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Introduction

> It is clear, as we have stated above, that the socio-economic rights entrenched in [the new Constitution] are not universally accepted fundamental rights. For that reason, therefore, it cannot be said that their "justiciability" is required by CP II. Nevertheless, we are of the view that these rights are, at least to some extent, justiciable.[1]

South Africa's 1996 Constitution – the "final" constitution that was a key component of the negotiated settlement ending apartheid – includes an extensive range of socioeconomic or social rights. These rights to basic necessities, such as housing, health care, food, water, social security, and education, represent an important – perhaps the most important – aspect of the broad political, social, and economic transformation promised under the new constitutional order.

The South African Constitutional Court's first opportunity to address the social rights provisions came in the form of a challenge to the provisions' constitutionality. The two-stage process for drafting and adopting the final constitution included a unique procedure. It empowered the newly established Constitutional Court to decide whether each provision complied with a set of thirty-four constitutional principles the negotiations established.[2]

With the cautious assessment quoted in the epigraph, the Court rejected arguments that the novel social rights provisions violated the separation of powers and the justiciability requirements in the constitutional principles. It was not exactly a ringing endorsement of the social rights' transformative potential. The Court's tentative language reflected a set of

[1] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*, 1996 (10) BCLR 1253 (CC) ("First Certification judgement"), [78].
[2] Ibid., [12–19]. The 34 principles are included in Annexure 2 of the judgment.

concerns raised during the constitutional drafting process over the wisdom and practical consequences of giving courts the power to reject and even dictate social-welfare policies in the new democracy.[3] Those concerns in turn reflected the terms of a long-running theoretical debate in the human rights and comparative constitutional law fields over whether social rights could properly be called rights at all and, even if they could, whether courts could ever legitimately enforce them.[4]

That debate over the justiciability of social rights centers on two related concerns: first, how to legitimate thrusting courts into the middle of complex and often contentious fiscal and policy debates that are the primary province of the legislature and the executive, and second, whether courts as institutions have the competence to craft remedies addressing those complex concerns and to issue orders that legislatures and executives either can or will follow.[5] These concerns arguably apply with greater force in transitional democracies like South Africa, where giving courts broad powers with potentially far-reaching fiscal consequences risks undermining the fragile commitment to constitutional democracy that those same courts are intended to protect and nourish.[6]

It is easy to trace the push and pull of these objections throughout the Constitutional Court's social rights decisions beginning with the infamous *Soobramoney* case, in which the Court rejected a claim for access to dialysis treatments because the allocation policy was rational and adopted in good faith. As Justice Sachs described the dilemma the Court faced in denying a dying man necessary care, "important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious."[7] Social rights advocates were deeply disappointed by that decision, in particular,

[3] Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013), 265–73.

[4] *See* Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008), 1–3; Dennis M. Davis, "Socio-economic Rights: Has the Promise of Eradicating the Divide between First and Second Generation Rights Been Fulfilled?," in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (2011), 519–21.

[5] E.g., Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010), 10–11; Jeff King, *Judging Social Rights* (2012), 3–4, Chapter 5.II.C.

[6] E.g., Cass R. Sunstein, "Against Positive Rights," in Andras Sajo (ed.), *Western Rights? Post-Communist Application* (1996) Ch. 12; Wojciech Sadurski, "Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights," 65 *L. and Contemp. Prob.* 223, 227–32 (2002); David Beatty, *The Ultimate Rule of Law* (2004) 125–26.

[7] *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (1997) ("*Soobramoney*") [58].

by the Court's adoption of an apparently deferential standard of review for social policies.[8] The Court's reputation took a further hit in the general public when Mr. Soobramoney died, literally on camera, in a media interview about his reaction to the decision.[9]

Three years later, in one of its most celebrated decisions, *Grootboom*, the Court did an apparent about-face when it held that the government's housing policies violated the access to housing right because those policies completely failed to address emergency needs of people like those in the displaced community where Irene Grootboom, who faced homelessness following eviction, lived.[10] Although the Court interpreted the housing right to impose a specific positive obligation on the state, it softened the effect of that pathbreaking interpretation in its remedy by refusing to specify even in general terms what policy changes the constitution required to meet this obligation.[11]

This was followed less than one year later by the equally famous *Treatment Action Campaign* (*TAC*) decision, in which the Court went even further and ordered the national government to expand a pilot program that provided antiretroviral drugs to prevent mother-to-child transmission of HIV. In terms miles distant from the First Certification judgment's modest acknowledgment that these rights are "at least, to some extent, justiciable," the Court unequivocally stated, "The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are."[12] The Court dispelled any doubts about the scope of its authority, holding that "courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation."[13]

These three decisions form the core of the Court's well-deserved international reputation as a leading example of a national court that has developed new and potentially effective approaches to enforcing social rights without either diminishing the status of the constitution in general or unduly usurping the roles of the legislative and executive (or, perhaps

[8] *See* Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution," 141 *U. Penn. L. Rev.* 91 (1992).

[9] Richard J. Goldstone, "A South African Perspective on Social and Economic Rights," 13 *Hum. Rts. Br.* 4, 5 (2006).

[10] *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) ("*Grootboom*").

[11] Ibid., [88–90].

[12] *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (2002) ("*TAC*") [25].

[13] Ibid., [113].

most significantly, bankrupting the state).[14] These decisions have been amply documented and analyzed by commentators both inside and outside of South Africa.

But a string of more recent decisions, beginning in 2008 with the housing-rights case *Olivia Road*, have garnered comparatively less attention, especially outside of South Africa.[15] Stuart Wilson and Jackie Dugard – activists and scholars who were key players in each litigation – recently identified these as the "second wave" of the Court's social rights jurisprudence.[16] The Court's formal doctrinal approach is nominally the same in both the first and second waves; however, the second-wave decisions display a distinctly different – and, in the view of most commentators, far less effective – approach to both interpretation and enforcement of the social rights provisions.[17]

The Court's water-rights decision, *Mazibuko*, is the most prominent – and most criticized – example of the strong procedural emphasis and self-consciously secondary role that the Court has adopted in the second-wave decisions.[18] *Mazibuko* recast the social rights as providing a primarily procedural set of protections that enforce a strongly participatory form of democracy rather than as a set of substantive guarantees.[19]

Analyses of *Mazibuko* and the second-wave decisions generally almost without exception conclude that the Court has retreated from even the modestly substantive version of the reasonableness standard of review it started to develop in its earlier, first-wave decisions.[20] There is a general

[14] *See* Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013) 38–45.

[15] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC) (2008) ("*Olivia Road*").

[16] Stuart Wilson and Jackie Dugard, "Constitutional Jurisprudence: The First and Second Waves," in Malcolm Langford, Ben Cousins, Jackie Dugard, and Tshepo Madlingozi (eds.), *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 35.

[17] Ibid., 37.

[18] *Mazibuko and Others v City of Johannesburg and Others* 2010 BCLR 239 (CC) (2009).

[19] Ibid., [71], [160].

[20] *See* Wilson and Dugard, *supra* note 16, 54–59; Liebenberg, *supra* note 5, 468–80; Kirsty McLean, "Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on *Joe Slovo*," 3 Const. Ct. Rev. 223, 24–42; Danie Brand, "Judicial Deference and Democracy," in Sandra Liebenberg and Geo Quinot (eds.), *Law and Poverty: Perspectives from South Africa and Beyond* (2012); Marius Pieterse, "Procedural Relief, Constitutional Citizenship and Socio-Economic Rights as Legitimate Expectations," 28 *S. Afr. J. Hum. Rts.* 359, 362 (2012). One notable exception is Susan Rose-Ackerman, Stefanie Egidy, and James Fowkes, *Due Process of Lawmaking: The United States, South Africa, Germany and the European Union* (2015) 148–50.

consensus among the Court's critics that it should revise its interpretive framework by, at a minimum, infusing reasonableness review with "substantive analysis of the normative purposes and values" social rights represent.[21]

A. Arguments and methods

That background sets up the central questions this book attempts to address. At the broadest level, this book contributes to the debate over judicial enforcement of social rights. I follow the lead of most recent work in this area and start with the assumption that social rights are appropriately included in modern constitutions and justiciable by courts.[22] I closely examine the major arguments in the justiciability debate, but I do not seek to develop a full-fledged defense of constitutionalizing social rights. Instead, I am interested in understanding how the justiciability concerns construct and constrain the roles courts adopt when they address social rights claims and whether and how those roles directly and indirectly contribute to fulfilling social rights.

1. Arguments

I take the South African Constitutional Court as my subject because it is widely recognized as a leading example of a domestic court that has developed creative enforcement techniques that successfully navigate the justiciability objections. Focused as I am on a single court within a specific country, my objective is not to provide a comprehensive theory of the judicial role applicable to social rights enforcement generally. Instead, I offer a fairly thick and nearly comprehensive description of the Court's social rights decisions. I use that thick description to identify two promising models derived from the interpretive and remedial techniques the Court has developed that could be adapted to apply in other contexts. I describe and analyze how those models respond to the justiciability objections and also the jurisprudential and functional characteristics that fit the conditions sociolegal studies identify as necessary for court decisions to influence social and political change.

The consensus within South Africa over the disappointing limits of the Court's social rights jurisprudence is at odds with the Court's

[21] Liebenberg, *supra* note 5, 467; *see*, *also*, Pieterse, ibid., 362; Wilson and Dugard, *supra* note 16, 60.

[22] *See* King, *supra* note 5, 1.

international reputation for developing an innovative set of enforcement techniques that do not unduly strain either judicial legitimacy or competence. The disconnect between those views is due, in large part, to the relative lack of attention the Court's more recent social rights decisions have received outside of South Africa. This book's first contribution is to remedy that gap in the literature by providing one of the most comprehensive accounts of the Constitutional Court's decisions, including the second-wave decisions identified by Wilson and Dugard and a more recent string of consistently pro-poor eviction-related cases.

But that disconnect also reflects the persistent influence of the justiciability concerns in the theoretical debate over the appropriate role of courts in enforcing social rights. The international acclaim the Court received for its early decisions focused in part on the simple fact that the Court was willing to enforce social rights but also on the relative modesty the Court displayed by carefully structuring both its legal analysis and remedies to leave ample room for the legislature and executive to respond. This careful balance was often associated with weak-form or dialogic forms of review.

Domestic critics targeted that same modesty but argued, far from initiating a potentially productive dialogue over the substance of social rights, the Court was diminishing their transformative promise and its own authority to enforce that promise. The Court is widely perceived as having adopted an even more deferential approach in its second-wave decisions by continuing to avoid strong substantive interpretations of social rights and limiting itself to a set of procedural rights and remedies.

I use the detailed account of the Court's decisions and the debate over its interpretive framework and remedial choices to make three related arguments. First, the Court's critics are correct that it has developed a largely procedural enforcement approach and moved even further from the more substantive interpretations it adopted in the later first-wave cases. Second, despite that deepening proceduralization, the Court's international reputation as a leader in developing innovative and effective interpretive and remedial techniques is well deserved, but for different reasons than those most commentators identified following the Court's first-wave decisions.

Rather than a weak-form review model, in which the Court engages in a substantive dialogue with the political branches that democratize judicial enforcement, the second-wave decisions reveal that the Court has developed a largely procedural set of rights and remedies and has consistently sought to avoid developing the substance of social rights

directly, preferring instead to rely on legislation and policy. Despite the significant substantive limitations to its approach, the Court has deployed these procedural techniques often in surprisingly authoritative ways that have contributed to the development of rights-protective policies.

Third, I use the examples of the Court's authoritative application of these procedural rights and remedies to describe two related enforcement models. The first of these, the "eviction model," comes from the Court's remarkably consistent record in finding procedural routes to delay or prevent evictions. In these decisions, the Court intervenes to stop temporarily an eviction or related action by the state and manages the situation to prompt the parties to reach a rights-protective outcome themselves, sometimes in ways that prompt broader policy and budget changes.

The second, "democratic engagement," expands the meaningful engagement requirement the Court has created to establish mechanisms that could give local communities and social rights activists more consistent access to policy-planning and budgeting processes. I argue that these models each could be expanded in ways that capitalize on the Court's more authoritative role and that have the potential to create even greater leverage for social rights activists, civil society, and local communities to press for policies that fulfill social rights.

2. *Methods*

This book draws on and connects with three closely related bodies of literature. First and foremost, it is part of the growing comparative constitutional law literature on judicial review of social rights, including discussions of alternative forms of judicial review and judicial–political dialogue over constitutional rights. Constitutional structures, interpretive approaches, and remedies that "weaken" judicial review or create opportunities for judicial-political dialogue feature prominently in the social rights literature because they offer theoretical solutions to the democratic-legitimacy and institutional-competence objections that are at the heart of the justiciability debate. The divergent assessments of the South African Constitutional Court's first-wave decisions center around whether the Court's interpretive framework and remedial choices represent creative applications of weak-form or dialogic review or an overly deferential abdication of the judicial role in a constitutional democracy.

Close analysis of both the first- and second-wave decisions shows that justiciability concerns play a consistently prominent role in the Court's decisions and result in a jurisprudence structured to avoid the

development of strong abstract principles that could potentially commit the Court to taking the lead role in articulating, even at a fairly abstract level, the social policies required to fulfill the social rights. Indeed, in the second-wave decisions, the Court frequently relies on procedural techniques to avoid even the weaker judicial–political dialogue over the substance of the social rights that many argued it was initiating in its early decisions. At the same time, however, the Court in the second-wave decisions has relied on a strongly participatory conception of democracy to enforce the social rights in authoritative ways that both avoid outright deference to the political branches and have resulted in identifiable changes to social policy.

Second, this book takes up Ran Hirschl's challenge to comparativists to abandon the safe confines of doctrinal analysis and consider the political and social forces that constrain and shape judicial enforcement of constitutional rights, including social rights.[23] At the broadest level, I try to connect the legal–theoretical debate over social rights with the sociolegal literature on rights, litigation, and social change. The social rights field has long engaged in the realpolitik analysis Hirschl advocates, and several studies approach many of the South African Constitutional Court's decisions from social science and political science perspectives.

I don't attempt to replicate those analyses here. Instead, I draw on them first to complicate and enhance the detailed account of the Court's jurisprudence by considering how the political and social factors these studies identify help explain both the Court's own analysis and the outcomes in social rights cases. Second, I connect studies of social rights and the Constitutional Court's decisions with more general analyses of the conditions under which rights-based approaches and litigation have helped instigate social change to support the central claims I advance based on that description. The mix of social, political, and historical factors that have shaped the Court's decisions makes it unlikely that it will adopt a stronger interpretive framework in the short term. Nonetheless, the Court's substantively limited procedural approach already has influenced social policies in South Africa and contributed to rights-based mobilization in identifiable and significant ways. Relatively modest changes to that approach focused on institutional reforms, particularly at the local government level, could provide even more effective tools for enforcing social rights.

[23] Ran Hirschl, "From Comparative Constitutional Law to Comparative Constitutional Studies," 11 *Int'l J. Const. L.* 1 (2013).

To both analyze the Court's own approach and support the claim that it illustrates how procedural enforcement models could be effective in fulfilling social rights, I also draw on what Charles Sabel and William Simon call "democratic experimentalism" or "experimentalism" and related studies of participatory democracy.[24] The Court has explicitly connected the social rights to the South African Constitution's strongly participatory version of democracy and identified social rights litigation as a mechanism for individuals and communities to challenge political decisions directly outside of elections. The Court also has identified a set of procedural rights and remedies, including meaningful engagement, that give individuals and communities the right to participate in policy and budget decisions that affect them.

Democratic experimentalism and participatory democracy offer a set of empirically grounded models for operationalizing participatory democracy through institutional reforms designed to make public institutions more responsive to the people they serve and more effective in delivering those services. These models overlap with social science studies of the conditions under which rights- and litigation-based strategies are likely to instigate meaningful change. They share an emphasis on institutional reform and the critical role of policies and procedures that give outsiders structured and consistent access to generate those reforms. I analyze the Court's procedural innovations in light of these models and argue that they offer a set of principles and judicial techniques that could create leverage for local communities and social rights activists to use social rights to press for similar institutional reforms.

B. Outline

Part I identifies the theoretical and practical arguments in the justiciability debate and how those arguments shaped the Court's jurisprudence in the first-wave cases. Chapter 2 summarizes the theoretical debate over entrenching social rights, including the strong influence that theories of dialogic and weak-form review have had on that debate. It then outlines how that debate played out in the constitutional drafting process in South Africa in ways that continue to influence the Court's approach to interpreting and enforcing social rights.

[24] Charles F. Sabel and William H. Simon, "Destabilization Rights: How Public Law Litigation Succeeds," 117 *Harv. L. Rev.* 1016 (2004). Sabel and Simon use the terms "democratic experimentalist review" and "experimentalist review" as shorthand for experimentalist judicial approaches and "democratic experimentalism" or "experimentalism to refer broadly to both judicial and nonjudicial processes." Ibid., 1082–94.

Chapter 3 closely analyzes the first-wave decisions and identifies the strong influence of the justiciability concerns in those decisions. Those concerns contributed to the distinctive features of reasonableness review, in particular the Court's emphasis on context-specific interpretations that incorporate the progressive-realization and resources limitations into the substance of the rights.

Chapter 4 describes the strikingly divergent assessments of the first-wave decisions that centered on the distinctive features of reasonableness review.[25] Domestically, the Court faced serious criticism for its largely contentless application of the reasonableness review standard. Outside of South Africa, by contrast, several of the first-wave decisions – especially *Grootboom* and *TAC* – were hailed as innovative examples of judicial enforcement of social rights that avoided either preempting democratic control over policy and budgets or exceeding the institutional competence of courts.

Part II turns to the second-wave decisions, which have received far less attention outside of South Africa. Despite the substantive limitations evident in the second-wave cases, the Court has demonstrated increasing confidence and greater institutional authority when addressing social rights claims. That confidence has resulted in some remarkably assertive interventions and creative applications of the social rights.

I argue that these decisions are more significant than the first-wave decisions for several reasons. First, they demonstrate the strength of the Court's commitment to a proceduralized enforcement approach. Second, the Court in several of these decisions has carved out substantial judicial authority to enforce social rights and has used that authority in creative ways to uphold challenges to government social policy. Third, the distinctive features of the Court's approach in these decisions have the potential to develop into two related enforcement models that could effectively instigate rights-protective policy changes while allowing courts to maintain a largely procedural role.

Chapter 5 analyzes the five decisions that form the core of the second wave. The two eviction cases illustrate the Court's decisive shift away from *Grootboom*'s highly abstract application of section 26 toward a concrete, hands-on approach that uses section 26 and related legislation to manage individual evictions directly. A set of three service-delivery decisions, including *Mazibuko*, highlights the Court's explicit embrace of a

[25] Roux, *supra* note 14, 262.