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Social Rights and Transformative Private Law

Edward Béchard-Torres
Lincoln Alexander School of Law, Toronto Metropolitan University

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Abstract

Although constitutional social rights continue to attract much scholarly attention, their role in shaping private law is often overlooked. This neglect has led some scholars to underestimate social rights' transformative potential. This article considers social rights' influence over contract and property law in India, Colombia, and South Africa—three leading jurisdictions of the Global South. It argues that social rights can promote redistributive outcomes and inspire important shifts in private law's values and modes of reasoning. However, it cautions that the depth of this transformation will depend on how judges choose to cross the public– private divide. One tradition rejects any role for social rights in the private sphere. Another approach is comfortable imposing positive social duties, but only on firms that resemble the state. One notch further along, there are approaches that prefer maximum flexibility and pragmatism, but which fail to invest much effort in elaborating legal doctrine or a theory of relationships. The final method integrates constitutional aspirations into private law. Integration transforms private law's modes of reasoning and offers the clearest language for confronting private domination and inequality. However, it can also threaten wide swaths of private law and risk a legitimacy crisis for the judiciary. This article charts each of these paths of influence. It considers the legal environments that foster each path, as well as their normative dynamics, internal limits, and shortcomings. This effort is meant to mirror developments in the literature on comparative public law, where scholars have mapped diverging strategies for enforcing social rights in litigation against the state. More fundamentally, this article aims to recentre private law in discussions of how social rights participate in transformative constitutionalism.

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Social Rights and Transformative Private Law

EDWARD BÉCHARD-TORRES*

Although constitutional social rights continue to attract much scholarly attention, their role in shaping private law is often overlooked. This neglect has led some scholars to underestimate social rights' transformative potential. This article considers social rights' influence over contract and property law in India, Colombia, and South Africa—three leading jurisdictions of the Global South. It argues that social rights can promote redistributive outcomes and inspire important shifts in private law's values and modes of reasoning. However, it cautions that the depth of this transformation will depend on how judges choose to cross the public–private divide.

One tradition rejects any role for social rights in the private sphere. Another approach is comfortable imposing positive social duties, but only on firms that resemble the state. One notch further along, there are approaches that prefer maximum flexibility and pragmatism, but which fail to invest much effort in elaborating legal doctrine or a theory of relationships. The final method integrates constitutional aspirations into private law. Integration transforms private law's modes of reasoning and offers the clearest language for confronting private domination and inequality. However, it can also threaten wide swaths of private law and risk a legitimacy crisis for the judiciary.

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* Assistant Professor, Lincoln Alexander School of Law. I am grateful to Robert Leckey, César Rodríguez-Garavito, Terry Skolnik, Ignacio Cofone, Alana Klein, Carlos Andrés Baquero-Diaz, Alma Diamond, Arpitha Kodiveri, Victoria Adelmant, two anonymous reviewers, and the participants of the Scholars in Residence Workshop at New York University's Center for Human Rights and Global Justice for their thoughtful comments. This research was supported by a Joseph-Armand Bombardier Canada Graduate Scholarship from the Social Sciences and Humanities Research Council of Canada.

CONSTITUTIONALIZED SOCIAL RIGHTS—which include rights to housing, health care, food, or water—can have a transformative influence on private law. These two bodies of norms are more related than they might first appear. Contract and property law can sometimes have the effect of denying vulnerable individuals access to vital goods and services necessary to sustain a dignified life.[1] More generally, private law can play an important role in shaping the distribution of resources within a political community, since rules governing entitlement and power set the terrain for market activity.[2] Social rights might therefore pose

1. Mark Tushnet thus writes of the private law's role in creating "conditions of unconstitutionality." See "Dialogue and Constitutional Duty" in Tsvi Kahana & Anat Scolnicov, eds, *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors and Positive Obligations* (Cambridge University Press, 2016) 94 at 98. See also Gary Peller & Mark Tushnet, "State Action & A New Birth of Freedom" (2004) 92 Geo LJ 779 at 779-80. On the role of private law in managing access to vital goods, see Helen Hershkoff, "Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings" in Varun Gauri & Daniel Brinks, eds, *Courting Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008) 268.
2. These ideas were at the heart of legal realists' critique of the public–private distinction, and subsequently influenced the critical legal studies movement. See *e.g.* Duncan Kennedy, "The Stakes of Law, or Hale and Foucault!" (1991) 15 Leg Stud Forum 327 at 327-45; Joseph William Singer, "Legal Realism Now" (1988) 76 Calif L Rev 465 at 475,482-92, citing Robert Hale, "Coercion and Distribution in Supposedly Non-Coercive States" (1923) 38 Poli Sci Q 470 [Hale, "Coercion and Distribution"] and Robert Hale, "Bargaining, Duress, and Economic Liberty" (1943) 43 Colum L Rev 603.

challenges to the contemporary allocation of rights in areas such as contract, property, and even corporate law.[3]

In spite of its importance, private law is often overlooked in the comparative literature on social rights. This neglect has led some scholars to underestimate social rights' transformative potential. Roberto Gargarella recently remarked that social rights have diverted attention away from needed economic reforms—as if the two were unrelated and not intrinsically linked.[4] Samuel Moyn has written that the whole corpus of human rights are "unambitious" and "ineffectual" in the face of market fundamentalism.[5] However, his brief review of comparative materials neglected social rights' role in private law entirely. When Mila Versteeg mounted a defence to Moyn's criticisms, her survey of comparative developments neglected to underscore private law as a site of change.[6]

In this article, I chart social rights' influence on private law in India, Colombia, and South Africa. These three jurisdictions have established track

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3. See Dennis M Davis & Karl Klare, "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 SAJHR 403.
4. See Roberto Gargarella, "Inequality and the Constitution: From Equality to Social Rights" in Philipp Dann, Michael Riegner & Maxim Bönnemann, eds, *The Global South and Comparative Constitutional Law* (Oxford University Press, 2020) 235 at 246-49. See also Roberto Gargarella, "Equality" in Rosalind Dixon & Tom Ginsburg, eds, *Comparative Constitutional Law in Latin America* (Edward Elgar, 2017) 176 at 176, 183, 188-94.
5. *Not Enough: Human Rights in an Unequal World* (Harvard University Press, 2018) at 216. In a similar but less critical vein, David Landau and Rosalind Dixon write recently that "courts are often less interested (or less able) in using social rights to promote social transformation than is commonly assumed." See "Constitutional Non-Transformation: Socioeconomic Rights Beyond the Poor" in Katherine Young, ed, *The Future of Economic and Social Rights* (Cambridge University Press, 2019) 110 at 110. See also Rosalind Dixon & Julie Suk, "Liberal Constitutionalism and Economic Inequality" (2018) 85 U Chicago L Rev 369 at 395-97."publisher":"Harvard University Press","publisher-place":"Cambridge","title":"Not Enough: Human Rights in an Unequal World","author":[{"family":"Moyn","given":"Samuel"}],"issued":{"date-parts":[["2018"]]},"locator":"216"},{"id":474,"uris":["http://zotero.org/users/local/vQeHM8vO/items/T2SKYB62"],"uri":["http://zotero.org/users/local/vQeHM8vO/items/T2SKYB62"],"itemData":{"id":474,"type":"chapter","container-title":"The Future of Economic and Social Rights","event-place":"Cambridge","page":"110","publisher":"Cambridge University Press","publisher-place":"Cambridge","title":"Constitutional Non-Transformation: Socioeconomic Rights Beyond the Poor","author":[{"family":"Landau","given":"David"},{"family":"Dixon","given":"Rosalind"}],"editor":[{"family":"Young","given":"Katherine"}],"issued":{"date-parts":[["2019"]]}},"locator":"110","prefix":"in a similar but less critical vein, David Landau and Rosalind Dixon write recently that \"courts are often less interested (or less able
6. "Can Rights Combat Economic Inequality?" (2020) 133 Harv L Rev 2017.

records in social rights enforcement.[7] They are also considered leading examples of "transformative constitutionalism," a juridical movement championed principally in countries in the "Global South."[8] This term refers to the long-term project of transforming a country's political, social, and economic institutions in a democratic and egalitarian direction, through processes grounded in law—and particularly constitutional law.[9] These constitutions take seriously the character of the country's economic life. They typically include positive socio-economic guarantees,[10] aim to shift the distribution of political and economic power, and are often "at least partly horizontal."[11]

This article will develop several claims. First, social rights can promote redistributive outcomes in private law and inspire transformations in private law's values and modes of reasoning.[12] Private law cultures that are structured around formalism and libertarianism can become aware of their role in entrenching private power, domination, and inequality. Properly understood, social rights do have much to say about economic structures. Indeed, some of these developments have been championed by the recent progressive scholarship on law and political economy.[13]

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7. These three jurisdictions have long been at the centre of the study of social rights enforcement. See *e.g.* Daniel Bonilla Maldonado, "Introduction" in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Colombia* (Cambridge University Press, 2013) 1.
8. Dann, Riegner & Bönnemann, *supra* note 4 at 20-23. For an examination of this tradition's resonance in the "Global North," see Michaela Hailbronner, "Transformative Constitutionalism: Not Only in the Global South" (2017) 65 Am J Comp L 527.
9. Karl Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14 SAJHR 146 at 150.
10. See Heinz Klug, "Transformative Constitutionalism as a Model for Africa?" in Dann, Riegner & Bönnemann, eds, *supra* note 4, 141 at 146.
11. Klare, *supra* note 9 at 153-54. See also Marius Pieterse, "What Do We Mean When We Talk About Transformative Constitutionalism" (2005) 20 S Afr Pub L 155; Hailbronner, *supra* note 8 at 540-41.
12. On this point, I draw on the classifications of modes of legal thought outlined by Duncan Kennedy. See "Three Globalizations of Law and Legal Thought: 1850-2000" [Kennedy, "Three Globalizations"] in David Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006) 19 (distinguishing between classical legal thought, socially oriented legal thought, and contemporary legal thought).
13. For a recent collection of contributions to this emerging field, see Poul F Kjaer, ed, *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press, 2020). See also Jebediah Britton-Purdy et al, "Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis" (2020) 129 Yale LJ 1784.

Second, the depth of this transformation will depend on how judges choose to cross the public–private divide. Some methods or strategies produce a more limited impact than others. At one extreme, social rights denialism maintains a sharp public–private divide and rejects any role for these rights in the private sphere. One notch further along, there are approaches that reserve positive social duties for firms that, in some meaningful way, resemble the state. Moving along further still, there are approaches that prefer maximum flexibility and pragmatism, but which fail to invest much effort in elaborating legal doctrine or a theory of relationships. This kind of flexible remedialism can impose ambitious social duties, but it does so overtop private law and conceives of the two spheres in separate terms.

The last approach integrates constitutional aspirations into private law. In the process, traditional rules are re-evaluated for their potential to promote constitutionally desired outcomes. Of the paths considered, the integrative approach is the best placed to reimagine private law and to shift its prevailing modes of legal reasoning. Even though its substantive outcomes can still be modest—even sometimes conservative—this approach offers the clearest language for confronting private domination and inequality. However, it can also threaten to uproot much of private law and risk a legitimacy crisis for the judiciary.

Legal systems tend to have a preference for one method or another. Indian law is marked by denialism. Colombian law appears to favour flexible remedialism. South African law trends towards normative integration. It is worth adding that these contrasting methods are influenced by—but are not reducible to—the formal distinctions between direct and indirect horizontal application of constitutional norms and the progressive development of general law.[14]

Each of the following sections takes up one of these approaches. I consider the legal environments that foster each approach, as well as their normative dynamics, internal limits, and shortcomings. This effort is meant to mirror developments in the literature on comparative public law, where scholars have mapped diverging strategies for enforcing social rights in litigation against the

14. For more on these distinctions, see Stephen Gardbaum, "Horizontal Effect" [Gardbaum, "Horizontal Effect"] in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016) 600 at 601; Hershkoff, *supra* note 1 at 282-86; Cheryl Saunders, "Constitutional Rights and the Common Law" in András Sajó & Renáta Uitz, eds, *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International, 2005) 183 at 183-84, 214.

state.[15] More fundamentally, I aim to recentre private law in discussions regarding the gradual realization of social rights.

I. SOCIAL RIGHTS DENIALISM

The first approach is the simplest and sees a sharp public–private divide that can deny any role for social rights in the private sphere. This division of labour can be the product of constitutional text, ideology, legal culture, and even the incentives created by local legal procedure. Whatever its cause, denialism confines the work of redistribution to tax-and-spend programs and to other legislative or administrative measures. In this section, I develop a brief account of the forces that produce denialism in India, where it remains dominant. I will also suggest that, of the approaches considered, denialism is the least satisfying.

Social rights' limited influence on Indian private law is perhaps surprising, since the Supreme Court of India has been known to enforce these rights in aggressive ways.[16] Famously, the Court side-stepped the textual constraints laid out by *The Constitution of India* ("Indian Constitution") to recognize a judicially enforceable right to "live with dignity," which has come to include positive rights

15. See especially César Rodríguez-Garavito & Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press, 2015); Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, "Introduction: From Jurisprudence to Compliance" in Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, eds, *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge University Press, 2017) 3; Katharine G Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012); Jeff King, *Judging Social Rights* (Cambridge University Press, 2012); Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2008); Rosalind Dixon, "Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited" (2007) 5 ICON 391.

16. See *e.g.* Manoj Mate, "Public Interest Litigation and the Transformation of the Supreme Court of India" in Diana Kapiszewski, Gordon Silverstein & Robert A Kagan, eds, *Consequential Courts* (Cambridge University Press, 2013) 262; S Muralidhar, "India: The Expectations and Challenges of Judicial Enforcement of Social Rights" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009) 102; Nick Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance Court" (2009) 8 Wash U Global Stud L Rev 1."ISBN":"978-1-139-20784-3","language":"en","note":"DOI: 10.1017/CBO9781139207843.013","page":"262-288","publisher":"Cambridge University Press","publisher-place":"Cambridge","source":"DOI.org (Crossref

to nutrition, shelter, basic health care, and a livelihood.[17] However, as Stephen Gardbaum writes in his recent review of the jurisprudence, there has been "little general discussion and few general principles established" on the reach of the Fundamental Rights into private law.[18] Although constitutional duties are occasionally imposed onto private parties, the law continues to be marked by "significant pockets that retain a fairly sharp public–private divide."[19]

There are several factors that produce India's denialism. The first is textual. With only a few exceptions, the Indian Constitution identifies "the State" as the bearer of constitutional duties.[20] This wording reflects an explicit decision, made by the members of India's Constituent Assembly, to keep constitutional duties out of the private sphere.[21] The Court has generally respected this choice. Judgments have expressed the view that, unless specified otherwise,[22] the Fundamental Rights bind only the State.[23]

These textual constraints are further supported by a confident liberal ideology. Indeed, liberal theorists and lawyer-economists are united in their resistance to a redistributive private law. John Rawls and Ronald Dworkin argued that access to basic entitlements should be guaranteed by state institutions, leaving individuals

17. See generally Muralidhar, *supra* note 16; Jayna Kothari, "Social Rights Litigation in India: Developments of the Last Decade" in Daphne Barak-Erez & Aeyal Gross, eds, *Exploring Social Rights* (Hart, 2007) 171; Shylashri Shankar & Pratap Bhanu Mehta, "Courts and Socioeconomic Rights in India" in Daniel Brinks & Varun Gauri, eds, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008) 146.
18. Gardbaum, "Horizontal Effect," *supra* note 14 at 608.
19. *Ibid*.
20. See *The Constitution of India* (1950), arts 12-13 [*Indian Constitution*].
21. See Gardbaum, "Horizontal Effect," *supra* note 14 at 602-603.
22. See *People's Union for Democratic Rights v Union of India*, [1982] 3 Supreme Court Cases 235 (India) (recognizing that certain specific rights are subject-less, and are "indubitably enforceable against everyone"). See also *Indian Constitution*, *supra* note 20, arts 23-24; Stephen Gardbaum, "Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?" in Vicki Jackson & Mark Tushnet, eds, *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017) 221 at 223.
23. See Gardbaum, "Horizontal Effect," *supra* note 14 at 602-603; *Zoroastrian Cooperative Housing Society v District Registrar*, [2005] 5 Supreme Court Cases 632 (India) ("[t]he fundamental rights in Part III of the Constitution are normally enforced against State action or action by other authorities who may come within the provision of Article 12 of the Constitution").

free to pursue their own ends without excessive constraint.[24] Modern Kantians fear that if private law becomes a site of redistribution, wealthier individuals would be at risk of being subordinated to others and denied the freedom to pursue their own ends.[25] Corrective justice theorists add that any attempt to address extreme need through a system of bilateral justice risks imposing an arbitrary burden on the defendant since the "underlying injustice is systemic."[26] In their view, private law should be limited to correcting private injustices.[27] In a rare moment of agreement, lawyer-economists have argued that tax-and-spend schemes more

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24. See John Rawls, "The Basic Structure as Subject" in Alvin Goldman & Jaegwon Kim, eds, *Values and Morals* (Springer, 1978) 47 at 54-55; John Rawls, *Political Liberalism* (Columbia University Press, 1993) at 283. Rawls writes that

> [t]he difference principle holds, for example, for income and property taxation, for fiscal and economic policy. It applies to the announced system of public law and statutes and not to particular transactions or distributions, nor to the decisions of individuals and associations, but rather to the institutional background against which these transactions and decisions take place (*ibid*).

See also Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) at 295-312. Note that several authors suggest that, properly interpreted, the Rawlsian basic structure does indeed require some measure of redistribution through the private law. See *e.g.* Samuel Scheffler, "Distributive Justice, the Basic Structure and the Place of Private Law" (2015) 35 Oxford J Leg Stud 213; Kevin Kordana & David Tabachnick, "Rawls and Contract Law" (2005) 73 Geo Wash L Rev 598; Kevin Kordana & David Tabachnick, "The Rawlsian View of Private Ordering" (2008) 25 Social Philosophy & Policy 288.nor to the decisions of individuals and associations, but rather to the institutional background against which these transactions and decisions take place\\uc0\\u8221{}

25. See *e.g.* Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, 1991) at 63; Ernest Weinrib, *Corrective Justice* (Oxford University Press, 2012) at 36; Jules Coleman & Arthur Ripstein, "Mischief and Misfortune" (1995) 41 McGill LJ 91 at 112; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) at 35.
26. Aditi Bagchi, "Distributive Justice and Contract" in Gregory Klass, George Letsas & Prince Saprai, eds, *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 193 at 194. See also Melvin Eisenberg, "Theory of Contracts" in Peter Benson, ed, *Theory of Contract Law: New Essays* (Cambridge University Press, 2001) 206 at 257 (rejecting redistribution in contract law as "completely haphazard"); Eric Posner, "Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract" (1995) 24 J Leg Stud 283 at 284.
27. See Ernest Weinrib, *The Idea of Private Law* (Oxford University Press, 2012) at 63-64.

efficiently achieve desired levels of redistribution.[28] They also note that private law rules can be contracted around, and are liable to be over- or underinclusive.[29]

The incentives created by Indian legal procedure have also contributed to a hollowing out of private litigation.[30] The Supreme Court of India can be petitioned directly in cases where an individual's Fundamental Rights have been threatened.[31] Under the banner of "Public Interest Litigation," the Court has also ushered in a series of procedural and evidentiary reforms to facilitate access to constitutional justice.[32] These advantages tempt plaintiffs to frame their cases purely in public law terms, against the state, even when a private law claim would otherwise be available.[33] With lawsuits framed in public law terms, judges can avoid addressing the extent to which the Indian Constitution reaches into the private sphere. Meanwhile, traditional contract, tort, and property cases—falling outside of the Court's original writ jurisdiction—rarely make it to the higher courts.[34]

Lastly, the dynamics of Indian private law limit the Indian Constitution's influence. Much of this law is set out in nineteenth-century statutes that were intended to constrain judicial discretion. Through codification, the British imperial government sought to stunt the kind of organic change familiar to most

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28. See especially Louis Kaplow & Steven Shavell, "Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income" (1994) 23 J Leg Stud 667 [Kaplow & Shavell, "Less Efficient"]; Louis Kaplow & Steven Shavell, "Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income" (2000) 29 J Leg Stud 821; Ronen Avraham, David Fortus & Kyle Logue, "Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell" (2004) 89 Iowa L Rev 1125 at 1126. See also Robert Cooter & Thomas Ulen, *Law and Economics*, 3rd ed (Addison-Wesley, 2000) at 112.
29. Kaplow & Shavell, "Less Efficient," *supra* note 28 at 674-75. See also Lee Anne Fennell & Richard McAdams, "The Distributive Deficit in Law and Economics" (2016) 100 Minn L Rev 1051 at 1065.
30. See Gardbaum, "Horizontal Effect," *supra* note 14 at 613; Shyamkrishna Balganesh, "The Constitutionalisation of Indian Private Law" in Choudhry, Khosla & Mehta, eds, *supra* note 14, 680 at 680-83 (writing that these new procedures' "long-term effects on India's private law edifice have been devastating").
31. See *Indian Constitution*, *supra* note 20, art 32.
32. Shyam Divan, "Public Interest Litigation" in Choudhry, Khosla & Mehta, eds, *supra* note 14, 662 at 668-78; Mate, *supra* note 16 at 264-65, 271-73, 281; Muralidhar, *supra* note 16 at 108-109; SP Sathe, "Judicial Activism: The Indian Experience" (2001) 6 Wash UJL & Pol'y 29.
33. See Balganesh, *supra* note 30 at 686-88; Gardbaum, "Horizontal Effect," *supra* note 14 at 613.
34. See Balganesh, *supra* note 30 at 692-93.

common law jurisdictions.[35] This legacy endures. Indian private law remains encased by a formalism that treats statutes as exhaustive and that limits courts to applying bright-line legislative norms.[36]

From this list, constitutional text and ideology are likely the weaker constraints. The Indian Constitution might rule out the direct horizontal application of constitutional norms, but it does not prevent courts from creating or shaping private law rules that are inspired by social rights' aspirational dimensions. The Court has also sidestepped textual constraints in the past. As discussed above, it is the Court that identified a core set of justiciable social rights notwithstanding the drafters' explicit choice to frame those rights as non-justiciable "Directive Principles of State Policy."[37]

The arguments grounded in liberal ideology are also unpersuasive. The liberal defence of autonomy is often made conditional on the state accomplishing the necessary background distribution.[38] Poverty and inequality expose as hollow the myths that individuals engage in "free" exchange.[39] Individuals experiencing poverty are often vulnerable to private domination, and their paths to a flourishing life can be thwarted by the endless task of securing their basic needs.[40] In such a society, private law might demand some level of redistribution, precisely to promote autonomy. It must also be remembered that constitutionalized social rights represent a collective commitment to ending extreme need. That communal promise should—at least some of the time—be capable of placing demands on the more powerful.

Instead of maintaining a strict division of labour, private law and tax-and-spend measures could both recognize limits to powerful parties' freewheeling autonomy and demand a degree of shared concern. There are benefits to having these

35. See Shyamkrishna Balganesh, "Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint" (2015) 63 Am J Comp L 33.
36. See Balganesh, *supra* note 30 at 683-85.
37. See especially *Francis Coralie Mullin v Administrator, Union Territory of Delhi*, [1981] 2 Supreme Court Reports 516 (India).
38. Scheffler, *supra* note 24 at 214.
39. For a recent articulation of this idea, see Hanoch Dagan, *A Liberal Theory of Property* (Cambridge University Press, 2021) at 23, 244 [Dagan, *Liberal Theory*].
40. See generally Robert Hale, *Freedom Through Law: Public Control of Private Governing Power* (Columbia University Press, 1952); Hale, "Coercion and Distribution," *supra* note 2. See also Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 JL & Equality 69 at 74-79; Christopher Essert, "Property and Homelessness" (2016) 44 Phil & Pub Aff 266 at 275-76; Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991) 39 UCLA L Rev 295 at 304, 315, 397 (on the threat that homelessness in particular poses for freedom).

two areas aligned. Strident individualism in private law can undermine social solidarity and foster resistance to the taxes and social programs that are relied on to do the necessary redistributive work.[41] Moreover, the dynamics of interest group politics can limit the political branches' ability to introduce new taxes or spending programs. The result is a "distributive deficit" that might be addressed only through reform to the general law.[42] Finally, as many scholars have stressed, a redistributive private law is not necessarily less efficient.[43]

Intriguingly, the ideological reasons for sustaining a sharp public–private divide appear to have already failed in India. The Court has hinted at positive redistributive duties in the employment and insurance contexts, although these indications have been rare. In *Life Insurance Corporation of India v Consumer Education and Research Centre*, the Court suggested that private health care insurers should offer "just and fair terms and conditions accessible to all segments of the society."[44] In *Consumer Education and Research Centre v Union of India*, the Court added that private employers have some duty to promote the health of their employees during employment and into retirement.[45] In the lower courts, judges have challenged shameless profiteering in private education.[46] More importantly still, judges have defended redistributive regulatory measures on the basis that they promote social rights. In *Chameli Singh v State of Uttar Pradesh*, for instance, the Court upheld measures that expropriated land for low-income housing on the grounds that these measures buttressed "social and economic justice" and the "right to housing."[47]

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41. See Hanoch Dagan, "The Utopian Promise of Private Law" (2016) 66 UTLJ 392 at 411.
42. See especially Fennell & McAdams, *supra* note 29 at 1056.
43. See *e.g.* Anthony Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale LJ 472 at 502-510; Bruce Ackerman, "Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy" (1971) 80 Yale LJ 1093 at 1097-98, 1102-19, 1186-88; Duncan Kennedy, "The Effect of the Warranty of Habitability on Low Income Housing: 'Milking' and Class Violence" (1987) 15 Fla St UL Rev 485 at 497-506; Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 Md L Rev 563 at 613 [Kennedy, "Distributive and Paternalist Motives"]; Avraham, Fortus & Logue, *supra* note 28 at 1144-48; Fennell & McAdams, *supra* note 29 at 1061; Rashmi Dyal-Chand, "Sharing the Cathedral" (2013) 46 Conn L Rev 647.
44. [1995] 5 Supreme Court Cases 482 (India).
45. [1995] 3 Supreme Court Cases 42 (India).
46. See *Hindi Vidya Bhavan Society v State of Maharashtra*, [2005] 4 Bombay Court Reporter 676 (Bombay HC, India). See also *Ravneet Kaur v The Christian Medical College* (1997), [1998] All India Reporter Punjab & Haryana 1 (Punjab & Haryana HC, India).
47. [1996] 2 Supreme Court Cases 549 at 553 [*Chameli*].

As a result, social rights' lack of influence appears to be a product of India's ossified private law and—perhaps ironically—the public interest procedural vehicles that encourage litigants to frame their claims against the state. Substantively, denialism is not only unsatisfying, but it appears to have failed to persuade judges. As I discuss in the following sections, Colombian and South African law contemplate more permissive channels of influence.

II. RELYING ON STATE RESEMBLANCE

The second approach also hesitates to cross the public–private divide but is willing to do so for firms that sufficiently resemble the state. This group of entities might include a business that controls an export processing zone or a corporation that has been charged by the government with supplying water or electricity. Constitutional duties might be heightened or imposed on them due to their state-like qualities.

Jurists who prefer this approach may still disagree on the features that create a sufficient degree of resemblance. At the more sophisticated end, Jean Thomas has attempted to list the qualities that are needed by charting the characteristics of the citizen–state relationship.[48] In her view, the public relationship is marked by a special kind of dependency. The state exercises coercive powers over the individual, and the individual willingly follows the rules that the state enacts.[49] This degree of reliance is only present in the private sphere when a powerful party exercises total control over the depending party's enjoyment of some good or interest, all within the context of an "undertaking by the controlling party."[50] Within such a relationship, the private entity can be the object of public duties, including obligations to fulfill positive social rights.[51]

Judicial attempts at locating state-like defendants tend to be less rigorous. Courts are sometimes content to make fleeting reference to a firm's work supplying a "public service" or performing a function that is connected to the "public interest." These terms have rich histories in common and civil law jurisdictions,

48. See Jean Thomas, *Public Rights, Private Relations* (Oxford University Press, 2015) [Thomas, *Private Relations*]; Jean Thomas, "Our Rights, But Whose Duties? Re-conceptualizing Rights in the Era of Globalization" [Thomas, "Whose Duties"] in Kahana & Scolnicov, eds, *supra* note 1, 6.
49. Thomas, "Whose Duties," *supra* note 48 at 22.
50. *Ibid* at 21. See also Thomas, *Private Relations*, *supra* note 48 at 20.
51. Thomas, "Whose Duties," *supra* note 48 at 23.

but in judgments they frequently go unelaborated.[52] At some point, the work of establishing a sufficient degree of resemblance has likely been abandoned in favour of an openly discretionary approach that is considered in the next section.

Courts in South Africa and Colombia seem comfortable deploying this method for bridging the public–private divide. In both jurisdictions, this approach acts as a basis for heightened duties and usually complements—rather than crowds out—other pathways of influence. This approach was on display in the Constitutional Court of South Africa's decision in *AllPay Consolidated Investment Holdings (Pty) LTD and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)*.[53] In that case, Cash Paymaster had agreed to administer a social security grant program.[54] The firm's contract had been nullified because of irregularities in the bidding process. A new tender was underway, but the Court ordered Cash Paymaster to continue administering the program until a new contract with another firm could be concluded. In the Court's view, the business "undertook constitutional obligations" by entering into the social grant payment contract.[55] The function that it performed was "fundamentally public in nature," exercising a "public power" to "give effect to the right of access to social security."[56] In these circumstances, the unanimous Court bluntly opined that "considerations of obstructing private autonomy…do not feature prominently, if at all."[57] The Court even directed Cash Paymaster to disclose its "break-even point" so that its services could be maintained without making a profit.[58]

This kind of reasoning also influences cases where service providers help realize social rights. Judges in South Africa have reasoned that private schools have (at least) a negative duty not to impede children's access to education.[59] *AB and Another v Pridwin Preparatory School and Others* ("*Pridwin*") considered whether this duty was breached when a private institution cancelled two students' enrollment after school officials were involved in a series of disruptive

52. See *e.g.* William Novak, "The Public Utility Idea and the Origins of Modern Business Regulation" in Naomi Lamoreaux & William Novak, eds, *The Corporation and American Democracy* (Harvard University Press, 2017) 139.
53. [2014] ZACC 12.
54. *Ibid*.
55. *Ibid* at paras 56, 59, 64.
56. *Ibid* at paras 52-54.
57. *Ibid* at para 66.
58. *Ibid* at para 67.
59. See *Governing Body of the Juma Musjid Primary School v Essay NO*, [2011] ZACC 13 at paras 57-58.

clashes with their father.[60] The Court reasoned that Pridwin Preparatory School was performing a "constitutional function" but, in the absence of an explicit assumption of state responsibility, the school was not fulfilling a "constitutional duty."[61] Such an institution could not be obliged to educate a child. However, any school that agreed to do so would be constrained in the ways it could later limit access to education.[62] In the Court's estimation, Pridwin was bound to implement a fair process, to consider the children's best interests, and to invite their parents to make representations before terminating enrollment.[63] The performance of a "constitutional function" was enough to attract heightened obligations but not the same duties incumbent on the state.

In Colombia, this approach is relied on even more aggressively. The *tutela*—a form of accelerated legal proceeding designed to protect fundamental rights—can be deployed against the providers of "public services."[64] This term has been broadly interpreted to capture not just providers of education, health care, and utilities, but also services such as banking.[65] Private companies are thus cast in the image of the state as pillars of the common interest. Seizing on the "public" nature of this work, the Constitutional Court of Colombia has ordered firms to maintain the supply of vital goods to Colombia's poor, even when the "client" is no longer able to pay. It has directed corporations to maintain the supply of a specified minimum amount of water per person,[66] to resume educating students enrolled in school,[67] to continue providing electricity to health care facilities and

60. [2020] ZACC 12 [*Pridwin*].
61. *Ibid* at para 179.
62. *Ibid* at paras 85, 179-80, 200.
63. *Ibid* at paras 152, 198, 207-208.
64. *Decreto 2591 de 1991 por el cual se reglamenta la acción de tutela consagrada en el articulo 86 de la Constitución Politíca* [Decree 2591 of 1991 of the Colombian Congress for the Implementation of Article 86 of the Constitution], arts 42(1)-(3), 42(8).
65. See *e.g.* Corte Constitucional [Constitutional Court], Bogotá, 29 August 2013, *Serrano c el Fondo Nacional de Vivienda*, Decision T-583/13 (Colombia) [*Serrano*]; Corte Constitucional [Constitutional Court], Bogotá, 10 March 1999, *Posada c CoopDesarollo*, Decision SU-157/99 (Colombia).
66. See generally Corte Constitucional [Constitutional Court], Bogotá, 12 December 2011, *Bermúdez Hernéandez c Empresas Públicas de Medellín ESP*, Decision T-928/11 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 3 October 2011, *Ortiz c Junta Administradora del Acueducto JUAN XXIII*, Decision T-740/11 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 14 February 2013, *Ramírez Torres c el Complejo Carcelario*, Decision T-077/13 (Colombia).
67. See Corte Constitucional [Constitutional Court], Bogotá, 8 June 2012, *Orbes Benavides c la Secretaría de Educación Departamental de Nariño*, Decision T-428/12 (Colombia).

prisons,[68] and to complete vital medical treatments.[69] In less pressing cases, the Court has scrutinized decisions to suspend public services or to refuse contracts, claiming that these choices must be based on reasonable and proportionate business grounds.[70] Admittedly, the Court's fleeting reliance on the concept of a "public service" is a shallow attempt at explaining why these moves are justified. In the next section, I consider whether some of these cases might better be thought of as exhibiting a flexible and discretionary approach to the public–private divide.

Relying on state resemblance is attractive for a few reasons. The approach can yield generous rights outcomes, as seen above. It also offers a straightforward account of why duties that would normally fall on the state can nevertheless be imposed on private actors. Other methods might be at risk of reflecting "purely pragmatic [decisions]" or principles that are "external to the rights themselves."[71] It also mounts an important challenge to the influential view that substantially all corporate activity is, in some sense, "private." At the same time, it still preserves a healthy space for autonomy. A limited class of defendants might be held to a higher, state-like standard, while the rest can continue to enjoy the relative liberty afforded by a sharp public–private divide. When this method is applied carefully—and to the exclusion of other approaches—courts can avoid problems "of indeterminacy and overbreadth associated with conventional methods of applying public rights to private relations."[72]

But there are also risks in relying on a supposed resemblance between private and public actors, particularly when this approach is applied to the exclusion of others. First, the method can be difficult to operationalize. To do so would

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68. See Jimena Murillo Chávarro, "Access to Effective Remedies for the Protection of Human Rights in Essential Public Services Provision in Colombia" in Marlies Hesselman, Antenor Hallo de Wolf & Brigit Toebes, eds, *Socio-Economic Human Rights in Essential Public Services Provision* (Routledge, 2017) 256 at 267.
69. See Corte Constitutional [Constitutional Court], Bogotá, 27 July 2010, Tapia Ahumada c Salud Total EPS, Decision T-603/10 (Colombia) [*Tapia Ahumada*].
70. See *e.g.* Corte Constitucional [Constitutional Court], Bogotá, 13 December 1999, *Acosta Hormechea c la Sociedad de Acueducto y Aseo de Barranquilla, "AAA" SA, ESP*, Decision T-1016/99 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 26 October 1994, *Jimenez c la Secretaría de Educación de Cundinamarca*, Decision T-467/94 (Colombia); *Serrano*, *supra* note 65.
71. Thomas, "Whose Duties," *supra* note 48 at 20 [footnotes omitted], citing Onora O'Neill, "The Dark Side of Human Rights" (2005) 81 Intl Affairs 427; Joseph Raz, "Human Rights Without Foundations" in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Oxford University Press, 2010) 321.
72. Thomas, *Private Relations*, *supra* note 48 at 19.

require an ideologically diverse set of judges to be in some agreement over the essential qualities of the citizen–state relationship and in their identification of meaningfully similar relationships in the private sphere. For Thomas, for instance, these relationships require a powerful party to exercise total control over another person's enjoyment of an important good, all within the context of some explicit undertaking.[73] This degree of dependency is present when workers are subjected to inhumane conditions in factories or nursing home patients are living at the mercy of their doctors and nurses.[74] These choices are bound to be controversial. As Cass Sunstein and Stephen A. Smith have persuasively argued, legal doctrines can more easily achieve the necessary degree of assent by reasoning at lower levels of abstraction.[75]

Second, the approach is an awkward fit with positive social rights because firms lack the qualities that make the state the most appropriate site of redistribution. Constitutionalized social rights represent a collective commitment to ending extreme need. Each individual member of the community might be thought of as bearing an "imperfect duty" to create and sustain a distribution where poverty no longer exists.[76] These imperfect duties can then be realized by the state, which has the power to tax individual members for their contributions and to represent the collective. These are the features that make government action a principled site for redistribution, and they have no obvious parallel in the private sector.

Third, relying on state resemblance can reify the public–private divide in ways that limit valuable transformations. Rhetorically, judges who rely on this method are often tempted to insist that the particular relationship before them is meaningfully different from a "normal" exchange. In *Pridwin*, the provision of education was said to be "distinctly different" from "ordinary commercial [transactions]."[77] As a result, the search for state-like defendants can simultaneously buttress the image of traditional economic spaces that are free from social rights and their redistributive tendencies. This trend is regrettable. Even outside of these classes of relationships, private law has an important role in entrenching private power, shaping distributions, and managing access to life-sustaining goods. State

73. *Ibid* at 20-21.
74. *Ibid* at 20.
75. Cass Sunstein, "Incompletely Theorized Agreements" (1995) 108 Harv L Rev 1733; Stephen A Smith, "Intermediate and Comprehensive Justifications for Legal Rules" in Simone Degeling, Michael Crawford & Nicholas Tiverios, *Justifying Private Rights* (Hart, 2020) 63.
76. Aditi Bagchi, "Distributive Injustice and Private Law" (2008) 60 Hastings LJ 105 at 108 (suggesting that social rights are held not against any single person, but rather against every other member of a political community, and derivatively against the state).
77. *Pridwin*, *supra* note 60 at para 183.

resemblance and the supply of publicly important goods and services provide a compelling basis for heightening duties on private actors, but they should not represent the beginning and end of social rights' role in private law.

To take just one example, a private fund that purchases vacant land for investment purposes does not resemble the state in any meaningful way. However, a displaced community's right to shelter should likely be capable of placing at least *some* demands on these kinds of firms. In South Africa, the Constitutional Court has recognized a duty to temporarily accommodate the landless—especially when the land is vacant—while the local municipality works to identify an alternative site.[78] Extrapolative approaches are not capable of challenging private law's traditional emphasis on autonomy and exclusion in this way.

III. FLEXIBLE REMEDIALISM

The third approach exploits the manner in which social rights centre human needs.[79] This "perspective of recipience" entails a certain flexibility to "allocat[e] these obligations on a basis that will ensure the effective realization of these rights."[80] David Bilchitz argues that corporations, nestled somewhere between the individual and the state, might therefore be appropriate duty-bearers.[81] This flexibility can also promote generous rights outcomes, but it can sometimes result in a neglect of theory. Judges can stridently cross the public–private divide without articulating a principle for why a particular defendant ought to be held responsible. More than the other approaches considered here, this method sees courts engage in practical problem solving. Indeed, it is an exercise that resembles discretionary remedialism, or a case-by-case balancing of competing interests. When presented with cases involving extreme need, a judge might redistribute resources from a powerful or deep-pocketed defendant towards a vulnerable applicant, occasionally taking care to avoid unduly onerous burdens.

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78. See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*, [2011] ZACC 33 [*Blue Moonlight*].
79. See David Bilchitz, "A Chasm Between Is and Ought? A Critique of the Normative Foundations of the SRSG's Framework and Guiding Principles" in Durya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect* (Cambridge University Press, 2013) 107 at 125-26.
80. *Ibid* at 126-27.
81. *Ibid* at 129-30. See also David Bilchitz, "Do Corporations Have Positive Rights Obligations?" (2010) 125 Theoria 1; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (Oxford University Press, 2008) at 72-74.

In Colombia, where this approach is prominent, flexible remedialism is the product of the horizontal application of constitutional norms coupled with a rigid private law. As an approach, it is generous but can ultimately be unsatisfying. Because it tends to neglect to elaborate a theory of relationships, it produces results that are (or at least appear) indeterminate and arbitrary. It can also be anti-transformative. These novel social duties are conceived as separate from private law, leaving traditional areas of contract and property intact and undisturbed. Indeed, this approach risks stunting the growth of private law and avoids confronting the ways that private law shapes private power and distributions.

A. COLOMBIA'S NURTURING ENVIRONMENT: *TUTELA* PROTECTION AND CIVIL LAW FORMALISM

There are a few features of the Colombian legal environment that appear to have allowed flexible remedialism to flourish. First, Colombian law allows for the direct horizontal application of constitutional norms.[82] Most importantly, the *Political Constitution of Colombia, 1991* ("Colombian Constitution") recognizes an obligation of solidarity when someone's life or health is threatened.[83] The Constitutional Court of Colombia has said that although the state bears the first-order responsibility of ensuring that basic needs are met,[84] when the state fails, such horizontal obligations can be "exceptionally" imposed on individuals.[85] Judges have not been shy about having insurance companies, health care providers, and financial institutions fulfill some of the basic needs of Colombia's poor. The Court has simply attempted to balance the demands of solidarity against the

82. Direct application of constitutional norms is indeed a regional trend. On one author's count, Argentina, Bolivia, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Honduras, Paraguay, Peru, Puerto Rico, and Uruguay all recognize direct horizontal effect. See Willmai Rivera-Perez, "What the Constitution Got to Do With It: Expanding the Scope of Constitutional Rights Into the Private Sphere" (2012) 3 Creighton Intl & Comparative LJ 189 at 198.

83. See *Political Constitution of Colombia, 1991*, arts 1 and 95(2) [*Colombian Constitution*]. See also Corte Constitucional [Constitutional Court], Bogotá, 5 June 2003, *Cooperativa Multiactiva de Empleados de Distribuidoras de Drogas c Banco de Bogotá*, Decision T-468/03 (Colombia).

84. See *e.g.* Yira López-Castro, "Viviendo bajo un contrato: La constitucionalización del derecho contractual" (2016) 13 Revista Jurídicas 82 at 87-88.

85. Corte Constitutional [Constitutional Court], Bogotá, 26 June 2003, *Huelsz c Juzgado 13 Civil de Circuito de Bogotá*, Decision T-520/03, s 3.3.1 (Colombia) [*Huelsz*]; Corte Constitutional [Constitutional Court], Bogotá, 18 July 2017, *José c el Banco Citibank Colombia SA*, Decision T-463/17, s 2.1 (Colombia) [*José*].

importance of individual autonomy,[86] which has roots in constitutional values such as liberty and equality, freedom of association, and freedom to pursue economic activities and private initiatives.[87]

Second, the *tutela* can be deployed against private defendants. Although the Colombian writ of protection is generally limited to claims against the state,[88] Decree 2591 of 1991 of the Colombian Congress for the Implementation of Article 86 of the Constitution identifies nine instances where *tutelas* may be sought against private parties.[89] Such direct recourse is available when a private entity provides a public service,[90] as described above, but also where the complainant is in a position of subordination or defencelessness,[91] or where certain specific norms have been violated.[92] "Defencelessness" includes instances where there is a severe power imbalance between contracting parties[93] and acts as perhaps the most important jurisdictional basis for Colombia's poor.[94]

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86. See Mariana Bernal-Fandiño, "El principio de solidaridad como límite a la autonomía privada" (2016) 13 Revista Jurídicas 60 at 64-67. Compare López-Castro, *supra* note 84 at 91 (suggesting that although the constitutionalization of contract law, contract solidarity, and the social function of private rights are often discussed together, they remain formally distinct doctrines).
87. See *Colombian Constitution*, *supra* note 83, arts 13 (equality), 16 (liberty), 33 (freedom of association), 333 (freedom to pursue economic activity and private initiatives). See also Corte Constitucional [Constitutional Court], Bogotá, 23 May 2003, *Franco Velez c Granahorrar*, Decision T-423/03 (Colombia); Bernal-Fandiño, *supra* note 86 at 64.
88. *Colombian Constitution*, *supra* note 83, art 86.
89. *Decreto 2591 de 1991 por el cual se reglamenta la acción de tutela consagrada en el articulo 86 de la Constitución Politíca* [Decree 2591 of 1991 of the Colombian Congress for the Implementation of Article 86 of the Constitution], *supra* note 64.
90. *Ibid*, arts 42(1)-(3), 42(8).
91. *Ibid*, art 42(4).
92. *Ibid*, arts 42(5), 42(9).
93. *Huelsz*, *supra* note 85, s 1.2.2; Corte Constitutional [Constitutional Court], Bogotá, 7 July 2006, *Cuervo Cruz c La Previsora SA, compañía de Seguros*, Decision T-517/06 (Colombia), s 2 [Cruz].
94. For its extensive use in litigating consumer insurance disputes, see Corte Constitutional [Constitutional Court], Bogotá, 16 February 1998, Ortiz c Compañía de Seguros Bolívar SA, Decision T-032/98 (Colombia); Corte Constitutional [Constitutional Court], Bogotá, 10 February 2000, Ramirez Bernal c Pan American de Colombia, Compañía de Seguros de Vida, Decision T-118/00 (Colombia); Corte Constitutional [Constitutional Court], Bogotá, 6 November 2001, *X c Aseguradora Solidaria de Colombia*, Decision T-1165/01 (Colombia) [*Aseguradora Solidaria*]; Corte Constitutional [Constitutional Court], Bogotá, 24 February 2003, *Salazar Potes c Compañía Suramericana de Seguros de Vida SA*, Decision T-171/03 (Colombia); Corte Constitutional [Constitutional Court], Bogotá, 26 September 2012, *Portillo Linares c BBVA Seguros De Vida Colombia*, Decision T-751/12 (Colombia); Corte Constitutional [Constitutional Court], Bogotá, 12 February 2016, *Hernandez Herrera c*

Third, Colombian private law has historically been encased in a rigid formalism that is resistant to judge-led change.[95] The *Colombian Civil Code* is a replica of the earlier *Civil Code of the Republic of Chile*, which in turn drew heavily on the French *Napoleonic Code* for its law of obligations.[96] The application of the *Colombian Civil Code* is often mythologized as a technical exercise in deductive reasoning, with little room for judicial "interpretation"—and no room for judicial innovation.[97] Although the constitutional reforms of 1991 have helped to unsettle a tradition favouring rigid formalism and strictly deductive reasoning, this culture remains influential over private law reasoning.[98]

As a result, public law norms and private law rules can appear incommensurable. Constitutional principles such as "solidarity" and the "social state" are abstract and are moulded by judges who demonstrate confidence and self-awareness in

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BBVA Seguros de Vida Colombia SA, Decision T-058/16 (Colombia) [Hernandez Herrera]; *Huelsz*, *supra* note 85.

95. Daniel Bonilla, "Liberalism and Property in Colombia: Property as a Right and Property as a Social Function" (2011) 80 Fordham L Rev 1135 at 1135-36, 1141-49 (describing a civil law and liberal property system as an "ideologically coherent machinery that [historically] prioritized the principle of autonomy over equality and solidarity." On Colombian civil law's traditional reputation for formalism, see Jorge Esquirol, "The Turn to Legal Interpretation in Latin America" (2011) 26 Am U Intl L Rev 1031 at 1036; Alfredo Fuentes-Hernández, "Globalization and Legal Education in Latin America: Issues for Law and Development in the 21st Century" (2002) 21 Penn State Intl L Rev 39; David Landau, "The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America" (2005) 37 Geo Wash Intl L Rev 687 at 689, 709-710.see Jorge Esquirol, \\uc0\\u8220{}The Turn to Legal Interpretation in Latin America\\uc0\\u8221{} [2011] 26:4 Am U Int\\uc0\\u8217{}l L Rev 1031 at 1036; Alfredo Fuentes-Hern\\uc0\\u225{} ndez, \\uc0\\u8220{}Globalization and Legal Education in Latin America: Issues for Law and Development in the 21st Century\\uc0\\u8221{} [2002] 21:1 Penn State Int\\uc0\\ u8217{}l L Rev 39; David Landau, \\uc0\\u8220{}The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America\\uc0\\u8221{} [2005] 37 Geo Wash Int\\uc0\\u8217{}l L Rev 687 at 689, 709\\ uc0\\u8211{}710.","plainCitation":"Daniel Bonilla, "Liberalism and Property in Colombia: Property as a Right and Property as a Social Function" (2011
96. MC Mirow, "Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoléon in Drafting the Chilean Civil Code" (2001) 61 La L Rev 291.
97. See generally Esquirol, *supra* note 95 at 1032.
98. Esquirol also highlights the role of American legal education and international development programs in prompting the region-wide shift away from formalism. See *supra* note 95.

the judicial role.[99] By contrast, private law rules are more specific, are assumed to be comprehensive, and are applied deductively. Partly for this reason, private law is sometimes dismissed for its ineffectiveness in protecting fundamental rights in a society marked by radical deprivation.[100] One of the legacies of Colombian formalism is that it may have left judges without the ideological resources needed to unearth and transform private law's implicit politics.

B. CONTINUED MEDICAL TREATMENTS AND DEBT RESTRUCTURING

Two lines of decisions showcase flexible remedialism at work. In the first, the Court has compelled the funding of medical treatments, even where the patient is unable to pay. In an important early case, a health care insurer was ordered to cover the full cost of a patient's chemotherapy and radiotherapy.[101] Under the terms of their contract, the firm was bound to cover only 79 per cent of the cost of treatment. However, for the patient, the remaining share remained

99. For a review of the implications of the Colombian Constitution on private relationships, see Bernal-Fandiño, *supra* note 86 at 60-61. For a review of the Colombian Constitution's implications for property, see Bonilla, *supra* note 95. See also Esquirol, *supra* note 95 at 1041 (noting a region-wide shift from an "unrelentingly formalist Latin American practice" to "post-legal-realist reconstructive theories of liberal law"); José Luis Benavides, "Contencioso contractual en Colombia: Flexibilidad del control e inestabilidad del contrato" (2006) 18 Revista Derecho del Estado 183 at 183 (discussing the wider shift in the self-conception and role of the judge in contractual disputes).

100. Rivera-Perez, *supra* note 82 at 205-206, citing Corte Constitucional [Constitutional Court], Bogotá, 18 September 1992, *Marin c Alberto Galeano*, *Rector del IDEM José Maria Bravo Márquez de la ciudad de Medellín*, Decision T-524/92 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 30 June 1993, *Pastrana c La Empresa de Productos Quimicos del Huila SA, "Proquimhul"*, Decision T-251/93 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 5 November 1993, *Camelo c la sociedad Servientrega Ltda*, Decision T-507/93 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 31 January 1994, *Acosta De León c Bernal Leal*, Decision T-028/94 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 26 October 1994, *Bonilla c la Asociacion de Usuarios del Acueducto Regional "Velu"*, Decision T-463/94 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 28 August 1995, *Rojas c Francisco Próspero de Vengoechea Fleury*, Decision T-379/95 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 4 March 1997, *Quintero c del Señor Miguel Avila Peña, en su calidad de administrador de la Comunidad del Cerrejón Central*, Decision T-100/97 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 30 July 1997, *Escalante Ramírez c Diocesis De Cúcuta*, T-351/97 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 19 July 2001, *Ariza c Juzgado 1 Penal Municipal de Soacha*, Decision T-767/01 (Colombia); Corte Constitucional [Constitutional Court], Bogotá, 8 March 2004, *Escobar c la Cooperativa Coopserp*, Decision T-222/04 (Colombia).

101. Corte Constitucional [Constitutional Court], Bogotá, 30 May 2003, *Rendón c Colseguros EPS*, Decision T-448/03 (Colombia).

prohibitively expensive. Ms. Rueda de Rendón was seventy-two years old, had lost her ability to speak, had little income, and was living rent-free in an apartment owned by her friend.

In the Court's view, if a patient is confronted by a health emergency, is already affiliated with a private health care provider, and is unable to pay for the full cost of a prescribed treatment, the balance must be paid by the provider. The Court was careful to insist that this private entity would then have a right to seek reimbursement from the state-funded *Fondo de Solidaridad y Garantía del Sistema de Salud* ("*Fosyga*").[102] Since the business could be compensated through the public fund, the decision did not perceive a threat to the entity's commercial viability. On similar grounds, the Court has insisted that private firms that provide (or fund) health care cannot discontinue treatments that have already begun.[103] Treatment must be completed, even if the patient has not paid and the contract could otherwise lawfully be put to an end.[104] Again, *Fosyga* could later reimburse firms for these expenses.[105]

These cases do not attempt to carve out a theory of liability. They instead ground their reasoning in the vulnerabilities of the applicants and the importance of health care. Some decisions make passing reference to the concept of a "public service," but some firms, such as insurers, have been similarly obliged even though they fall outside of that scope. Fortuitously, the prospect of public compensation provides a convenient path for fulfilling these vital needs without compromising significant autonomy interests or commercial viability.

The health care cases also demonstrate how flexible remedialism can lead to artificial line drawing between public and private norms. For instance, the Court has struggled to explain how a private firm could be bound by some positive duty if, under the terms of Colombian civil law, the parties' contract could be put to an end. Instead of challenging an important tenet of contract law, the Court's solution was to distinguish a "formal juridical relationship," which is governed by the norms of civil law, from a "material juridical relationship," which can contain

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102. *Ibid*, s 6.
103. Tapia Ahumada, *supra* note 69, s 2.4.3.1; Corte Constitutional [Constitutional Court], Bogotá, 16 February 2012, *Hurtado Torres c Capresoca Eps S*, Decision T-081/12 at para 16 (Colombia).
104. See *e.g.* Corte Constitutional [Constitutional Court], Bogotá, 5 November 2009, *Jesús Mira Rúa c Uno A Aseo Integrado SA con vinculación de EPS Comfenalco Antioquia*, Decision T-797/09 (Colombia); Corte Constitutional [Constitutional Court], Bogotá, 4 June 2008, *Castro Cuartas c Salud Total EPS, ARS, SA*, Decision T-573/08 (Colombia); Tapia Ahumada, *supra* note 69; *Torres*, *supra* note 103.
105. *Torres*, *supra* note 103 at para 16.

public duties that outlast the contract.[106] Separating the two leaves traditional civil law intact, even though the Court meant to say something important about the law governing private ordering.

Judges have also drawn on the duty of solidarity in reshaping the debt of vulnerable borrowers. In an early decision, the debtor in question had been kidnapped. Shortly after the debtor was released, his lender began enforcement proceedings on the loan that was then in default. Given the debtor's circumstances and mindful of the threat that the proceedings posed for the debtor's financial life, the Court ordered the lender to propose more accommodating terms of payment.[107] The reasoning in that case was later extended to protect debtors who were victims of forced displacement, and later still to debtors with serious illness or disability.[108] This protection is considered even more important in cases of secured debt because enforcement can result in the loss of the debtor's home.[109]

Courts have drawn some limits to this debt restructuring. Judges are keen to insist that the loan principal is not being forgiven or cancelled.[110] They add that property sold in the process of debt execution cannot be recovered—unless the third-party purchaser happens to be another financial institution.[111] However, the results can still be dramatic. Execution proceedings are stayed, accrued interest is forgiven (at least in part), and the existing loan is subject to "novation," replaced with a new contract with more forgiving terms.[112]

C. DISCRETIONARY DUTIES AND A NEW PUBLIC–PRIVATE DIVIDE

Throughout, the Constitutional Court of Colombia's approach remains flexible. It has attempted to strike sensible balances between competing interests without articulating much of a theory of liability. Insurance firms that fund health care can be obliged to pay the full cost of treatments because their expenses can be compensated. Accrued interest on a loan can be forgiven, but the principal debt

106. *Ibid*, citing Corte Constitutional [Constitutional Court], Bogotá, 15 December 1993, Cordoba Romaña c el Hospital San José de Turbo, Antioquia, Decision T-597/93 (Colombia).
107. See *Huelsz*, *supra* note 85.
108. See Corte Constitutional [Constitutional Court], Bogotá, 15 June 2010, *Velasquez Ramirez c Refinancia SA*, Decision T-448/10 (Colombia) [*Ramirez*] (forced displacement); Corte Constitutional [Constitutional Court], Bogotá, 25 February 2005, *Sandra c Banco Conavi*, Decision T-170/05 [*Sandra*] (illness); *José*, *supra* note 85 (illness); *Hernandez Herrera*, *supra* note 94 (disability).
109. See *e.g. Sandra*, *supra* note 108; *Ramirez*, *supra* note 108.
110. See *Ramirez*, *supra* note 108, ss 10, 13.
111. *Ibid*, ss 10, 17.
112. See *e.g. José*, *supra* note 85, s 2.3, part III; *Ramirez*, *supra* note 108, s 13.

cannot be. Sold property cannot be recovered, unless the purchaser is another financial institution. Some of these decisions have been sensibly criticized for producing law that is arbitrary and indeterminate.[113] Occasionally gesturing towards concepts such as "solidarity," "public service," or "public interest" does not suffice as a theory of liability since these concepts themselves often remain broad and unexplored.

In its flexibility, this approach resembles discretionary public law remedies. In both cases, a constitutional right must first be in jeopardy and the state's legislative and regulatory framework must be judged inadequate.[114] These novel obligations are then introduced as exceptional, remedial interventions borne out of extreme need. Consistent with other discretionary remedies, the Court has made little effort to elaborate a doctrinal edifice or to undertake a deeper transformation of the underlying private law. These new duties simply represent case-by-case responses to deprivation. Indeed, these constitutional duties may only be imposed when private law has been judged inadequate to protect the rights of vulnerable persons.[115] As with other discretionary remedies, these norms can appear highly malleable and jettison "adherence to principle" in decrees that resemble "administrative or executive action."[116]

This flexibility has its advantages. The debt restructuring cases demonstrate that such flexibility can produce generous outcomes for Colombia's poor. Furthermore, this approach's sensitivity to context means that judges can avoid formulating rigid rules that can be over- or underinclusive, a well-known problem for redistributive norms.[117] There may also be limits to how much judges can theorize redistributions within a system of bilateral justice. The initial deprivation will typically be the product of systemic factors. Relying on private litigation to

113. See Fabricio Mantilla Espinosa, "El solidarismo contractual en Francia y la constitucionalización de los contratos en Colombia" (2011) 16 Revista Chilena Derecho Privado 187 at 208, 216, 226.
114. See *Huelsz*, *supra* note 85, s 3.3.1; *José*, *supra* note 85, s 2.1. See also López-Castro, *supra* note 84 at 87-88.
115. Corte Constitutional [Constitutional Court], Bogotá, 13 February 2017, *Barrera Joven c Correservicios y Logística SAS*, Decision T-583/17 at para 10.
116. On these qualities of more conventional public law remedies, see Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press, 2012) at 11; William Fletcher, "The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy" (1982) 91 Yale LJ 635 at 644.
117. See *e.g.* Kaplow & Shavell, "Less Efficient," *supra* note 28 at 674-75; Bagchi, *supra* note 76 at 116 (writing that "it is not at all clear which general rules of contract law consistently disadvantage the socially disadvantaged").

respond to extreme need is destined to be at least somewhat arbitrary.[118] The best a court might do is to insist that the political branches have the first-order responsibility for creating an environment capable of fulfilling every person's basic needs and to reserve the court's discretion to impose a non-ideal solution in the event that the state fails.

Ultimately, though, flexible remedialism is unsatisfying. The gulf between public and private norms leaves both bodies of law impoverished. The positive social duties sourced in the Colombian Constitution are left without private law's focus on elaborating theories of relationships. The outcome is a jurisprudence that can seem arbitrary and indeterminate, provoking resistance to social rights among local actors.[119]

Moreover, these constitutional duties are imposed overtop private law, instead of helping to transform it. That process of foundational change is neglected when the two bodies of norms are considered and elaborated in separate spheres. In recent Colombian decisions, for instance, judges continue to describe the civil law as a "crystallization of the principle of the autonomy of the will," even though positive social duties now mark many different private relationships.[120] Tellingly, the Court has described solidarity as "fulfilling the function of systematically correcting some of the harmful effects that social and economic structures have on long-term political coexistence."[121] The statement is revealing in the way that it fails to acknowledge how those "social and economic structures" are themselves shaped by Colombian private law and how its continued application risks reproducing injustice. Reflecting a common framing, this statement instead values and naturalizes the "free" market, so long as the state curbs its excesses.[122]

On the substantive front, private law doctrines that could be developed to be more responsive to poverty are stunted, as judges and litigants rely instead on the constitutional duty of solidarity. This public–private division also produces contrived legal fictions, such as the ostensible distinction between a "formal juridical relationship" and a "material juridical relationship," discussed in Part III(B), above. Overall, the approach resembles the modes of thought associated with what Duncan Kennedy has called "the Social," represented by an effort to carve specific relationships out of the traditional private law (*e.g.*, labour, tenancy,

118. Bagchi, *supra* note 26 at 194-95.
119. See *e.g.* Mantilla Espinosa, *supra* note 113.
120. *José*, *supra* note 85, s 2.2.
121. *Huelsz*, *supra* note 85.
122. See *e.g.* Rob Hunter, "Critical Legal Studies and Marx's Critique: A Reappraisal" (2021) 31 Yale JL & Human 389 at 409.

or consumer protection) while leaving its classical core intact.[123] The integrative approach, considered in the next section, presents a more direct challenge to some of the old law's central assumptions.

IV. SOCIAL RIGHTS INTEGRATION

The two previous approaches—relying on state resemblance and flexible remedialism—risk neglecting private law. Relying on state resemblance can lead to a limited class of duty-bearers, leaving other private actors free to roam "normal" economic spaces. For its part, flexible remedialism imposes a range of constitutional obligations overtop private law, conceiving of the two spheres in separate terms. By contrast, this final approach, normative integration, attempts to reshape the foundations of private law in light of constitutional rights and their aspirations.

In this section, I will explore how normative integration's reach extends beyond the realization of vital needs; this channel of influence can also have a transformative impact on private law's discourse and modes of reasoning. Conservative legal cultures steeped in a myth of neutrality and formalism begin to favour openly political and historically situated arguments that acknowledge legal indeterminacy. Judges increasingly acknowledge the law's consequences on power and distribution. They rely less frequently on appeals to tradition and favour instead calls to orderly transformation and substantive equality. Instead of a sharp public–private divide, jurists prefer a public–private alignment, where the redistributive work accomplished by the state dovetails with the solidarity promoted in private relationships. Abandoning the myth of legal determinacy and objective meaning also means that judges must find new ways of legitimizing their decisions.

Substantively, the outcomes can still be modest. The proliferation of constitutional norms and human rights means that traditional liberty interests receive a constitutional gloss, acting as a bulwark against radical change. Courts also continue to prefer incremental change to sweeping reform. The integrative approach's most important contribution is therefore discursive. It succeeds in bringing private power and distribution to the surface in a way that has been championed by critical legal theorists and the recent wave of law and political economy scholarship.

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123. "Three Globalizations," *supra* note 12 at 43. See also Marija Bartl, "Socio-Economic Imaginaries and European Private Law" [Bartl, "Socio-Economic Imaginaries"] in Kjaer, ed, *supra* note 13, 228 at 237.

Some developments in Colombia reflect normative integration. An early example includes the constitutional effort to reframe property rights and the corporate form as being animated by a "social function" that extends beyond the interests of owners.[124] In a similar vein, reframing corporate activity as being part of a "public service" or in the "public interest" can encourage or facilitate business regulation and social control.[125] More recently, the Constitutional Court of Colombia has brought the duty of solidarity into conversation with concepts such as freedom of contract, good faith, and reasonable reliance.[126]

Profound change is evident in a series of contract refusal cases. In the name of "solidarity," the Court has scrutinized insurers' reasons for refusing to issue policies, insisting that decisions must be motivated by reasons that are "objective," "reasonable," and "proportionate" relative to the risks involved.[127] In one case, an applicant was denied access to social housing because he could not secure a life insurance policy. His would-be insurer declined to contract on the grounds that he was an asymptomatic carrier of HIV.[128] The Court was incredulous: Insurers undertake "commercial activity that will always be risky," and refusing to contract in these circumstances "is discriminatory and does not reflect the purposes that animate the social state of law and the respect for human dignity."[129] When a bank later refused to open an account for a person on probation, the Court insisted that banks must also adopt reasonable and proportionate policies that respond to real risks to the business.[130] The way that these judgments challenge autonomy and situate private activity within the aspirations of the Colombian Constitution suggests a more meaningful influence than in the cases considered above.

Integration is the dominant approach in South Africa, which will be this section's focus. There, *The Constitution of the Republic of South Africa*'s ("South

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124. On the historical development of the social function in the law of property, see Bonilla, *supra* note 95. Regarding companies, see *Colombian Constitution*, *supra* note 83, art 333; Corte Constitucional [Constitutional Court], Bogotá, 14 August 1997, *Rojas c Terpel Sur SA*, Decision T-375/97 (Colombia), s 5.
125. *Ramirez*, *supra* note 108, s 10-11, 17. On the relationship between social control and the public interest or public service framing, see Novak, *supra* note 52; William Novak, "Institutional Economics and the Progressive Movement for the Social Control of American Business" (2019) 93 Bus History Rev 665.
126. See *e.g.* Corte Constitucional [Constitutional Court], Bogotá, 23 June 1993, *JEVJ c la Asociacion de Diarios Colombianos*, Decision T-240/93 (Colombia), s 3; *Tapia Ahumada*, *supra* note 69, s 2.4.3.1.
127. *Cruz*, *supra* note 93, s 3.
128. *Aseguradora Solidaria*, *supra* note 94.
129. *Ibid* at part IV.
130. See *Serrano*, *supra* note 65, s 3.

African Constitution") transformative socio-economic aspirations have been invoked to reframe the contract doctrine of public policy, to impose duties of sharing on landowners, and to limit commercial lenders' ability to seize property in execution of debt. The Constitutional Court of South Africa's reasons reveal a significant discursive shift. Libertarianism and formalism have given way to a private law that centres history, power, distribution, and a shared concern for one another. Social rights appear to have inspired that transformation. The next subsection considers South Africa's apartheid-era private law culture and the South African Constitution's ambitious mandate; the one after traces the Court's reasoning in a selection of leading cases; and the last subsection takes stock of how social rights have reshaped private law's discourse.

A. SOUTH AFRICAN PRIVATE LAW'S TRANSFORMATIVE MANDATE

Historically, much of South African private law was encased in a form of civil law absolutism. Its modes of reasoning were structured around a "scientific method" of "strict deductive and syllogistic logic," favoured for its ostensible neutrality, universality, and certainty.[131] This "technicist" framing naturalized the law's preference for individualism and freedom from constraint.[132] A rigid version of contractual liberty was thus treated as an "axiomatic truth rather than a controversial [premise] in an ongoing argument."[133] Meanwhile, the right of ownership was cast in absolute terms, winning "any straight contest of power against any other right."[134]

Towards the end of apartheid, South African jurists clashed over the legacy and fate of this classical private law. There were some who argued that Roman-Dutch law could be excised of apartheid's influences and returned to its ideal state—neutral and universal.[135] The view that prevailed preferred to link private law's development to the wider "transformative project of renovating

131. AJ Van der Walt, "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" (1995) 11 SAJHR 169 at 171-79 [Van der Walt, "Tradition on Trial"].
132. Deeksha Bhana, "The Role of Judicial Method in Contract Law Revisited" (2015) 132 SALJ 122 at 123, 126-27 [Bhana, "Role of Judicial Method"]; Van der Walt, "Tradition on Trial," *supra* note 131 at 178-80, 193-94. On the naturalism that has spanned market thinking and private law, see Bartl, "Socio-Economic Imaginaries," *supra* note 123 at 234-35.
133. Alfred Cockrell, "Substance and Form in the South African Law of Contract" (1992) 109 SALJ 40 at 46.
134. Van der Walt, "Tradition on Trial," *supra* note 131 at 179.
135. See *e.g.* JM Potgieter, "The Role of the Law in a Period of Political Transition: The Need for Objectivity" (1991) 54 THRHR 800.

[the country's] legal infrastructure."[136] The supporters of this view were alert to the risk that, if left untransformed, the country's private law would entrench an unjust distributional status quo, and that change was thus needed for the "countless quotidien background rules that structure social and economic life."[137] The transition to democracy had to be matched by a shift in wealth distribution, reversing the disparities in land ownership inherited from apartheid.[138] Property thus occupied a symbolically central position in the nation's future. As Gregory Alexander has written, "[w]hether and how South Africa will be able to fully transform itself…is substantially a matter of property."[139]

The South African Constitution's final text thus provides that rights may bind private individuals where it is appropriate, given "the nature of the right and the nature of any duty imposed by the right."[140] More importantly, in practice, the South African Constitution recognizes that courts "must" develop the common law—including its Roman-Dutch rules of contract, delict, and property—to "promote the spirit, purport and objects of the Bill of Rights."[141] This indirect influence has been generally preferred.[142] The civil law's malleability creates some room for gradual, rights-oriented development. As an uncodified body of law, South African civil law has been compared to the common law in its capacity "to sustain development in new directions, to branch out when necessary, to absorb concepts from elsewhere, and to adapt to the needs of society."[143] The project of renovating private law has also not been left entirely to the courts. Several post-apartheid statutes were introduced with the specific objective of improving access to secure tenure and housing. This body of legislation includes the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*,[144] the

136. Davis & Klare, *supra* note 3 at 410-11.
137. *Ibid*.
138. See AJ Van der Walt, *Property in the Margins* (Hart Publishing, 2009) at 2 [Van der Walt, *Property*].
139. Gregory Alexander, *The Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press, 2006) at 12.
140. *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, s 8(2) [*South African Constitution*]. Although this directive is a source of controversy, in some cases the Bill of Rights is explicit; under section 9(4), for instance, the prohibition on unfair discrimination binds every person.
141. *Ibid*, ss 39(2), 173.
142. Saunders, *supra* note 14 at 214-15.
143. Michael Corbett, "Trust Law in the 90s: Challenges and Change" (1993) 56 THRHR 262 at 264.
144. No 19 of 1998 [*PIE*].

Extension of Security of Tenure Act,[145] the *Rental Housing Act*,[146] and the *Alienation of Land Amendment Act*.[147]

South African courts have been criticized for their perceived reluctance to take up this mandate for transformation.[148] Blame is often placed on the lingering influences of South Africa's conservative legal culture. Dennis Davis and Karl Klare have argued that the old private law's formalism and neutrality are still valued and indeed preferred by local jurists to the "high profile constitutional decisions," with their "political overtones that strain the legitimacy of judicial power."[149]

It is true that substantive developments in South African private law have remained modest, although Davis and Klare may have mistaken the cause. Judicial reticence reflects the fact that traditional values such as autonomy and stability of contract have been recast as pillars of the rule of law, human dignity, and economic development.[150] Elements of a liberal economic policy have thus been given a constitutional gloss, buttressing traditional contract and property rules precisely at the moment when formalism is no longer up to the task of

145. No 62 of 1997.
146. No 50 of 1999.
147. No 103 of 1998.
148. See Davis & Klare, *supra* note 3; Dennis Davis, "Developing the Common Law of Contract in the Light of Poverty and Illiteracy: The Challenge of the Constitution" (2011) 22 Stellenbosch L Rev 845; Sandra Liebenberg, "Socio-Economic Rights Beyond the Public-Private Law Divide" in Malcolm Langford, ed, *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press, 2013) 63; Emile Zitzke, "A Case of Anti-Constitutional Common-Law Development" (2015) 48 De Jure 467; Emile Zitzke, "Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development" (2015) 7 Constitutional Court Rev 259; Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta, 2010) at 361-65; Deeksha Bhana, "The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract" (2015) 26 Stellenbosch L Rev 3 at 3, 9-10 [Bhana, "Basic Approach"]; Bhana, "Role of Judicial Method," *supra* note 132 at 123-27, 133-34; Stuart Woolman, "The Amazing, Vanishing Bill of Rights" (2007) 124 SALJ 762; Philip Sutherland, "Ensuring Contractual Fairness in Consumer Contracts After Barkhuizen v Napier 2007 5 SA 323 (CC) – Part 1" (2008) 19 Stellenbosch L Rev 390; Marius Pieterse & Deeksha Bhana, "Towards Reconciliation of Contract Law and Constitutional Values" (2005) 122 SALJ 865.
149. Davis & Klare, *supra* note 3 at 452-53. See also Bhana, "Role of Judicial Method," *supra* note 132 at 123, 126-27.
150. See *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*, [2020] ZACC 13 at paras 80-88 [*Beadica*].

justifying legal outcomes.[151] The Court also remains cautious. Fears of judicial overreach combine naturally with private law's incrementalism and with the South African Constitution's commitment to realize social rights progressively.[152]

Despite these modest outcomes, private law's discourse and modes of reasoning have undergone a substantial transformation. Recent cases bristle with references to the country's history and to the political and distributive dimensions of private law.[153] In an early judgment, Justice Madala stressed that apartheid-era oppression included domination between individuals and that the South African Constitution "must have been intended to address these oppressive and undemocratic practices at all levels…restructur[ing] the dynamics in a previously racist society."[154] Recent reasons draw on the work of American critical legal scholars, such as Kennedy. The Court now regularly accepts that the country's English common law and Roman-Dutch civil law sources will often fail to do justice for modern South Africa. Judges must therefore create new rules that advance the country's transformative aspirations.[155] These shifts are apparent in the cases considered in the following subsection.

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151. On the importance of contract enforcement and the protection of private property for international development institutions and development rhetoric more generally, see Bartl, "Socio-Economic Imaginaries," *supra* note 123 at 228-29. See also Priya Gupta, "Judicial Constructions: Modernity, Economic Liberalization, and the Urban Poor in India" (2014) 42 Fordham Urb LJ 25 at 31-35.
152. *Carmichele v Minister of Safety and Security*, [2001] ZACC 22 at paras 36, 55 [*Carmichele*] (cautioning against "overzealous judicial reform," noting that "the major engine for law reform should be the legislature and not the judiciary," and suggesting that "common law [must] be developed…within its own paradigm"); *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another*, [2015] ZACC 34 at paras 39, 44 [*Mighty Solutions*] (writing that "[t]he principle of separation of powers should thus be respected" and that "fundamental changes to the fabric of the common law and customary law are often more appropriately made by way of legislation").
153. See *e.g. Everfresh Market Virginia v Shoprite Checkers*, [2011] ZACC 30 at para 71 (Deputy Chief Justice Moseneke recognizing that it is "necessary to infuse the law of contract with constitutional values, including values of ubuntu").
154. *Du Plessis v De Klerk*, [1996] ZACC 10 at para 163, Madala J.
155. See *Mighty Solutions*, *supra* note 152. The decision reads:

> The South African common law of contract is as old as the ancient city of Rome...[I]t has proven its value over time, but does not always meet the requirements of a constitutional democracy. Therefore it has to be developed in accordance with the spirit, purport and objects of the Bill of Rights (*ibid* at paras 1, 36).

See also Dennis Davis, "Where Is the Map to Guide Common-Law Development" (2014) 25 Stellenbosch L Rev 3 at 5.

B. CONSTITUTIONAL RIGHTS IN CONTRACT AND PROPERTY LAW

One of the first sites of constitutional law's influence over private law has been contract law's doctrine of public policy. The two leading cases—*Barkhuizen v Napier* ("*Barkhuizen*") and *Beadica 231 CC v Trustees for the time being of the Oregon Trust* ("*Beadica*")—reveal important shifts in language and reasoning, even if their outcomes do not.[156] *Barkhuizen* concerned a time limitation clause in an insurance policy. The policy holder filed a claim for damage done to his motorcycle and the claim had been rejected. Because the insured party failed to serve a summons within ninety days, he was deemed by contract to have released the insurer from liability. The time limitation clause had been buried in a dense, unsigned, standard form document and had only been incorporated into the contract by reference. The question posed to the Court was whether this clause was enforceable, even though it appeared to impinge on the constitutional right of access to courts.[157]

The majority upheld the contractual stipulation on grounds that recall a stubbornly neutral private law. Faced with a clause that was—by all appearances—designed to exploit consumers' ignorance, the majority insisted that there was no evidence that the contract "was not freely concluded," that "there was unequal bargaining power," or that "the applicant was not aware of the clause."[158] Likewise, the applicant failed to furnish evidence justifying his non-compliance.[159] The majority went further and reframed a firm commitment to *pacta sunt servanda* in constitutional language. In its words, the "very essence of freedom and a vital part of dignity" lies in being able to regulate one's own affairs, "even to one's own detriment."[160]

In spite of ample academic criticism,[161] *Barkhuizen*'s conservatism has represented the norm for cases challenging contracts on the basis of public policy.[162] Recently, in *Beadica*, the Court declined to reconsider its approach.[163]

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156. See *Barkhuizen v Napier*, [2007] ZACC 5 [*Barkhuizen*]; *Beadica*, *supra* note 150.
157. See *South African Constitution*, *supra* note 140, s 34 (providing that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum").
158. *Barkhuizen*, *supra* note 156 at para 66.
159. *Ibid* at para 84.
160. *Ibid* at para 57.
161. See *supra* note 148.
162. See also *Afrox Healthcare Beperk v Strydom*, [2002] ZASCA 73; *Bredenkamp and Others v Standard Bank of SA Ltd*, [2010] ZASCA 75.
163. *Beadica*, *supra* note 150.

Beadica concerned the renewal of a commercial lease and franchise agreement for a business supported by South Africa's Black economic empowerment initiative. The franchisees had failed to exercise their option to renew the lease by its deadline, and this in turn jeopardized their overall franchise relationship. The franchisees argued that a strict enforcement of the renewal clause would be contrary to public policy. The majority disagreed. A merely "subjective view" that contractual terms are "unfair, unreasonable or unduly harsh" would be insufficient.[164] The lease terms appeared in "simple, uncomplicated language," and the franchisees had not explained why they could not comply with the notice requirement.[165] The franchisees were thus left to the same fate as the applicant in *Barkhuizen*.

The majority reasons innovated in the way they contextualize freedom of contract within the country's constitutional aspirations. Justice Theron accepted that the South African Constitution's "transformative mandate" will have implications on, as Justice Moseneke put it, the "search for substantive justice" in private law.[166] However, the Constitution was interpreted as favouring the strict enforcement of contracts. Clarity and predictability are pillars of the rule of law, a "foundational constitutional value,"[167] while *pacta sunt servanda* reflects the "central constitutional values of freedom and dignity."[168] The majority then turned to South Africa's economic development. The "fulfillment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country," and this growth hinges on "the willingness of parties to enter into contractual relationships."[169] Protecting the "sanctity of contracts" is thus "essential" to achieving South Africa's "constitutional vision."[170] The majority belaboured the point in threatening terms: "[O]ur constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*."[171] Later in the judgment, Justice Theron added that affording preferential treatment to the franchisees might impede equality in the long term by increasing the risks borne by those who contract "with historically disadvantaged persons who benefit from the [National Empowerment] Fund."[172]

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164. *Ibid* at para 80.
165. *Ibid* at paras 94-95.
166. *Ibid* at para 74.
167. *Ibid* at para 81.
168. *Ibid* at para 83, citing *Barkhuizen*, *supra* note 156.
169. *Ibid* at paras 84-85.
170. *Ibid* at para 85.
171. *Ibid*.
172. *Ibid* at 101.

For their part, the dissenting judgments favoured a more pronounced role for reasonableness, good faith, and *ubuntu*.[173] Justice Froneman's reasons stress the franchisees' lack of sophistication, the closeness of the business relationship between franchisor and franchisee, and the one-sidedness of the notice requirement.[174] Drawing on the work of Kennedy, Justice Froneman stressed the distributive and "anti-freedom" consequences of an absolutist approach to freedom of contract in a deeply unequal society.[175]

Both majority and dissenting reasons jettison formalism and any claim to an apolitical private law. In their place stand two approaches rooted in conflicting visions of how the country's constitutional aspirations can best be achieved. Justice Theron repositioned *pacta sunt servanda* as essential for the country's economic success, demonstrating how modern development discourse can influence jurisprudence.[176] Although *Beadica* marks little change in the substantive law, the judgment's modes of reasoning reveal an important transformation. There is an open discussion about context and consequence. The Court's doctrinal choices are understood to be contingent. Justice Theron makes little effort to hide behind tradition or the presumed universality of private law's principles. Instead, her reasoning reflects the shift from private law's classical individualism towards viewing law as a tool for building well-functioning markets.[177]

The decisions concerning land and housing are bolder. As before, these disputes have been reframed in constitutional terms. South African courts now speak of striking a balance between the constitutional right to property and the right to housing. This process has also been facilitated by recent legislative interventions. Furthermore, unlike the contract cases, these decisions are influenced by memories of apartheid and of the land dispossession that was central to it. Property emerges as a symbolically important site for the country's transformative aspirations, lending the Court's judgments a rare confidence and insistence.

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173. *Ibid* at paras 155-58, 175, 212. *Ubuntu* refers to a moral philosophy and worldview stressing the importance of shared concern, solidarity, and self-realization through participation in community.
174. *Ibid* at paras 196-202.
175. *Ibid* at paras 122, 143, citing Kennedy, "Distributive and Paternalist Motives," *supra* note 43.
176. For more on the influence of development discourse on apex court judges in the Global South, see *e.g.* Gupta, *supra* note 151.
177. See Kennedy, "Three Globalizations," *supra* note 12 at 64. See also Marija Bartl, "Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political" (2015) 21 Eur LJ 572.

The Court seized on this constitutional vision of property in *Port Elizabeth Municipality v Various Occupiers* ("*Port Elizabeth*"), an early case.[178] The Court was tasked with deciding whether a municipality's proposed eviction of some sixty-eight people from privately owned land was "just and equitable" under the terms of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (*PIE*).[179] According to Justice Sachs, *PIE* (and the social rights that inspired it) infuse "elements of grace and compassion into the formal structures of the law"[180] and reposition "[p]eople once regarded as anonymous squatters" as individuals "entitled to dignified and individualised treatment."[181] Together, these social rights are rooted in a "constitutional vision of a caring society based on good neighbourliness and shared concern" and imbue property rights "with a communitarian philosophy."[182] Justice Sachs rooted this vision of property in an appropriate response to South Africa's history. Apartheid-era law had given a legal "imprimatur to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations."[183] For the country's Black population, "dispossession was nine-tenths of the law."[184] Roman-Dutch civil norms then legitimized, in a facially neutral way, the consequences of this institutionalized racism.[185]

Constitutional rights call for a different approach. Justice Sachs recognized that judges cannot undo systemic wrongs, but they can "soften…injustice" through a "reasonable application of judicial and administrative statecraft."[186] *Port Elizabeth* thus introduced a requirement for municipalities to engage respectfully with occupiers—possibly through the assistance of a mediator—before seeking expulsion.[187] Eviction in that case was refused: The landless occupiers had lived on the lot for a lengthy period, the lot had no other use, and the municipality had engaged in no sincere effort to engage with the community and propose a viable alternative.[188]

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178. [2004] ZACC 7 [*Port Elizabeth*].
179. *PIE*, *supra* note 144.
180. *Port Elizabeth*, *supra* note 178 at para 37.
181. *Ibid* at para 13.
182. *Ibid* at para 37.
183. *Ibid* at para 9.
184. *Ibid*.
185. *Ibid* at para 10.
186. *Ibid* at paras 29, 38.
187. *Ibid* at para 61.
188. *Ibid* at para 59.

Judges have been comfortable with this kind of language—and extending these kinds of protections—even in the absence of legislation. The Court applied *Port Elizabeth*'s model of judicial oversight and respectful engagement to sales in execution. In *Jaftha v Schoeman and Others*, the Court confirmed that a person's home could be sold in execution of a debt—even a modest one—but imposed a requirement of judicial oversight and proof of good faith engagement between creditor and debtor.[189] Similar requirements were later extended to proceedings to enforce a mortgage bond in *Gundwana v Steko Development CC and Others*.[190] The majority resisted the conclusion that mortgage debtors have accepted the risk of losing their secured property.[191] Although execution of mortgage bonds is "part and parcel of normal economic life," courts and creditors should first consider whether there are reasonable alternative measures of satisfying the debt that avoid the "drastic consequences" of depriving individuals experiencing poverty of their homes.[192]

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*, the Court gestured towards a positive duty on landowners to temporarily accommodate landless occupiers while municipalities work to identify an alternative site.[193] Eviction proceedings had been brought to relocate some eighty-six unlawful occupiers from dilapidated commercial premises in the city of Johannesburg. The occupiers had taken shelter on the property for a meaningful period of time, and Blue Moonlight had been aware of their presence when the property was bought. These families would be rendered homeless following eviction, and the property was only intended for commercial purposes.[194] The Court accepted that an owner "cannot be expected to provide free housing for the homeless…for an indefinite period," although they might owe patience and "accept that the right to occupation may be temporarily

189. *Jaftha v Schoeman and Others*, *Van Rooyen v Stoltz and Others*, [2004] ZACC 25.
190. [2011] ZACC 14.
191. *Ibid* at paras 42-49.
192. *Ibid* at paras 53-54.
193. *Blue Moonlight*, *supra* note 78.
194. *Ibid* at paras 39-40. In another case, the owner was an individual who had invested a portion of his pension in the occupied property, and the Court was accordingly more favourable to his position. See *Occupiers of Erven 87 and 88 Berea v De Wet NO and Another*, [2017] ZACC 18.

restricted."[195] The eviction order was delayed, which provided the impleaded municipality time to accommodate the community on an alternative site.[196]

The Court has elaborated on this novel view of property in cases concerning the *Extension of Security of Tenure Act* (*ESTA*), which protects the tenure of tenant-farmers. *ESTA* has been interpreted as a response to property law's tendency to "entrench unfair patterns of social domination and marginalisation of vulnerable occupiers."[197] As a result, ownership rights must now be balanced against the "genuine despair of our people who are in dire need of accommodation."[198] In *Baron and Others v Claytile (Pty) Limited and Another*, for instance, the Court concluded that in the absence of a breakdown of the employment relationship, landowners have a duty to assist evicted tenants to find alternative land—or, exceptionally, to provide suitable housing themselves.[199] In *Daniels v Scribante and Another* ("*Daniels*"), the Court concluded that *ESTA* occupiers do not need the landowner or manager's consent before proceeding with renovations, where those renovations are required to live in a dignified dwelling.[200]

Daniels showcases the extent to which property discourse has shifted. Ms. Daniels, a domestic worker and single parent, resided in a home with a leaky roof, no ceiling, and a lack of running water and wash basin. The parties to the dispute all agreed that the dwelling was unfit for habitation. Ms. Daniels had been willing to pay the costs of renovating her home but could not legally proceed without the consent of the property manager, which was refused. She applied to the courts for permission but was only successful before the Constitutional Court.

Justice Madlanga began his reasons by reciting the words of an "old man… at a community meeting" in Eastern Transvaal: "[O]ur purpose is the land… [W]hen the whites took our land away from us, we lost the dignity of our lives."[201] Justice Madlanga then recounted how widespread dispossession of land "was central to colonialism and apartheid," and that laws were introduced to favour white farmers, creating for them a "pool of cheap labour" dependent "on employment for survival."[202] Black South Africans were subjected to "untold

195. *Blue Moonlight*, *supra* note 78 at para 40.
196. *Ibid* at para 100. For similar judgments, see *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others*, [2011] ZACC 36; *Occupiers of Portion R25 of the Farm Mooiplaats 335 JR v Golden Thread Ltd and Others*, [2011] ZACC 35.
197. *Molusi and Others v Voges NO and Others*, [2016] ZACC 6 at para 39 [*Molusi*].
198. *Ibid*.
199. [2017] ZACC 24 at para 37.
200. [2017] ZACC 13 at paras 27-36, 61-62 [*Daniels*].
201. *Ibid* at para 1.
202. *Ibid* at paras 14-16.

cruelty and suffering."[203] This history contextualizes both the constitutional right to housing and *ESTA*'s specific protections.

Justice Froneman, one of the Court's few white judges, wrote stirring concurring reasons. Writing from a deep "sense of shame," he called for an "honest and deep recognition of past injustice," "acceptance…of the consequences of constitutional change" and, more fundamentally, a "re-appraisal of our conception of the nature of ownership and property."[204] His reasons go on to reframe the dispute in personal terms: "For many of us who grew up on farms… the difference between our privileged lifestyle and those of the people who lived and worked on the farm was merely natural. *We* and *they* were *different.*"[205] That injustice is "nowadays not easily denied, but rather avoided."[206] The central task for South African jurists is thus to question "the very foundations upon which the current distribution of property rests,"[207] since "regulatory restrictions… cannot do all the transformative work that is required."[208]

For Justice Froneman, absolutist approaches to ownership must be discarded. They reflect an outdated European response to the "struggle between the modern civil law and feudal law, as well as the socio-political struggle against feudal oppression."[209] Concerns that a redistributive property law might be inefficient had to likewise be rejected. In his estimation, the conditions for efficient outcomes are absent from South Africa, which is marked by a variety of market and government failures.[210] Moreover, poverty and inequality prevent "citizens from not only enjoying the benefits of that efficiency, but from protecting their basic rights."[211]

C. DISCURSIVE TRANSFORMATIONS

Although modest in result, the decisions in the above section reveal the role that social rights have played in transforming private law's values and modes of argument. Most obviously, contract and property law have become politicized. Their rules are often situated within the country's constitutional aspirations. It is now common for judges to accept, as Justice Theron did in *Beadica*,

203. *Ibid* at para 18.
204. *Ibid* at paras 109, 115.
205. *Ibid* at para 116 [emphasis in original].
206. *Ibid* at para 117.
207. *Ibid* at para 148, citing Van der Walt, *Property*, *supra* note 138 at 16.
208. *Daniels*, *supra* note 200 at para 136, citing Van der Walt, *Property*, *supra* note 138 at 16.
209. *Daniels*, *supra* note 200 at para 134.
210. *Ibid* at paras 141-42.
211. *Ibid* at para 142.

that the South African Constitution's "transformative mandate" will have implications on the "search for substantive justice" in private law.[212] Judges are openly sensitive to the ways that law can constitute private power and cement inequality. The "old law" of property is remembered for entrenching "unfair patterns of social domination and marginalisation of vulnerable" groups.[213] The majority in *Pridwin* likewise seized on contracts for schooling as a site where parties could "perpetuate inequality" and were therefore important spaces for the "transformation of private relations."[214] In *Sarrahwitz v Maritz NO and Another* ("*Sarrahwitz*"), Chief Justice Mogoeng spoke to how difficult it is for homeless persons to maintain their sense of self-worth, as they have to subject themselves to the "mercy of any landlord, relative or friend."[215] Writing extrajudicially, judges have been equally blunt. Justice Madlanga recently suggested that "if we refuse to impose human rights obligations on private individuals for fear of interfering with their autonomy, we risk maintaining a perverse status quo which entrenches a social and economic system that privileges the haves, mainly white people."[216]

The judges of the Constitutional Court do not attempt to hide judicial power behind formalism's myth of legal determinacy. Instead, the Court now regularly asks what the "underlying reasons" behind the traditional rules are, whether these underlying reasons offend the "spirit, purport and object of the Bill of Rights," how the civil law could be developed, and what the "wider consequences of the proposed change" might be.[217] Judges invoke the authority of tradition with less frequency. The old law's legacy is instead appreciated in mixed terms. Roman-Dutch civil law is said to have "proved its value over time," but it also "evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination, sexism" and, of course, apartheid.[218] The formalist tradition represents an important part of this legacy, and post-apartheid legislation has been framed as a deliberate response, infusing the law with "elements of grace and compassion."[219]

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212. *Beadica*, *supra* note 150 at para 74.
213. *Molusi*, *supra* note 197 at para 39.
214. *Supra* note 60 at paras 129, 131.
215. [2015] ZACC 14 at para 42 [*Sarrahwitz*].
216. Mbuyiseli Madlanga, "The Human Rights Duties of Companies and Other Private Actors in South Africa" (2018) 29 Stellenbosch L Rev 359 at 364, 368. See also Dikgang Moseneke, "Transformative Constitutionalism: Its Implications for the Law of Contract" (2009) 20 Stellenbosch L Rev 3 at 12 (writing that "private power cannot be immune from constitutional scrutiny...particularly so...when private power approximates public power").
217. *Mighty Solutions*, *supra* note 152 at para 38.
218. *Ibid* at paras 1, 36.
219. *Port Elizabeth*, *supra* note 178 at para 37.

This constitutionalized private law does not supply precise answers. Instead, social rights and their transformative aspirations provide a new language within which many different arguments can be developed.[220] They offer a "useful and challenging hook upon which to hang a critical post-apartheid debate about reform, development, stability and change."[221] This is most obviously true regarding the place of efficiency analysis. In *Beadica*, Justice Theron defended the sanctity of contract on the grounds that it would, over time, increase the aggregate wealth, freeing vulnerable South Africans from poverty.[222] This argument reflects a longstanding trend of framing economic efficiency as a neutral value, since wealth maximization presumably leaves everyone better off.[223] Justice Froneman preferred a more critical position. In *Beadica*, he cited the work of Kennedy and stressed the exploitative consequences of freedom of contract.[224] Justice Froneman went even further still in *Daniels*, reasoning that efficiency concerns should be excluded from the analysis. In his view, market failures and steep inequality would conspire to deny poorer South Africans the benefits of that greater aggregate wealth.[225]

These arguments share the common reflex of recasting private law in light of constitutional aspirations. Contract and property law are embedded in a "constitutional vision of a caring society based on good neighbourliness and shared concern."[226] Even cases that deny assistance, as *Beadica* and *Barkhuizen* did, at least attempt to justify their outcomes from the vantage point of the vulnerable. Private law is positioned as an important space for transformation, one that complements public efforts to lift up the country's vulnerable. Its approach attempts to align different sources of law[227] and often acknowledges that regulation "cannot do all the transformative work that is required."[228]

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220. This is the quality that Duncan Kennedy attributes to modes of legal thought. See Kennedy, "Three Globalizations," *supra* note 12 at 67.
221. Van der Walt, *Property*, *supra* note 138 at 9.
222. *Supra* note 150 at paras 82-84.
223. See *e.g.* Britton-Purdy et al, *supra* note 13 at 1800, 1813-15.
224. *Supra* note 150 at paras 122, 143, citing Kennedy, "Distributive and Paternalist Motives," *supra* note 43.
225. *Supra* note 200 at paras 140-42.
226. *Port Elizabeth*, *supra* note 166 at para 37.
227. See AJ Van der Walt, "Property Law in the Constitutional Democracy" (2017) 28 Stellenbosch L Rev 8 at 23.
228. *Daniels*, *supra* note 200 at para 136, citing Van der Walt, *Property*, *supra* note 138 at 16.

In embracing arguments that are openly political, the Court has also avoided the "hermeneutic of suspicion."[229] This style of reasoning sees lawyers work to "uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology."[230] Recent decisions in South Africa are beyond the innocence of an apolitical private law. Their disagreements are instead framed through political values and contingent policies.

In contrast to the flexible remedialism considered the previous section, the Court has done more than layer a set of communitarian norms overtop the foundations of a classical private law. Instead, the effort is integrative and sees judges work to unearth and critique the politics of the old law. Justice Froneman's concurrence in *Daniels* thus argued that an absolutist approach to ownership represented a specific European response to the struggles against feudal oppression and that the transformation of South Africa requires jurists to question the foundations of "the current distribution."[231] This kind of reasoning marks a departure from the modes of legal thought that have characterized "the Social," where efforts to carve out specific redistributive areas of private law left a classical core intact.[232]

Substantive outcomes, however, trend towards minimal to modest redistributions. The Court appears to be suggesting that although every person can be made responsible for contributing to South Africa's transformative project, no individual can be made fully responsible for lifting another up to the place that they would occupy under a just distribution. Described in these terms, this approach resembles Hanoch Dagan and Avihay Dorfman's calls for a private law animated by a mutual respect for one another's "self-determination and substantive equality."[233] In Dagan and Dorfman's view, these kinds of just relationships include limited duties of "affirmative interpersonal accommodation," including in cases of poverty.[234] However, this positive duty must remain sensitive to context, and

229. Duncan Kennedy, "A Political Economy of Contemporary Legality" in Kjaer, ed, *supra* note 13, 89 at 89.
230. *Ibid*.
231. *Daniels*, *supra* note 200 at paras 134-36, citing Van der Walt, *Property*, *supra* note 138 at 16.
232. See Bartl, "Socio-Economic Imaginaries," *supra* note 123 at 237; Kennedy, "Three Globalizations," *supra* note 12 at 43.
233. Hanoch Dagan & Avihay Dorfman, "Just Relationships" (2016) 116 Colum L Rev 1395 at 1397. For similar or compatible theories of sharing, particularly in property law, see Gregory Alexander, "The Social-Obligation Norm in American Property Law" (2009) 94 Cornell L Rev 745; Dyal-Chand, *supra* note 43.
234. Dagan & Dorfman, *supra* note 233 at 1416-20, 1451-55.

can never be excessive.[235] Otherwise, it would unduly undermine the autonomy of the wealthier party and create "interpersonal subordination."[236] Importantly, these obligations are capable of reaching every member of the community, and are rooted in a theory of relationships—one that does not hinge on the extent to which the defendant resembles the state.

D. THE RISK OF RADICAL CHANGE AND A CRISIS OF LEGITIMACY

The integrative approach also entails important risks. First, by calling for a systemic audit of private law rules, it holds out the possibility of uprooting much of the settled law. Second, by shedding the myth of a neutral, determinate, and apolitical law, it also courts a legitimacy crisis for the judiciary. In South Africa, the first risk has been mitigated by constitutional design, and the second by the Court's artful reliance on historical narrative in its reasoning.

On the first point, there are several constraints that limit the extent to which private law could be rapidly overhauled. Indeed, the dominant academic view in South Africa is that its jurisprudence has not gone far enough, fast enough.[237] For one, the proliferation of human rights has allowed competing interests to receive a constitutional gloss. The right of access to housing gets balanced against the right to property, for instance. Various rights can even conflict in ways that replicate well-known debates native to contract or property law. Judges may also disagree on the best path for realizing social rights, as *Beadica*'s debate over the sanctity of contract demonstrates. Human rights may provide a new language and novel points of emphasis, but they do not offer a clear and consistent ideological agenda in private law.

Institutional self-restraint and private law's traditional incrementalism also play a role in limiting change. Judges are sensibly hesitant to overturn long-settled precedents, displace legislative norms, or to introduce far-reaching and unpredictable changes. The "inherently preservative nature" of the general law, which is developed only incrementally, is balanced against the South African Constitution's "mandate for the transformation of society."[238] The Court's

235. *Ibid* at 1423-24.
236. *Ibid* at 1423-24, 1455.
237. See *e.g.* Davis & Klare, *supra* note 3; Bhana, "Basic Approach," *supra* note 148 at 9.
238. Davis, *supra* note 155 at 5 (describing the "tension between the inherently preservative nature of the common law, with the central premise being that this body of law is changed in incremental steps...and the mandate for the transformation of society and hence the legal underpinnings thereof"); Saunders, *supra* note 14 at 191; Christopher Roederer, "The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy" (2006) 37 Colum HRLR 447 at 465.

reasons frequently refer to the need to avoid "overzealous judicial reform" and insist that sweeping changes must be made by legislation.[239] Judges speak of their role in modest terms; they engage in the "reasonable application of judicial… state craft,"[240] balancing "resourcefulness and restraint."[241] Judicial discipline also reflects the South African Constitution's aspirations to balance transformation with order and stability, the conflicting cores of transformative constitutionalism.[242] In South Africa, striking the right balance between upholding vested interests and promoting restitution and redistribution was a central challenge for its peaceful transformation from apartheid.[243] That test has evidently resurfaced in post-apartheid litigation.

The last constraint is procedural. Only certain kinds of questions can be litigated, and cases tend to target one narrow area of law at a time. In an early decision, Justice Froneman recognized that it would "probably take generations to correct the imbalance" inherited from apartheid, since development of the law by the courts "is by its very nature dependent on litigation" and therefore slow.[244] It can also take time for legal actors to become comfortable with new modes of reasoning. It took the Court over two decades to get to decisions as rhetorically ambitious as *Daniels*.

The Court thus addresses these capacity concerns with a familiar blend of modesty and incrementalism. By contrast, it has responded to the legitimacy concern by turning to history and narrative. This narrative locates property as a privileged site, where the country can transition from a bleak past of land dispossession towards one marked by a caring and substantively equal community. In *Port Elizabeth*, Justice Sachs contextualized this constitutional vision of property as a response to apartheid's history of land dispossession.[245] In *Sarrahwitz*, Chief Justice Mogoeng recalled how countless South Africans have suffered the "painful and demeaning experience…[of] not having a place they could truly call home."[246] The country's "painful history abounds with incidents of atrocious forced removals and heartless evictions," and "no vulnerable person who has tasted what it means to have a place they can truly call home should be

239. *Carmichele*, *supra* note 152 at paras 36, 55; *Mighty Solutions*, *supra* note 152 at paras 39, 44.
240. *Port Elizabeth*, *supra* note 178 at paras 29, 38.
241. *Beadica*, *supra* note 150 at para 76.
242. See Klare, *supra* note 9 at 153.
243. See Van der Walt, *Property*, *supra* note 138 at 6.
244. *Gardener v Whitaker*, [1994] 5 BCLR (E) 19 at 31 (S Afr HC, E Cape Div).
245. *Port Elizabeth*, *supra* note 178 at para 9.
246. *Sarrahwitz*, *supra* note 215 at para 1.

deprived of it without justification."[247] Justice Madlanga returned to this past marked by dispossession, cruelty, and domination in *Daniels*.[248]

This turn to history has a substantive dimension. The Court is acknowledging law's politics and contextualizing its rules in a society marked by historic inequality. Judgments like *Port Elizabeth* recognize how facially neutral norms can reproduce inherited injustice. Some of these reasons also suggest—as scholars have elsewhere—that the value of autonomy and a classical private law depend on a relatively just background distribution.[249]

However, these appeals to history may have an even more important *legitimizing* function: They serve to connect developments in property law (which may well be controversial) to the country's collective commitment to peaceful transformation (which should not be). As Paul Kahn has argued, judgments are most compelling when they draw on these kinds of "broad narrative accounts" that give order to a country's "social and political life," and that connect the law to a people's perspective on themselves, their community, and their history. Rooting decisions in this kind of collective self-perception also encourages citizens to see themselves in the judgment, lending the Court valuable charismatic authority and a claim to democratic legitimacy.[250] The law is also attractively presented "in the image of energy,"[251] with an ethic of community ousting a rigid autonomy that helped perpetuate injustice. As Pierre De Vos identified early on in the Court's public law jurisprudence, South African judges are drawn to arguments centred around such a "grand narrative" in order to compensate for the absence of objective constitutional meaning, and an increasingly blurred boundary between law and politics.[252]

Constitutional design and artful reasoning may have shielded South Africa from some of normative integration's risks. However, it remains an open question whether other jurisdictions—with different historical, political, and legal contexts—would fare similarly.

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247. *Ibid* at para 42.
248. *Supra* note 200 at paras 14-18.
249. See Dagan, *Liberal Theory*, *supra* note 39 at 23, 244.
250. *Making the Case: The Art of the Judicial Opinion* (Yale University Press, 2016) at 58, 76.
251. For more on the aesthetics of judgments and the various ways law can be cast, see Pierre Schlag, "The Aesthetics of American Law" (2002) 115 Harv L Rev 1047 at 1051-52.
252. "A Bridge Too Far? History as Context in the Interpretation of the South African Constitution" (2001) 17 SAJHR 1 at 3-8.

V. CONCLUSION

This article has considered how social rights can influence private law. I have argued that the shape of this influence can vary considerably, depending on how courts approach the public–private divide. Denialism favours a rigid distribution of labour, leaving social rights out of private relations. The search for state-like defendants delineates a group of individuals and entities who are capable of bearing public duties, while potentially reifying "normal" economic spaces that are free from social rights' redistributive tendencies. Flexible remedialism favours practicality at the expense of legal doctrine and avoids confronting the elements of private law that can entrench poverty and inequality. Most ambitiously, the integrative approach is devoted to the slow and difficult work of unearthing the private law's politics and reshaping its modes of reasoning. Although particular jurisdictions tend to favour some methods over others, these choices will not just be a function of constitutional norms or ideology. Legal culture and the incentives created by local procedure can be just as determinative.

This article has generally favoured the integrative approach. It holds out the potential of centring private law's role in entrenching poverty and inequality, and of fostering relationships animated by a spirit of shared concern. Contrary to what has been argued by critics such as Gargarella and Moyn, integrative approaches demonstrate that social rights can play an important role in the transformation of economic relations. These approaches also best reflect the reality that social rights represent a genuinely communal commitment to ending extreme need.