articulated the rule that “the nature of the violation determines the scope of the remedy.” *Id.* In so doing, the Supreme Court affirmed a district court decree in which school attendance boundaries were redrawn and students were reassigned among schools to eliminate one-race schools and to achieve some degree of racial ‘balance’ in the school system and busing was ordered to achieve these objectives. Thus, the Supreme Court upheld an order that students be bused across town to integrate the schools in spite of segregated housing patterns.

The Supreme Court expanded upon the holding in *Swann* by stating that “the principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself.” *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977). In *Milliken v. Bradley*, the Supreme Court upheld a district court order that a school district needed to establish a remedial education program.

⁶⁵ See, e.g., Read and McGough describe the Supreme Court’s role in desegregation institutional suits as largely unhelpful, in the following:

Throughout the desegregation battles from 1955 to 1970, the Supreme Court of the United States has been content with prodding its lower courts towards more rapid compliance with its mandates. Even its decisions in *Green*, *Alexander* and *Carter*, the Supreme Court issued terse ‘do it now’ commands [;] ot did not provide ‘how to do it’ instructions. Lacking firm directives from the Supreme Court on how to accomplish desegregation, the lower federal courts—with the bulk of the activity centering in the [United States’ Court of Appeals for the] Fifth Circuit—were abandoned to their own devices in determining appropriate methods of compliance From pupil placement acts to freedom-of-choice to neighborhood zoning to majority-to-minority transfer options to clustering and pairing of schools to busing, the federal courts of the South had struggled with the ‘how’ of integration while the Supreme Court had been content with ‘hurry-ups.’” Frank Read and Lucy McGough, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978) at 523.

⁶⁶ *Missouri v. Jenkins*, 115 S.Ct. 2038, 2049 (1995) (quoting *Freeman v. Pitts*, 503 U.S. at 489)).

⁶⁷ In *Missouri v. Jenkins*, *supra* note 66 above, for example, the Supreme Court was sceptical of a decree ordering higher teacher salaries and other improvements in public schools. The district court’s

Federal courts have employed structural injunctions not just to foster school desegregation, but also in many other institutional contexts, applying the same preference for localized district court ordered relief.⁶⁸ Unlike desegregation jurisprudence just discussed, in the penal, mental health center and juvenile detention facility institutional litigation arena, district court judgments themselves set the standard for constitutional violations. For example, after eight years of pre-trial activity and 159 days of trial,⁶⁹ District Judge William Wayne Justice held in *Ruiz v. Estelle* that the Texas Department of Corrections (“TDC”) management of prisons constituted “cruel and unusual punishment,” prohibited by the Eighth Amendment of the United States Constitution.

“The trial of this action lasted longer than any prison case—and perhaps any civil rights case—in the history of American jurisprudence. In marked contrast to prison cases in other states, the defendant prison officials here refused to concede that any aspect of their operations were unconstitutional, and vigorously contested the allegations of the inmate class on every issue. However, the evidence and the applicable law have demonstrated that the constitutional infirmities pervade the TDC prison system.

This memorandum opinion has, at some length, cited and summarized the evidence indicating the existence of these constitutional violations.

rationale was that by making the schools more attractive, they would attract more white students. The Supreme Court held that, without greater justification than was given, the salary order was “simply too far removed from an acceptable implementation of a permissible means to remedy previous illegally mandated segregation.” *Id.*

Also, once the school system has been desegregated, despite whatever other beneficial improvements could be made, judicial supervision should cease. *See, e.g., Bd. of Educ. v. Dowell* (1991). Similar issues arise regarding the end of supervisory jurisdiction over prison reform litigation, *see, e.g.,* John C. Jefferies, Jr., Pamela Karlan, Peter W. Low and George A. Rutherglen, *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* (Westbury, N.Y.: Foundation Press, 2000) at 846-52.

⁶⁸ For examples of some of these cases, *supra* notes 53, 54, 55 and 56.

See also, Zaring, “National Rulemaking Through Trial Courts,” *supra* note 58 at 1018-19 (“Beginning with *Brown v. Board of Education*, hundreds of schools, and, eventually, thousands of other government institutions that were sued for constitutional and federal statutory violations came under the dominion of injunctions and consent decrees. Prisons, child welfare agencies, mental retardation institutions, and city housing authorities are among the many local government institutions that have been subjected to extended periods of judicial supervision.”)

⁶⁹ By the conclusion of the trial, Judge Justice had heard the “testimony of 349 witnesses and had received approximately 1,565 exhibits into evidence.” *Ruiz v. Estelle*, *supra* note 53 at 1276.

But it is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within TDC prison walls—the gruesome experiences of youthful first offenders forcibly raped; the cruel and justifiable fears of inmates wondering when they will be called upon to defend the next violent assault; the sheer misery, the discomfort, the wholesale loss of privacy for prisoners housed with one, two or three others in a forty-five foot cell or suffocatingly packed together in a crowded dormitory; the physical suffering and the wretched psychological stress which must be endured by those sick or injured who cannot obtain adequate medical care; the sense of abject helplessness felt by inmates arbitrarily sent to solitary confinement or administrative segregation without proper opportunity to defend themselves or to argue their causes; the bitter frustration of inmates prevented from petitioning the courts and other governmental authorities for relief from perceived injustices.

For those who are incarcerated within the parameters of TDC, these conditions and experiences form the content and essence of daily existence. It is to these conditions that each inmate must wake every morning; it is with the painful knowledge of their existence that each inmate must try to sleep at night. *But these iniquitous and distressing circumstances are prohibited by the great constitutional principles that no human being, regardless of how disfavored by society, shall be subjected to cruel and unusual punishment or be deprived of the due process of the law within the United States of America. Regrettably, state officials have not upheld their responsibility to enforce these principles. In the wake of their default, the United States Constitution must be enforced within the confines of TDC by court order.*⁷⁰

After this memorandum opinion was entered, in an attached, but separate order, Judge Justice gave the parties a general outline of what had to be accomplished to remedy the prison system and ordered the parties to meet and attempt to reach agreement. After the case was affirmed on appeal, the parties reached agreement on many issues—making it unnecessary for Judge Justice to impose more detailed remedies himself.⁷¹

⁷⁰ *Ruiz v. Estelle*, 503 F.Supp. at 1390, *supra* note 53 (Emphasis added.).

For an excellent synopsis of how the *Ruiz v. Estelle* litigation was started, see William Wayne Justice, “The Origins of *Ruiz v. Estelle*,” 43 STAN. L. REV. 1 (1990) and Kemerer, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY, *supra* note 62.

⁷¹ *Ruiz v. Estelle*, *supra* note 53.

As was common in the prison institutional litigation context, and specifically illustrated in *Ruiz v. Estelle*, often, a judge's remedial order in an institutional lawsuit will be the outcome of negotiation between the parties, in which the judge may participate. The result is a "consent" decree—so named because it is, at least nominally, an arrangement that both the state defendant and plaintiffs have accepted, though neither may be entirely satisfied.⁷²

"Consent decrees are a form of settlement in which the parties agree to end the litigation in return for a promise that one (or both) of them will change their conduct for a specified period of time, sometimes indefinitely. They are entered as a judgment of the court and are enforceable in the same way as court injunctions . . .".⁷³

There are three important features of consent decrees to note: (1) entering into a consent decree is voluntary; (2) a consent decree carries the force of law; and (3) consent decrees are not a finding of legal liability. A consent decree is an order of a court; parties in violation of a consent decree are subject to the full range of judicial sanctions including the issuance of structural injunctions compelling compliance and being held in contempt of court.⁷⁴ As such, a consent decree is an agreement

There was an order accompanying this *Ruiz v. Estelle* memorandum opinion which identified key areas of needed TDC reform, such as minimal safeguards for personal safety of the inmates, staff brutality, and prison medical care, and ordered government submissions as to appropriate injunction relief, to follow. The parties agreed to settle the litigation before specific structural injunctive relief was ordered and Judge Justice approved their broad consent decree, which permitted court supervision over the penal institutions in Texas as they undertook the agreed institutional reform.

⁷² If the first efforts executing the consent decree to achieve the desired result do not produce the preferred outcomes, or if conditions change so much so that the initial remedy no longer works, the judge may modify the remedies at a later point in time even if they are the product of a consent decree. The Supreme Court has ruled that in institutional reform litigation, "a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992).

⁷³ Michael W. McConnell, "Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change," 1987 U. CHI. LEGAL. FORUM 295, 296.

⁷⁴ The United States Supreme Court has underscored that judges are free to use their power to enforce consent decrees: "Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced." *Frew v. Hawkins*, 540 U.S. 431, 440

voluntarily entered by the parties to a lawsuit, in lieu of continuing the litigation, given the force of law by judicial approval, with no finding of legal liability. A consent decree may be an attractive solution to all parties to effectuate reform on their own terms.

A challenge facing institutional reform litigators is finding ways to achieve compliance from state defendants. After all, from the applicant's perspective, if the government was doing its job in the first place a lawsuit would not have been necessary. In such a situation, if the government defendant agrees to a consent decree, it can increase the likelihood that it will be implemented. Moreover, because a consent decree can mandate more reform than the law requires, parties, and the applicants in particular, can offer creative and effective proposals. The parties are also more likely to be better informed about the problems and challenges that the government faces in implementation than is the judge. The parties can build on this experience to craft sensible consent decrees.

“A consent decree is a valuable tool in the effective enforcement of civil rights law. It permits flexibility in adapting a judicial order to the particular needs of the case at hand. That all interested parties have a hand in its formation leads to a greater degree of cooperation and reduces the inevitable friction that accompanies litigation. It permits imaginative and hence often more effective solutions to practical problems.”⁷⁵

A consent decree, then, when possible, allows the government to actively choose how best to meet its constitutional obligations, leaving the judicial role only to ensure that the government complies with the decree.

From United States' case law addressing structural injunctive relief, several important inferences can be drawn. Vague, open-ended declaratory orders by the

(2004) (holding that institutional reform consent decrees are consistent with the Eleventh Amendment of the United States Constitution).

⁷⁵ *Kindred v. Duckworth*, 9 F.3rd 638, 644 (7th Cir. 1993).

Supreme Court did not obtain tangible results, such as in *Brown II*, allowing recalcitrant state defendants that did not want to implement those decisions to delay implementation. Structural injunction orders, in contrast, have been shown to be better suited to address the implementation of systemic institutional reform. Structural injunction orders successfully have been employed by district courts to address everything from methods for assigning students to schools, to the number of prisoners that may be put into a cell, to the quality of food served in detention cafeterias. In this way, when the state had a vital function to perform, and did not perform that duty causing further injuries, courts have actively intervened to provide direction and accountability to protect those rights.

There are additional ways for a district court ordering structural injunctive relief to avoid excessive interference with the workings of the other branches of government. The parties can agree on relief, entering into a consent decree, rather than have the judge select it herself, as seen in *Ruiz v. Estelle*. Further, the court can appoint a special master and monitor to oversee compliance with either the consent decree or court-ordered remedies. Or, when a structural injunctive remedy is called for, and the state defendant exhibits an obdurate resistance to change, the adversarial nature of the judicial process—particularly the consideration of the testimony of expert witnesses—enables her to order remedies that are neither arbitrary, tyrannical, nor the product of the court's own imagination, but rather remedies that flow logically from the court's findings in the case.

III. PART THREE: EXPLORING THE USE THE STRUCTURAL INJUNCTION REMEDY IN EXISTING SOUTH AFRICAN SOCIO-ECONOMIC RIGHTS CASES.

In keeping with their constitutional obligation to award appropriate, effective relief, a number of high courts have granted structural injunction orders in cases

dealing with socio-economic rights violations.⁷⁶ In these decisions, high courts have recognized that “the structural [injunction] is particularly suited to a society committed, as ours is, to the values of ‘accountability, responsiveness and openness’ in a system of democratic governance.”⁷⁷ Most famous in the South African context are the structural injunction orders in *Grootboom – High Court*⁷⁸ and *Treatment Action Campaign – High Court*⁷⁹.

In *Grootboom – High Court*, Davis J found that (a) the state respondents were obliged to provide the applicant children with shelter under section 28(1)(c) of the Constitution, that (b) the respondents had failed to provide them with shelter and needed to do so immediately and as a consequence, (c) the respondents had to report back to the High Court as to the implementation of its order within three months.⁸⁰

⁷⁶ A list of relevant High Court decisions can be found above, *supra* note 10.

⁷⁷ *S v Zuma and 23 similar cases* 2004 (4) BCLR 410 (E) at para 39 (where the court aimed to correct systemic difficulties that made it difficult to implement a sentence of committing a juvenile to reform school).

⁷⁸ *Grootboom v Oosenberg Municipality supra* note 10.

⁷⁹ *Treatment Action Campaign and Others v Minister of Health and Others supra* note 10.

⁸⁰ The actual text of the *Grootboom – High Court* order reads:

“I propose that an order shall be issued in the following terms:

(1) The application insofar as it relates to housing or adequate housing, and insofar as it is based on section 26 of the Constitution, fails and it is dismissed;

(2) It is declared, in terms of section 28 of the Constitution that:

(a) the applicant children are entitled to be provided with shelter by the appropriate organ of state;

(b) the applicant parents are entitled to be accommodated with their children in the foregoing shelter; and

(c) the appropriate organ or department of state is obliged to provide the applicant children, and their accompanying parents, with such shelter until such time as the parents are able to shelter their own children;

(3) The several respondents are directed to present, under oath a report or reports to this Court as to the implementation of paragraph (2) above within a period of three months from the date of this order;

(4) The applicants shall have a period of one month, after presentation of the foregoing report, to deliver their commentary thereon under oath;

After finding a constitutional violation of children's right to shelter, the High Court next considered what would be appropriate relief. In so doing, Davis J acknowledged that before he would be able to order relief best suited to remedy the constitutional infraction, more information was needed:

*“[The advocate for several of the state defendants] correctly cautioned against an order which would be so general that the respondents would not know what was required of them. It seems to me that the relief which can properly be granted at this stage on the available evidence is at best declaratory. The next step, is to endeavour to give some practical content to the declaration. It will serve no worthwhile purpose to direct the parties to begin again on new papers. For this purpose more information is needed than is presently before us. In fairness to the respondents, who now know where their duty lies, they should be given an opportunity of proposing a practical solution. In fairness to the applicants, now that they know where their rights lie, respondents should be directed to make such proposals within a reasonable time. The applicants should furthermore have the opportunity of commenting on the proposals, and the respondents should be allowed to respond to such comment.”*⁸¹

This statement by the High Court judge is significant for a couple of reasons. It reflects an understanding by a government representative that vague, declaratory orders asserting a socio-economic right do not meaningfully direct the state how to remedy that right. Recognizing the limited record before him to craft an appropriate remedy—rather than superimpose his own remedy on the parties based on his own opinions and conjecture—Davis J requested reports and comments from all parties to assist in determining a remedy. This underscores the reticence of courts, rightfully so,

(5) The respondents shall have a further period of two weeks to deliver their replies under oath to the applicants' commentary;

(6) There will be no order as to the costs of these proceedings up to the date of this judgment;

(7) The case is postponed to a date fixed by the Registrar for consideration and determination of the aforesaid report, commentary and replies;

(8) The order of Josman AJ dated 4 June 1999 will remain in force until such time as the further proceedings contemplated by the preceding paragraph have been completed.” *Grootboom – High Court supra* note 10 at 293H-J – 294A-C.

⁸¹ *Id.* at 292B-D (Italics added.).

to order remedies which come only from the findings of the case. Rather, as Davis J did in this case, courts can declare the parameters of a socio-economic right, solicit plans and encourage agreement by the parties to remedy the constitutional violation with as limited court involvement as practicable.

Despite this reasonable and balanced order from the High Court, the Constitutional Court acted to replace the High Court initial injunction order with a declaratory order that the state was in breach of one of its constitutional obligations.⁸² This order required the state to act to meet its obligation to provide access to housing, but it did not include any judicial supervision over the implementation of the order, nor did it mention time frames within which the state had to act.⁸³ The Constitutional Court noted that in terms of monitoring, the South African Human Rights Commission (“SAHRC”) had agreed to observe and report on the state’s compliance with its *Grootboom* obligations.⁸⁴ Consequently, this meant that if it was alleged that

⁸² The Constitutional Court also rejected the holding of the High Court that the state was in breach of its section 28 duty to provide shelter to children; instead, finding that the state was in breach of its section 26 obligation to devise a comprehensive program to realize the right of access to adequate housing. *Grootboom supra* note 8 at paras 80-92.

⁸³ The text of the Constitutional Court’s order in *Grootboom* reads:

“The following order is made:

1. The appeal is allowed in part.
2. The order of the Cape of Good Hope High Court is set aside and the following is substituted for it:

‘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 co-ordinated program progressively to realise 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.

(c) As at the date of the launch of this application, the State housing program in the area of the Cape Metropolitan Council fell short of compliance with the requirements in para (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.”

3. There is no order as to costs.”

the government was not complying with its orders in terms of the judgment, a new case would have to be brought.

The remedy selected by the Constitutional Court in *Grootboom* has been the source of academic discussion and criticism.⁸⁵ While the SAHRC agreed to monitor the compliance of the state as to the *Grootboom* orders, its reporting has been incomplete,⁸⁶ focusing on the situation in the applicants' community without ensuring full compliance of the judgment, which "requires systemic changes to national, provincial and local housing programmes to cater for people in desperate and crisis situations."⁸⁷

⁸⁴ *Grootboom* supra note 8 at para 97 ("In the circumstances, [SAHRC] will monitor and, if necessary, report in terms of these powers on the efforts made by the State to comply with its s 26 obligations in accordance with this judgment.").

Section 184(3) of the South African Constitution enjoins "relevant organs of state to provide the [SAHRC] on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."

⁸⁵ Some of the many scholarly articles written about *Grootboom* are listed above, supra note 3.

See also, Sandra Liebenberg, "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa," 17 SAJHR 232 (2001) (characterizing *Grootboom* as a positive precedent for the judicial enforcement of socio-economic rights); Cass R. Sunstein, "Social and Economic Rights? Lessons from South Africa," 11 CONSTITUTIONAL FORUM 123 (2001) (praising the restraint of the Constitutional Court in upholding socio-economic rights while allowing the political branches of government wide discretion); Theunis Roux, "Understanding *Grootboom* – A Response to Cass R. Sunstein," 12 CONSTITUTIONAL FORUM 46 (2002) (arguing that the Constitutional Court was reluctant to prioritize access to housing over competing social needs); Bilchitz, "Giving Socio-Economic Rights Teeth," supra note 5; Wesson, "*Grootboom* and Beyond," supra note 9.

⁸⁶ A SAHRC report filed with Constitutional Court over a year after the *Grootboom* judgment was handed down indicates that it took over one year for the local administration (City of Cape Town) and the Western Cape provincial administration to finally decide where the "locus of responsibility" lay with regard to the implementation of the Court's order. One can safely deduce if the various organs of state were squabbling as to who was responsible for carrying out the *Grootboom* order, that no progress was made during that time to actually aid the applicants. See Pillay, "Implementing *Grootboom*: Supervision needed," supra note 3.

⁸⁷ Pillay criticizes the efficacy of having the SAHRC monitor the *Grootboom* judgment because the SAHRC is not required to report back to the Court in the actual *Grootboom* order and because there is a lack of clarity as to what the scope of monitoring should be, as explained in the following:

"There is a clear lack of understanding that the judgment requires systemic changes to national, provincial and local housing programmes to cater for people in desperate and crisis situations The SAHRC has tended to focus more on monitoring the implementation of the first order dealing with the situation of the first order dealing with the situation of the *Grootboom* community. There is a lack of information on

While there is agreement that it is a positive step for the nascent socio-economic rights' jurisprudence to declare part of the government's housing program to be unreasonable because it failed to provide those in desperate need with emergency housing, there is real controversy as to whether the declaratory relief ordered resulted in any actual improvement of the housing program itself.⁸⁸ The primary complaint has been that because there is no accountability over or enforcement of the *Grootboom* order, the declaratory order has been complied with shallowly by relevant state institutions. Roux describes this minimal compliance as follows:

“An interesting aspect of the *Grootboom* case, and a further illustration of the way in which the Court sought to manage its relationship with the political branches, concerns the order handed down at the end of the judgment ‘a reasonable part of the national housing budget to be devoted to [providing relief to those in desperate need]’ was not made part of the order, which was entirely declaratory. In the result, the political branches were not strictly speaking required to do anything in response to the Court’s decision in *Grootboom*. In practice, it appears that the political branches have responded to the judgment but the response has been fairly low-key, with a requirement having been set that 0.55% to 0.75% of the provincial housing budget be allocated to meeting the temporary accommodation needs of victims of flood and dire disasters.”⁸⁹

For the applicants, the result of *Grootboom* has been that, several years after the order was entered, there has been little tangible change in the housing policy to cater for

whether nationally and at provincial level there is compliance with the obligation to put in place and implement accelerated land release programmes.” Pillay, “Implementing *Grootboom*: Supervision needed,” *supra* note 3.

⁸⁸ As Pillay also explains, “[t]he decision of the Constitutional Court in the *Grootboom* case has been hailed as a great victory for the homeless and landless people of South Africa. However, the actual impact of the judgment on the housing situation of the litigants and others who find themselves in a similar situation has been less dramatic.” Pillay, “Implementing *Grootboom*: Supervision needed,” *supra* note 3.

⁸⁹ Theunis Roux, “Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court,” in *DEMOCRATIZATION AND THE JUDICIARY*, Siri Gloppen, et al, eds (Frank Cross: 2004), available at: http://www.law.wits.ac.za/lt/pdf/Norway_paper.pdf (last checked on 1 June 2006) at fn 28.

people who find themselves in desperate or crisis situations.⁹⁰ This much-publicized lack of compliance with the order illustrates that the SAHRC and the Constitutional Court has been ineffective in requiring government responsiveness to the *Grootboom* order.⁹¹ This grievous delay could have been avoided if the Constitutional Court had either affirmed the High Court's balanced injunction order or instituted its own structural injunction order.

In another example of a case ordering structural injunctive relief, *Treatment Action Campaign – High Court*, Botha J found that the national Minister of Health and respective members of the executive councils responsible for health in all provinces⁹² (“the respondents”) were constitutionally obligated under section 27 of the Constitution to plan and to implement an effective, comprehensive and progressive program for the prevention of mother-to-child transmission of HIV, that they had failed to deliver on these constitutional obligations by refusing to make Nevirapine available in the public health sector and consequently, ordered that the

⁹⁰ See, e.g., on the issue of whether the *Grootboom* judgment made any significant difference for the applicant community, a report in the Sunday Times entitled “Treatment with Contempt” stated:

“Grootboom is a part of Wallecedene, a large shantytown on the eastern side of Kraaifontein, a working-class area about 30 km inland from Cape Town along the N1. Grootboom is named after Irene Grootboom, a woman who made legal history and then apparently disappeared.

Grootboom and 900 other applicants successfully contested in their 1998 eviction from a site in Wallacedene when the Constitutional Court ruled in their favour in October 2000.

Today, all that the site of Grootboom has to show is the smelly ablution block, built in a donga that had served as a latrine for the squatters who went to court.” THE SUNDAY TIMES, 21 MARCH 2004.

⁹¹ See, e.g., Pillay, “Implementing *Grootboom*: Supervision needed,” *supra* note 3; Bilchitz, “Giving Socio-economic Rights Teeth,” *supra* note 9 at 24-25; Pieterse, “Coming to Terms with Judicial Enforcement of Socio-Economic Rights,” *supra* note 9 at 414-15.

⁹² The respondents included all respective members of the executive councils (“MEC”) responsible for health, except for the Western Cape MEC. As was explained in footnote 4 of the *Treatment Action Campaign* decision, “[t]he Western Cape MEC was originally a party to the proceedings in the High Court. The applicants later withdrew the application against him.”

respondents had to report back to the High Court as to the implementation of its order within three months.⁹³ Botha J explained the need for supervisory jurisdiction over the respondents, in the following excerpt from the judgment:

⁹³ The full text of the *Treatment Action Campaign – High Court* order is as follows:

“The following order is granted:

1. It is declared that the first to ninth respondents are obliged to make Nevirapine available to pregnant women with HIV who give birth in the public health sector, and to their babies, in public health facilities to which the respondents’ present programme for the prevention of mother-to-child transmission of HIV has not yet been extended, where in the judgment of the attending medical officer, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the woman concerned has been appropriately tested and counselled.

2. The first to ninth respondents are ordered to make Nevirapine available to pregnant women with HIV who give birth in the public sector, and to their babies, in public health facilities to which the respondents’ present programme for the prevention of mother-to-child transmission of HIV has not yet been extended, where in the opinion of the attending medical practitioner, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the woman concerned has been appropriately tested and counseled.

3. It is declared that the respondents are under a duty forthwith to plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which programme must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner.

4. The respondents are ordered forthwith to plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which programme must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner.

5. Each of the respondents is ordered to deliver, before 31 March 2002, a report or reports which set out, under oath:

- 5.1 what he or she has done to implement the order in paragraph 4
- 5.2 what further steps he or she will take to implement the order in paragraph 4, and when he or she will take each such step

6. The applicants may within a month of delivery of such reports deliver their replies, under oath, to the respondents’ reports.

7. The respondents may within two weeks of delivery of such reports deliver their answers to the replies of the applicants.

8. The application is postponed to a date to be fixed by the Registrar for the consideration and determination of the said reports, replies and answers.

“The programme of the respondents lacks the impetus that is required for a programme that must move progressively. If there is no time-scale, there must be some other built-in impetus to maintain the momentum of progression. It must be goal driven. As stated in *Grootboom* case . . . there is a balance between goal and means. Sometimes the goal will enforce the creation of the means. Sometimes the attainment of the goal will be delayed for lack of means. What I find unacceptable in the respondents’ approach is the formulation that once the lessons have been learnt from the test and research sites, the roll-out will follow as the means allow. That does no justice to the exigency of the case.”⁹⁴

Since the respondents had in place only an open-ended, largely undetermined mother-to-child HIV prevention program, one which left all planning for the future, more than a declaratory order was needed to ensure timely, meaningful government action. As a result, the process leading up to a structural injunction order was initiated.⁹⁵

The Constitutional Court upheld the main findings of Botha J—that the state’s preventive mother-to-child transmission program was “inflexible,” “unreasonable” and “a breach of the State’s obligations under [section] 27(2) read with [section] 27(1)(a) of the Constitution.”⁹⁶ The Constitutional Court then ordered that the government needed to, without delay, “remove the restrictions” that prevent the use of Nevirapine, to “permit and facilitate” its use, and to “take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.”⁹⁷

9. The first to ninth respondents are ordered to pay the applicants’ costs, including the costs attendant upon the employment of two counsel.” *Treatment Action Campaign – High Court, supra* note 10 at 386-87.

⁹⁴ *Treatment Action Campaign – High Court, supra* note 10 at 385.

⁹⁵ *Supra* note 93.

⁹⁶ *Treatment Action Campaign, supra* note 6 at para 80.

⁹⁷ *Treatment Action Campaign, supra* note 6 at para 135.

There is a noteworthy difference between the High Court order and the Constitutional Court one, which is the removal of supervisory jurisdiction over government compliance.⁹⁸ Despite the applicants requesting a structural interdict to

⁹⁸ The full text of the Constitutional Court order in *Treatment Action Campaign* states:

“We accordingly make the following orders:

1. The orders made by the High Court are set aside and the following orders are substituted.
2. It is declared that:
 - (a) Sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the right rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.
 - (b) The programme to be realised progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purpose.
 - (c) The policy for reducing the risk of mother-to-child transmission of HIV as formulated and implemented by government fell short of compliance with the requirements in subparas (a) and (b) in that:
 - (i) Doctors at public hospitals and clinics other than the research and training sites were not enabled to prescribe Nevirapine to reduce the risk of mother-to-child transmission of HIV even where it was medically indicated and adequate facilities existed for the testing and counselling of pregnant women concerned.
 - (ii) The policy failed to make provision for counsellors at hospitals and clinics other than at research and training sites to be trained in counselling for the use of Nevirapine as a means of reducing the risk of mother-to-child transmission of HIV.
3. Government is ordered without delay to:
 - (a) Remove the restrictions that prevent 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 when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counseled.
 - (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 counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV.
 - (d) Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.
4. The orders made in para 3 do not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV.

ensure government compliance for providing Nevirapine and the roll-out of national program for the prevention of mother-to-child transmission of HIV, the Constitutional Court declined to monitor the implementation of its order, explaining that the state has always respected and executed orders of the Constitutional Court.⁹⁹ Accordingly, the Court held that there was need to believe the government would not obey its orders in this case:

The order made by the High Court included a structural [injunction] requiring the appellants [the respondents] 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 a power if it is necessary to secure compliance with a court order. That may be because of a 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.*¹⁰⁰

This deferential order, also made without any provision of supervisory jurisdiction, too, has been controversial because of the government's resistance to this court order.¹⁰¹

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5. The government must pay the applicants' costs, including the cost of two counsel.
 6. The application by government to adduce further evidence is refused." *Treatment Action Campaign, supra* note 6 at para 135.

⁹⁹ See Swart, "Left out in the cold?" *supra* note 3 at 222-24.

¹⁰⁰ *Treatment Action Campaign, supra* note 6 at para 129 (Emphasis added.).

¹⁰¹ For example, Bilchitz has expressed real concern with the Constitutional Court's faith in the government to act quickly to provide Nevirapine to all public hospitals:

"[T]his seems like a strikingly bad moment to express good faith in the government's ability to deliver nevirapine expeditiously. The policy of the government in relation to HIV is notable for its very slow progress in coming to terms with the health crisis facing the country. There has been a tremendous amount of bungling and a high degree of reluctance to provide nevirapine. At one point prior to the release of the judgment, the Minister of Health threatened to disobey the court order on national television. We are also concerned with the very serious matter that this drug has the potential to prevent a life-threatening disease. It is of the utmost urgency that nevirapine be dispensed immediately. Under these conditions, it seems that the Court should have been prepared to ensure that its order is implemented as soon as possible. Whilst it may be politically important to show confidence in the government, the importance of the interests concerned argue in favour of a more

The Constitutional Court set out the extent to which the state's mother-to-child transmission prevention policy fell short of the requirements of reasonableness and directed government to remove all restrictions to the availability of Nevirapine in circumstances where the capacity to administer it existed and where it was medically indicated. The Court, however, did not include any supervisory jurisdiction to monitor government compliance with its order, despite the Court explicitly finding that an order to that effect—as was made in the High Court—fell within its judicial powers.¹⁰² This decision has been widely regarded as “curious and even irresponsible” in light of publicly expressed opposition by the Minister of Health as to the implementation of the order, even before it had been handed down.¹⁰³

Since the requested structural injunction order was not granted by the Constitutional Court and the High Court order requiring supervisory jurisdiction replaced by the Constitutional Court one, the applicants themselves were compelled, by default, to ensure government fulfilment of the *Treatment Action Campaign* order. Consequently, the applicant had to resort to contempt proceedings to secure compliance with the *Treatment Action Campaign* judgment in certain provinces.¹⁰⁴

stringent approach. The measured cautious approach of the Court is inappropriate in relation to the interests of such importance.” Bilchitz, “Towards a Reasonable Approach to the Minimum Core,” *supra* note 5 at 23-24.

¹⁰² *Treatment Action Campaign supra* note 6, at paras 97-114, 129.

¹⁰³ Pieterse, “Coming to Terms with Judicial Enforcement of Socio-Economic Rights,” *supra* note 9 at 415-16.

See also, Bilchitz, “Towards a Reasonable Approach to the Minimum Core,” *supra* notes 5 and 101; Mark Heywood, “Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the *Treatment Action Campaign* Case Against the Minister of Health,” 19 SAJHR 278, 308-09 (2003); Mark Heywood, “Contempt or compliance? The TAC case after the Constitutional Court judgment,” VOL. 4, NO. 1 ESR REVIEW (MARCH 2003) (“Contempt of compliance?”).

¹⁰⁴ As Heywood described, the Treatment Action Campaign has tried, on its own, to ensure government compliance with the Court's order, resulting in further contempt proceedings in *TAC v MEC for Health, Mpumalanga and Minister of Health*, TPD 35272/02.

Passing the responsibility of ensuring government fulfilment of a court order to civil society, community groups and individual applicants is improper. It directly contradicts the principle upheld by the *Treatment Action Campaign* judgment itself that, “[w]here a breach of any right has taken place, including a socio-economic right, a Court is under a duty to ensure that effective relief is granted.”¹⁰⁵ If a court, like the Constitutional Court, has the responsibility to ensure effectual relief is achieved, it is inappropriate to shirk that obligation by requiring to civil society, community groups or the applicants themselves to do it instead.¹⁰⁶

From an exploration of the orders in *Grootboom* and *Treatment Action Campaign*, it is clear the Constitutional Court has not yet stated any set timeframes or minimum standards from which either the full extent of the citizenry’s socio-economic entitlements can be gleaned or of the state’s socio-economic obligations may be derived. Socio-economic constitutional rights have enforceability—that much is known from the declaratory orders—but as of yet, it is still unclear what the government must specifically do in order to satisfy its constitutional obligations. The discussion cannot end here, however.

There has been an interesting development requiring government compliance with the Constitutional Court’s socio-economic rights judgments by executing structural injunction orders, as exemplified by the judgment of Selikowitz J in *City of*

“It should be evident that the TAC case is still ongoing. Although Mpumalanga is in the process of being forced into compliance, this is many months after the original order and undoubtedly at a cost of many lives. Further, social movements like the TAC have a limited capacity to monitor and ensure compliance Although the etiology of the ‘benefit of the doubt’ approach of the Court in not asserting its supervisory powers may have been understandable, with hindsight it may have been mistaken.” Heywood, “Contempt or compliance?” *supra* note 103.

¹⁰⁵ *Treatment Action Campaign*, *supra* note 6 at para 106 (Italics added.).

¹⁰⁶ In fairness, in contrast with the *Grootboom* order, however, the relatively high level of specificity in the *Treatment Action Campaign* order enabled the applicants to play a more proactive role in monitoring compliance with the order. See, e.g., Mark Heywood, “Contempt or compliance?” *supra* note 103; Pieterse, “Coming to Terms with Judicial Enforcement of Socio-Economic Rights,” *supra* note 9 at 415.

Cape Town v Rudolph and Others.¹⁰⁷ This decision is reminiscent of judgments like *Green*,¹⁰⁸ *Swann*,¹⁰⁹ and *Davis*,¹¹⁰ a few of the many United States district court cases implementing true desegregation reform after *Brown II* through the use of structural injunction orders. In each of these decisions, the lower court relied on a judgment of its highest court, which, in a declaratory order, held that a violation of a certain constitutional right could not be tolerated, as the necessary authority to order structural injunctive relief to remedy continued violations of that same constitutional right.

In *City of Cape Town v Rudolph*, the relevant issue was whether the City of Cape Town had complied with its constitutional obligations as set out by the Constitutional Court in its *Grootboom* judgment and if not, what the appropriate remedy ought to be.¹¹¹ Selikowitz J found that the government had not satisfied its constitutional obligation to make reasonable provision for access to housing, despite the Constitutional Court's order in *Grootboom*.

“The Constitutional Court has pronounced upon the nature of [the government's] constitutional obligations. It declared that the housing programme in the area in question was inconsistent with the Constitution, for its failure to make reasonable provision for people with no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations. It held that the local authority is under a duty to implement a programme such as the AMLSP with due regard to the urgency of the situation it is intended to address. [The government's] response, more than a year later, is:

¹⁰⁷ *City of Cape Town v Rudolph and Others*, *supra* note 10.

¹⁰⁸ *Green v. County School Bd. of New Kent County*, *supra* note 52.

¹⁰⁹ *Swann v. Charlotte-Mecklenburg Bd. of Educ*, *supra* note 59.

¹¹⁰ *Davis v. School Commissioners of Mobile County*, *supra* note 59.

¹¹¹ “The issue in this counter-application, two and a half years after the judgment in the *Grootboom* case, is whether the applicant has complied with its constitutional duties as declared by the Constitutional Court – and if not, what should be the appropriate remedy.” *City of Cape Town v Rudolph*, *supra* note 10 at 79H.

- a. in effect to acknowledge that it has not implemented any such programme;
- b. to give no indication that it has any intention of implementing such a programme;
 - to insist that it will continue to deal with applicants purely on the basis of when their name was placed on the waiting list; and
 - to deny that people who live in cars; in the streets; under the stairs at a school⁷ in the bushes; or at places outside wherever they can find shelter at night, and who have literally nowhere they may lawfully live, are living in intolerable conditions or that they are in crisis situations.

I find, on the evidence before me, that [the government] has displayed, and continues to display, an unacceptable disregard for the order of the Constitutional Court—and therefore for the Constitution itself.”¹¹²

Accordingly, the High Court held that in the circumstances, given the extreme government denial in its failure to recognize its obligation to elevate the plight of the homeless applicants and its lack of action regarding the Constitutional Court’s *Grootboom* order, that this was an appropriate situation to enter a structural interdict order.¹¹³

¹¹² *City of Cape Town v Rudolph*, *supra* note 10 at 83J – 84A-D (Emphasis added.).

¹¹³ See *supra* note 10 for a great quote from the *City of Cape Town v Rudolph* Court as to the need to enter a structural injunction order in this instance, given the state’s lack of compliance with the *Grootboom* declaratory order.

Also, in *City of Cape Town v Rudolph*, Selikowitz J made the following order, in relevant part:

“2. In the counter-application:

- 2.1 It is declared that the housing programme of the City of Cape Town fails to comply with the constitutional and statutory obligations of the City of Cape Town in that:
 - 2.1.1 it does not make short-term provision for people in Valhalla Park who are in a crisis or in a desperate situation;
 - 2.1.2 it does not provide any form of relief for people in Valhalla Park who are in a crisis or in a desperate situation;
 - 2.1.3 it fails to give adequate priority and resources to the needs to the people in Valhalla Park who have no access to a place where they may lawfully live;
 - 2.1.4 in the allocation of housing, it fails to have any or adequate regard to relevant factors other than the length of time an applicant for housing has been on the waiting list, and in particular does not have regard to the degree and extent of the need of the applicants;
 - 2.1.5 it has not been implemented in such a manner that the right to access to housing of residents of Valhalla Park is progressively realised.

3. The City of Cape Town is ordered to comply with its constitutional and statutory obligations as declared in this order.

4. The City of Cape Town is ordered within four months of the date of this order to deliver a report or reports under oath, stating what steps it has taken to comply with its constitutional and

This order is important in that it reflects the recognition by a High Court judge that often a declaratory order alone will be inadequate to ensure government protection of a constitutional right. More direction and guidance will be needed to achieve government compliance. In this way, a structural injunction order—through submitting plans and establishing reporting guidelines—is necessary to require the government to comply with its constitutional and statutory obligations.

This analysis is not meant to discount the importance of underlying decisions, such as the *Grootboom* judgment, which gave meaning and texture to the right of access to adequate housing. This will always be a crucial first step. Rather, this Article argues subsequent enforcement judgments are necessary to ensure that the promises to remedy constitutional violations made in these fundamental rights judgments, like the *Grootboom* decision, are actually carried out. Because judgments like *Grootboom* lack any specific guidelines or time deadlines for government action, the government has little incentive to move quickly, or at all, to ensure meaningful compliance with its order. Furthermore, institutional reform applicants, community groups and civil society seldom have the resources to monitor government action to maintain pressure for compliance nor should they be forced to. Consequently, judgments with structural injunction orders attached following initial rulings, like the

statutory obligations as declared in this order, what further steps it will take in that regard, and when such future steps will be taken.

5. The respondents in the main application [the homeless class] may within one month of delivery of that report or reports, deliver commentary thereon, under oath.

6. The City of Cape Town may within one month of delivery of that commentary, deliver its reply to that commentary under oath.

7. Thereafter, the matter is to be enrolled on a date to be fixed by the Registrar in consultation with the presiding Judge for consideration and determination of the aforesaid report, commentary and reply.

8. The City of Cape Town is ordered to pay the costs of the counter-application.” *Id.* At 89I-J – 90A-H.

one in *City of Cape Town v Rudolph*, become essential to ensure that the necessary and appropriate constitutional relief is realized.¹¹⁴

IV. PART FOUR: A DEFENSE OF THE STRUCTURAL INJUNCTION REMEDY FOR SOCIO-ECONOMIC RIGHTS CASES IN SOUTH AFRICA.

Although it is clear that it can be implemented successfully, the structural injunction order is not without its own controversies. Some argue that the implementation of a structural injunction order violates the separation of powers between branches of governments. Others contend that judges are ill-equipped to make such policy decisions because as they are polycentric and complex; and that enforcement is best left to the political branches. In this final section, this Article addresses these complaints and defends why, despite these criticisms, structural injunction orders are suitable and, in some cases, essential to ensure appropriate and effective relief.

At the most simplistic level, some argue that courts simply have no business telling a state institution how to operate its pension system, its schools, its prison system or any other public institution. This is nonsensical. Judges may make decrees which require massive expenditure without any regard to the budgetary consequences, particularly by way of enforcing civil and political rights.¹¹⁵ This is in contrast to the executive and legislative branches of government where the budget is an important

¹¹⁴ “Since trial court remedial discretion in institutional suit is inevitably political in nature, it must be regarded as presumptively illegitimate. But [Fletcher] concludes that the presumption of illegitimacy may be overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default. In that event, *and for so long as those political bodies remain in default, judicial discretion may be a necessary and therefore legitimate substitute for political discretion.*” Fletcher, “The Discretionary Constitution,” *supra* note 2 at 637 (Emphasis added.).

¹¹⁵ See, e.g., Mureinik, “Beyond a Charter of Luxuries,” *supra* note 13 at 466 (suggesting that an order of *habeas corpus*, for example, has costly financial consequences for the government because the effect is “to burden the state with the massive costs of a criminal justice system.”).

See also, Darrel Moellendorf, “Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims,” 14 SAJHR 327, 331 (1998) (arguing that the Constitutional Court may pass judgments on all socio-economic rights, as with other rights, that require a change in fiscal position).

input to a decision. As noted by the Constitutional Court in *Treatment Action Campaign*, all orders, including declaratory orders, can have profound financial and policy implications on the state; that fact alone cannot justify courts not ordering appropriate relief.¹¹⁶

“A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers.”¹¹⁷

Moreover, every judicial order implies an allocation of public funds sufficient to enforce it; “the enforcement costs of even routine private litigation are often substantial, and enforcement often depends on the discretionary initiative of public officials, such as sheriffs charged with finding and executing on a defendant’s assets.”¹¹⁸

The enforcement of all rights has policy implications.¹¹⁹ When a positive order in relation to any right may have far-reaching consequences, it is certainly appropriate for the courts to allow a margin of choice to the executive and legislature.

¹¹⁶ “There is also no merit in the argument advanced on behalf of the government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so. Thus, in the *Mpumalanga* case, this Court set aside a provincial government’s policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several months. Also, in the case of *August* the Court, in order to afford prisoners the right to vote, directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications.” *Treatment Action Campaign*, *supra* note 6 at para 99.

¹¹⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa*, 1996 1996 (4) SA 744 at paras 76-78.

¹¹⁸ Sabel and Simon, “Destabilization Rights: How Public Law Litigation Succeeds,” *supra* note 30 at 1059.

¹¹⁹ See, e.g., Fiss, “The Forms of Justice,” *supra* note 35 (suggesting that all judicial norm declarations have policy implications); Sabel and Simon, “Destabilization Rights: How Public Law Litigation Succeeds,” *supra* note 30 at 1059-60 (providing the example of a negligence case, which will often “set a standard that raises the costs of a practice or product—costs that may or may not be passed on to customers”).

However, this does not mean that the courts should abdicate all responsibility for the enforcement of those rights to the political branches of government because, as illustrated above, it is ineffective.

A slightly more sophisticated criticism of structural injunction orders is that courts should defer to the experienced judgment of state institutions in effectuating institutional reform.¹²⁰ This is misguided: just because state officials have made a decision, however, does not make it either correct or constitutional. Also, state officials can be unaware of conditions in their own agencies. Agency heads can take any criticism of their agency personally; and consequently, they are unable to evaluate objectively the agency's performance.

As seen above, in the United States, southern states ignored the Supreme Court segregation decisions; in like manner, state institutions often will be fiercely resistant to court-imposed changes to business as usual. State institutions often develop an entrenched set of customs and habits that will not be changed merely by a court by pounding a gavel and solemnly intoning that its practices are unconstitutional.¹²¹

Deference to government experience in awarding relief further assumes that government actors take seriously the constitutional violations of the applicants.

Although one would hope so, this is not always the case. Because of the explicit

¹²⁰ See, e.g., Robert F. Nagel, 'Controlling the Structural Injunction,' 7 HARV. J.L. & PUB. POL'Y 395, 397 (1984) ("The mechanism used by federal judges to assume control over such a broad range of institutions and issues is the injunction. Injunctive decrees are often so complete and detailed that they resemble legislation and administrative regulations. Sometimes shaped and implemented by quasi-administrative officials called monitors or masters or receivers, they are used to govern nearly every aspect of the decision-making process from trivial to fundamental.")

¹²¹ For some examples of both U.S. and South African governmental resistance to court orders, see *supra* notes 3, 10, 49, 50, 62, 63.

Also, Fletcher explains that in cases where negative injunctions are inadequate and the parties are uncooperative, the court will have no choice but to enter orders of her own creation. "If the trial judge cannot issue a negative injunction, and if the parties are unwilling to agree on a remedial plan, the judge will have no practical alternative but to exercise his or her own discretion." Fletcher, "The Discretionary Constitution," *supra* note 2 at 655.

orders, time frames and checks, institutional reform litigation may be the most effective strategy to protect the politically powerless.¹²² The applicants who typically file institutional reform litigation do so because they believe that government institutions are unresponsive to their constitutional rights and statutory requirements and that judicial action will improve their lives. Typically, the applicants lack economic or political power, and are often invisible to the larger society.¹²³ The traditional avenues of government are resistant to them: elected officials can be inattentive, uncaring or hostile and government bureaucracies can be callous and unresponsive. Weiner concludes that institutional reform litigation can “play a significant role in shaping the actions of government agencies and can promote the interests of the politically weak and dependent members of society” In this way, he claims, these actions can “promote the interests of the weak and despised against the many; the desperate against the majority.”¹²⁴

Not all government institutions that are found to be constitutionally deficient are that way intentionally, however; they may lack adequate resources from the legislature and executive to carry out much needed and desired reform.¹²⁵ In this way,

¹²² See, e.g., Tremgrove, “Judicial Remedies,” *supra* note 39.

¹²³ *Id.*

¹²⁴ John Barlow Weiner, “Institutional Reform Consent Decree as Conservers of Social Progress,” 27 *Colum. Human Rights L. Rev.* 355, 359 (1996).

He also argues that institutional reform litigation, and subsequent consent decrees, can “promote the interests of the socially disadvantaged and politically weak segments of our society by imposing specific obligations upon governmental bodies whose legal duties previously were unclear. Not only rights to food and shelter, but due process for prisoners, educational opportunities for minority children, welfare assistance for the poor, care for the mentally ill, and other rights and benefits enjoyed by the politically weak and dependent can be clarified by [institutional reform consent decrees].” *Id.* at 362.

¹²⁵ Even United States Supreme Court Justice William Brennan recognized that structural injunction orders provide the necessary leverage for cash-strapped government institutions to increase their budgets, noting “even prison officials have acknowledged that judicial intervention has helped them to obtain support for needed reform.” *Rhodes v. Chapman*, *supra* note 53 at 360.

structural injunction orders from the courts can be used to leverage additional resources.¹²⁶ As evidence of this, “it is perhaps the case,” a law-review note posits, that state administrators can “rely upon the courts to pressure the legislatures and impose needed reforms.”¹²⁷ In the seminal United States mental health institutional reform litigation, *Wyatt v. Stickney*, for example, the State Superintendent found that the court’s orders enabled him to “‘stand up’ to staff members, members of the community, and politicians who objected to the actions he took as Superintendent.”¹²⁸ Reform-minded administrators can thus use court intervention as a tool to effectively implement reforms that they have been unable to convince others to go along with.

Even in institutional reform cases, courts remain constrained by certain hallmarks of judicial decision-making: (1) the judge must make a decision on every grievance presented; (2) the judge must listen to witnesses and arguments on both sides of every issue; (3) the judge must justify her decision; and (4) appellate review ensures that courts do not overstep their authority.¹²⁹ These safeguards, which are not

¹²⁶ See, e.g., Diver, ‘The Judge as Political Powerbroker,’ *supra* note 45 at 71 (suggesting that court orders give an institution manager “a powerful ally in his unending quest for additional funds”).

Harriman and Strausmann argue that for administrators who wish to make changes but see little hope of obtaining the necessary resources from the legislature, judges may appear as “budgetary saviors” providing the “one possibility for budgetary growth.” Linda Harriman and Jeffrey D. Straussman, “Do Judges Determine Budget Decisions? Federal Court Decisions in Prison Reform and State Spending for Corrections,” 43 PUB. ADMIN. REV. 343, 348-49 (1983).

¹²⁷ Note, “Implementation Problems in Institutional Reform Litigation,” 91 HARV. L. REV. 428, 430 (1977).

¹²⁸ Note, “The *Wyatt* Case: Implementation of a Judicial Decree Ordering Institutional Change,” 84 YALE L. J. 1338, 1368 (1975) (quoting the Commissioner of the Alabama Board of Mental Health Stonewall Stickney). See also, *Wyatt v. Stickney*, *supra* note 54.

See also, *United States v. City of Miami*, 2 F.3d 1497, 1507 (11th Cir. 1993) (“[E]xperience teaches us that on some occasions public employers prefer the supervision of a federal court” to confronting tough political decisions).

¹²⁹ Obviously, appellate review would not be possible if the Constitutional Court were to issue a structural injunction order because it is the highest constitutional court in South Africa. However, just as for all other courts, when the Constitutional Court issues a judgment, it, too, must address all issues raised and consider all relevant evidence and affidavits filed in the matter.

imposed on state legislators and executive officers, who themselves make decisions which profoundly affect the welfare of the community, make it more likely that a judge's decision regarding the remedy to be imposed will be reliable and well-considered.

Another criticism levied against the use of structural injunction orders is that of separation of powers. Structural injunctions are accused of infringing on the separation of powers by excessively concentrating power in the courts at the expense of the electoral branches.¹³⁰ As noted previously, there is a substantial traditional precedent for intrusive remedies stemming from institutional litigation which would suggest that separation of powers is not an issue. "To portray the judicial activity in structural reform as encroaching on executive and legislative discretion ignores the complexity of the relations among the branches [of government] . . .".¹³¹ Sabel and Simon convincingly suggest that institutional structural injunction orders provide an "accountability-reinforcing" role for the courts, which fits well with familiar notions of the separation of powers.¹³²

Moreover, if the Constitutional Court were to review a high court structural injunction order, as was the case in both *Grootboom – High Court* and *Treatment Action Campaign – High Court*, appellate review would remain available.

Some examples of U.S. Supreme Court appellate review and reversal of institutional litigation where the district court issued supervisory jurisdiction, *see, e.g., Missouri v. Jenkins, supra* note 66 (proposing that trial courts limit their remedial discretion); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (finding that an end-result order was not properly within the power of the district court); *Lewis v. Casey*, 518 U.S. 343 (1996) (holding that to the extent that remedial issues were indeterminate, courts should defer to the defendant).

¹³⁰ A comprehensive discussion of the separation of powers critique is laid out by Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights," *supra* note 9 at 385-90, 395-411.

¹³¹ Sabel and Simon, "Destabilization Rights: How Public Law Litigation Succeeds," *supra* note 30 at 1091.

¹³² *Id.* at 1090-94. They advance that courts can exercise this "accountability-reinforcing" role if they actively work with the state defendant to encourage collaboration of the relief to be ordered, either through the submission of reports or a consent decree. They label this type of structural injunction relief to be "experimentalist."

Their thesis that structural injunction orders afford an “accountability-reinforcing” role for courts, rather than a usurping function, can be persuasively applied to the South African model as well. As seen from the facts of *Grootboom* and *Treatment Action Campaign*, litigation was brought as a consequence of a failure or refusal of government to make any meaningful policy to remedy socio-economic rights violations. The orders of both *Grootboom – High Court*¹³³ and *Treatment Action Campaign – High Court*¹³⁴ make clear that structural injunctive relief was issued to demand that a state defendant simply promulgate a reasonable policy, within an allotted time period. Because these orders left the government respondent significant discretion, separation of powers concerns seem less pressing than had the High Court immediately imposed her own structural injunction order.

Moreover, as Sabel and Simon make clear, this type of collaborative, “accountability-reinforcing” court order actually vindicate separation of powers concerns, particularly as to accountability since all parties can be involved in drafting a consent decree. These structural injunction orders enhance responsibility “by requiring executive officials to make explicit policies and to subject themselves to the mechanisms of measurement and monitoring that make their performance more readily accessible.”¹³⁵ This, in turn, makes the executive and agencies more accountable to the legislature, the electorate and the courts.¹³⁶

¹³³ The full text of the *Grootboom – High Court* order can be found at note 80.

¹³⁴ The complete text of the *Treatment Action Campaign – High Court* order can be found at note 93.

¹³⁵ Sabel and Simon, “Destabilization Rights: How Public Law Litigation Succeeds,” *supra* note 30 at 1093.

¹³⁶ *Id.* at 1094 (“The new regime [of structural injunction orders allowing discretion to the government when possible] makes clear the goals to which the representatives have committed their constituents and makes progress measurable in terms of criteria to which the representatives have agreed. Where progress is not being made, constituents will sometimes be in a position to put pressure on or to replace their representatives.”).

Perhaps the most serious criticism of judicial issuance of structural injunction orders is that of institutional incompetence: that is a single judge, or panel of judges, is not equipped, nor should they be, to make important decisions about how a state institution should be run.¹³⁷ Some critics have argued that courts are simply functionally incapable of addressing polycentric problems that involve many different factors and relationships.¹³⁸ Other case studies have found that courts experience difficulty in weighing policy alternatives and in calculating costs and benefits.¹³⁹ While courts are expert at determining fact and causation, structural remedies call upon them to engage in markedly different activities. They must discover and address the political, economic and social factors that may have created and exacerbated the constitutional violation. Formulating the correct remedy requires courts to predict how the remedy will affect, and be affected by, the political, economic and social context within which it is implemented. Thus, the argument goes, courts are structurally worse off than other branches of government at developing an intellectually coherent solution to social problems.

¹³⁷ See Pieterse, “Coming to Terms with Judicial Enforcement of Socio-Economic Rights,” *supra* note 9 at 396-416.

¹³⁸ Most famously, see Lon L. Fuller, “The Forms and Limits of Adjudication,” 92 HARV. L. REV. 353, 393-404 (1978).

The theory of polycentricity advances that a complex problem always has a number of subsidiary problem “centers,” each of which is related to the others, such that the solution to each depends upon the solution to all of the others. A classic metaphor for a polycentric problem is a spider web, in which the tension of the various strands is determined by the relationship among all of the parts of the web, so that if one pulls on a single strand, the tension of the entire web is redistributed in a new and complex pattern. *Id.* at 595. Fuller argued that polycentric conflicts are ill-suited to resolution by normal techniques of adjudication, contending that at some point “managerial” techniques involving intuitive and discretionary judgments are necessary. *Id.* at 598.

Put differently, Mureinik defined this polycentric problem as a positiveness argument, that “economic rights can be delivered in many different ways, and it is always a matter of political and economic controversy which is best.” Mureinik, “Beyond a Charter of Luxuries,” *supra* note 13 at 468.

¹³⁹ See, e.g., Donald L. Horowitz, THE COURTS AND SOCIAL POLICY at 294-97 (1977).

This is a serious concern and it is true that judges are not necessarily experts in prison administration or school reform. It is also true that they are no more experts in these areas as they are in business arrangements, criminal conspiracies, optimal family custodial arrangements or automobile accident reconstruction. Yet judges are often called upon to make legal and factual conclusions with respect to these and other topics.¹⁴⁰ Remedial orders in institutional litigation are similar to and no more complex than the traditional duties of a judge. In both private law and public institutional disputes, the issue of what remedy must be imposed presents unique analytical problems, and is always distinct from the finding of liability.¹⁴¹ That a dispute involves arguments over how state institutions should be run, rather than a private law dispute between two individuals or businesses, is a difference of degree, rather than of kind. What distinguishes institutional reform litigation from other forms is only the scale to which it is applied. .

Ideally, institutions themselves should be left to correct their own unconstitutional practices; *but this can only work if they attempt to do so in good faith*. A court can declare the parameters of a socio-economic right, provide benchmarks and deadlines for the government to honor on its constitutional obligations and leave the parties with the discretion as to how to assure constitutional compliance. However, the government and applicants agree if that the government should meet its responsibilities, the judicial role would remain to ensure that the state has acted to meet its obligations. In this way, soliciting plans from interested parties

¹⁴⁰ See Eisenberg and Yeazell, "The Ordinary and Extraordinary in Institutional Litigation," *supra* note 30 at 476-81 (arguing that there is little of importance that differentiates modern institutional decrees from the many well-established judicial practices that intrude deeply into the affairs of public and private entities).

¹⁴¹ For example, in a contract case, the measure of damages may depend upon factual determinations regarding mitigation and whether there were consequential damages. In certain kinds of tort cases, damages can occupy more of the court's time than the liability phase does.

and encouraging agreement among all parties can be enormously useful; it permits those directly affected by the litigation to protect their interests from avoidable harm and it relieves the court of the need to decide what is best for the parties. This method also enables courts to avoid exercising their discretion to solve polycentric problems and puts the burden of the remedial solution back on at least some of those most directly affected.

Unfortunately, this practice of deferring solutions back to the state agent or institution may not always work. The facts of *City of Cape Town v Rudolph* underscore this point. Not every politician and bureaucrat has a respect for constitutional requirements.¹⁴² Admittedly, a structural injunction order resulting from institutional litigation is a poor alternative to capable and caring performance by state officials fulfilling their constitutional duties. But if state institutions fail to measure up to what the constitution or other law demands, and the political branches of government take no remedial steps, this may be the only way to bring justice to the victims of the state's continued malfeasance.

Unless one is prepared to reduce constitutional guarantees to a form of words, the proposition that if a constitutional violation is found, it must be remedied cannot be questioned. If the law makes empty promises of justice and courts stand by—impotently watching constitutional violations persist without taking action to correct them—then courts do not fulfil the guarantees of human dignity, equality and freedom.

V. CONCLUSION

Structural injunction orders have effectively been used in the United States to remedy institutional violations of constitutional rights. They are an attractive way for

¹⁴² See, e.g., Governor George Wallace's blatant defiance of Judge Johnson's desegregation orders, *supra* note 64.

the nascent Constitutional Court and South African judiciary to remedy the wide range of socio-economic issues that they are faced with. South African courts have taken unprecedented, progressive steps to recognize socio-economic rights. Court-ordered structural injunction orders are one way that those intended rights can be realized by all South Africans.