

CONTENTS

Detailed table of contents page vii Acknowledgments xiii Table of cases xvi Table of legislation xxiv
Introduction: aims and methods 1
Part I The case for constitutional social rights 15
The case for social rights 17
The value of courts in light of the alternatives 59
A basic interpretive approach 97
Part II A theory of judicial restraint 119
Institutional approaches to judicial restraint 121
Democratic legitimacy 152
Polycentricity 189
Expertise 211
Flexibility 250
Part III Incrementalism 287
Incrementalism as a general theme 289
Appendix 1: The scope of economic and social rights under international law 326 Bibliography 328 Index 356





DETAILED TABLE OF CONTENTS

1	Intr	oduction: aims and methods 1
	I	Introduction 1
	II	Why does it matter? 2
	III	Arguments against constitutional social rights 3
		A The bad arguments 4
		B The good arguments 5
		C The best argument – the risky enterprise 7
	IV	The case for incrementalism in a nutshell 8
	V	Background political conditions – when the argument
		applies 10
		A The background political conditions 10
		B When the conditions do not apply 12
	VI	Conclusion 13
	Par	t I The case for constitutional
		al rights 15
		v
2		case for social rights 17
		Introduction 17
		Different senses of 'social rights' 18
	III	Social rights, human rights, and the welfare state 20
		A Social rights as human rights: form and justification 20
		B The basic content of social human rights 28
		1 The social minimum 29 2 The basic duties in respect of the social minimum 35
	IV	C State responsibility and the welfare state 39 Multi-institutional protection of social rights 41
	1 V	
		A Legislative 41 B Executive/administrative 44
		C Adjudicative 48
	3.7	D Constitutional 51
	V	Conclusion 57
		vii



viii		DETAILED TABLE OF CONTENTS
3	The v	value of courts in light of the alternatives 59 Introduction 59
	II	The prima facie benefits of legal accountability 60
	III	The courts and social change 63
		A Significant social change 63
		B Impact and administrative justice 70
		C A pathology of legalism? 76
		D A hollow hope for the poor? 79
	IV	Alternatives to courts: partner or substitute? 85
		A Specialised adjudication – tribunals 86
		B Ombudsmen 90
		C Alternative dispute resolution (ADR) 93
	V	Conclusion: the role of law in an incrementalist
		approach 95
4	A ba	sic interpretive approach 97
	I	Introduction 97
	II	Constitutional social rights: a basic interpretive
		approach 97
		A The structure of rights: scope of interest and nature of obligation 98
		B Constitutional text: absolute and qualified
		obligations 100
		C Judicial interpretation: the inescapability of
		vagueness 105
	III	The need for an approach to judicial
		restraint 108
		A Social rights in the shadow of <i>Lochner</i> and Dicey 108
		B The allure and limits of existing interpretive approaches 111
		1 Interpretivism 111
		2 Principles, balancing, and proportionality 112
		3 Deliberative democracy 113
		4 The minimum-core approach 114 5 Institutional reform approach 116
		6 South African reasonableness 116
	IV	
	Part	II A theory of judicial restraint 119
5		tutional approaches to judicial restraint 121 Introduction 121
	I II	
	11	Formalist approaches 122



6

7

	DETAILED TABLE OF CONTENTS	ix		
	A The distinction between law and politics 123			
	B The principle/policy distinction 125			
	C Justiciability 129			
III	•			
	A The rising tide of institutionalism 133			
	B General features of institutional approaches 136			
	C Two paths diverge: restrictive vs. contextual			
	institutionalism 141			
	D Measuring the success of institutional approaches 142			
IV	Developing the contextual institutional			
	approach 143			
	A The nature of legal reasoning under a 'principled			
	approach' 143			
	B Pragmatics: how should judges apply an institutional			
* 7	approach? 148			
V	Conclusion 150			
Den	nocratic legitimacy 152			
I				
II	The dignity of legislation 153			
	A The argument from political equality 154			
	B Limits 156			
	1 The gap between preferences and outcomes 156			
	2 Equality or outcome-based departures from formal			
***	voting equality 159			
III	Two pressing problems with the finality of			
	legislation 163			
	A Absence of legislative focus 164			
137	B Marginalisation 165			
IV	Giving weight to democratic legitimacy 169			
	A Executive action: not pre-empting legislative focus 169 B Primary legislation: ensuring legislative focus 171			
	7 . 8			
	C Primary legislation: weak democratic restraint 173 1 Absolute obligations 173			
	2 Procedural rights 174			
	3 Clear or core cases 175			
	4 Marginalised groups 176			
	D Primary legislation: strong democratic restraint 185			
V	Conclusion 187			
Poly	centricity 189			
I.	Introduction 189			
II	The idea and importance of polycentricity 190			



X

		DETAILED TABLE OF CONTENTS
	III	The pervasiveness of polycentricity 192
		Refinement of Fuller's idea 193
		A A property of issues, not areas 193
		B When a legal issue is polycentric 194
	V	Giving weight to polycentricity: attenuating factors 198
		A Judicial mandate 198
		B Degree 202
		C Access to information: case management and interventions 203
		D Relative competency 208
		E Flexibility: remedies and revisitation 209
	VI	Conclusion 209
_	_	
8		ertise 211
	I	Introduction 211
	II	Law and expertise in historical context 212
		A Lesson from America 212
	TTT	B Expertise in British law and administration 215
	III	Types of expertise 220
		A Front-line expertise 221 B Managerial expertise 223
		C Professional expertise 225 D Specialised adjudicative expertise 228
	IV	
	1 4	A Expertise–accountability trade-offs 229
		1 Expert intuition and accountability 230
		2 Expertise and democratic accountability 231
		3 Expertise-accountability trade-offs and
		cost-benefit 233
		B Expertise types and variation of scrutiny 233
		C Failures of expertise 235 1 Refusal to apply expertise 235
		1 Refusal to apply expertise 235 2 Distinctive facts 238
		3 Contradiction of established scientific or social science
		evidence 240
	V	Conclusion 248
9	Flex	cibility 250
-	I	Introduction 250
	II	Forms of inflexibility 251
		A Legal forms 251
		1 Agenda control 251



10

		DETAILED TABLE OF CONTENTS	xi
		2 Delay 253	
		3 Cost 257	
	В	Bureaucratic and political forms 258	
		1 Conscious forms: fettering, ideology,	
		and stereotype 259	
		2 Bounded rationality, path-dependence, and heuristics 259	
III	Gi	iving weight to flexibility 264	
	A	The perils of procedural rights 264	
		1 Interest representation in administrative	
		policy-making 264	
		2 Trial-like rights in administrative decision-making	268
	ъ	3 Structural injunctions and supervisory jurisdiction	271
	В	Mandating flexibility 275 1 Procedural rights 275	
		2 Non-fettering and mandatory consideration 277	
	С	Remedies: respecting flexibility 281	
		1 Constitutional avoidance 281	
		2 Vague legal standards 282	
13.7	C.	3 Flexible remedies and the virtue of silence 283	
1 V	C	onclusion 285	
Par	t II	I Incrementalism 287	
Incr	em	entalism as a general theme 289	
		troduction 289	
II	In	crementalism and public administration 290	
III		pplying judicial incrementalism 293	
	A	The techniques of incrementalism 294	
		1 Particularisation 294	
		2 Cautious expansion, analogical reasoning 296 3 Vague legal standards 296	
		3 Vague legal standards 296 4 Procedural rights 298	
		5 Constitutional avoidance 299	
		6 Non-intrusive remedies 300	
	_	7 Revisitation 301	
IV	ln	crementalism and its cousins 303	
	A	Sunstein's judicial minimalism 303	
	В	Democratic experimentalism 306	
V		riticisms of incrementalism 311	
	A	Inert incrementalism 311	
	В	Insidious incrementalism 313	
	C	Impossible incrementalism 314	



xii

DETAILED TABLE OF CONTENTS

VI Incrementalist answers to familiar social rights problems 315

A Enforcement of positive obligations 316

B Evaluation of resource scarcity 316

VII Incrementalism and the principles of restraint 320

VIII Conclusion 322

Appendix 1: The scope of economic and social rights under international law 326

Bibliography 328

Index 356