

Cambridge University Press

978-1-107-02945-3 - Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's SecondWave

Brian Ray

Frontmatter

[More information](#)

ENGAGING WITH SOCIAL RIGHTS

With a new and the most comprehensive account of the South African Constitutional Court's social rights decisions to date, Brian Ray argues that the Court's procedural enforcement approach has had significant but underappreciated effects on law and policy and challenges the view that a stronger substantive standard of review is necessary to fulfill their potential. Drawing connections between the Court's widely acclaimed early decisions and the more recent second-wave cases, Ray explains that the Court has responded to the democratic-legitimacy and institutional-competence concerns that consistently constrain it by developing doctrines and remedial techniques that enable activists, civil society, and local communities to press directly for rights-protective policies through structured, court-managed engagement processes. *Engaging with Social Rights* shows how those tools could be developed to make state institutions responsive to the needs of poor communities by giving those communities and their advocates consistent access to policy-making and planning processes.

BRIAN RAY is the Joseph C. Hostetler-BakerHostetler Professor of Law at Cleveland-Marshall College of Law, Cleveland State University. He has published widely on social rights and judicial review, and his work has appeared in leading journals, including the *Stanford Journal of International Law*, the *South African Journal of Human Rights*, and the *Constitutional Court Review*.

Cambridge University Press

978-1-107-02945-3 - Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave

Brian Ray

Frontmatter

[More information](#)

COMPARATIVE CONSTITUTIONAL LAW AND POLICY

Series Editors

Tom Ginsburg

University of Chicago

Zachary Elkins

University of Texas at Austin

Ran Hirschl

University of Toronto

Comparative constitutional law is an intellectually vibrant field that encompasses an increasingly broad array of approaches and methodologies. This series collects analytically innovative and empirically grounded work from scholars of comparative constitutionalism across academic disciplines. Books in the series include theoretically informed studies of single constitutional jurisdictions, comparative studies of constitutional law and institutions, and edited collections of original essays that respond to challenging theoretical and empirical questions in the field.

Books in the Series

Engaging with Social Rights Brian Ray

Making We the People Chaihark Hahm and Sung Ho Kim

Radical Deprivation on Trial Cesar Rodríguez-Garavito and Diana Rodríguez-Franco

Unstable Constitutionalism edited by Mark Tushnet and Madhav Khosla

Magna Carta and Its Modern Legacy edited by Robert Hazell and James Melton

International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union Clifford Carrubba and Matthew Gabel

Reputation and Judicial Tactics: A Theory of National and International Courts Shai Dothan

Constitutions and Religious Freedom Frank Cross

Constitutionalism in Asia in the Early Twenty-First Century edited by Albert Chen

Social Difference and Constitutionalism in Pan-Asia edited by Susan H. Williams

Constitutions in Authoritarian Regimes edited by Tom Ginsburg and Alberto Simpser

Presidential Legislation in India: The Law and Practice of Ordinances Shubhankar Dam

Social and Political Foundations of Constitutions edited by Denis J. Galligan and Mila Versteeg

Consequential Courts: Judicial Roles in Global Perspective edited by Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan

Comparative Constitutional Design edited by Tom Ginsburg

Cambridge University Press

978-1-107-02945-3 - Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave

Brian Ray

Frontmatter

[More information](#)

ENGAGING WITH SOCIAL RIGHTS

Procedure, Participation, and Democracy in
South Africa's Second Wave

BRIAN RAY



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-1-107-02945-3 - Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave

Brian Ray

Frontmatter

[More information](#)

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107029453

© Brian Ray 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

A catalogue record for this publication is available from the British Library

ISBN 978-1-107-02945-3 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication, and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press

978-1-107-02945-3 - Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave

Brian Ray

Frontmatter

[More information](#)

CONTENTS

Acknowledgments page ix

1	Introduction	1
	A Arguments and methods	5
	1 Arguments	5
	2 Methods	7
	B Outline	9
	PART I Justiciability and the first wave	13
2	The justiciability debate and the 1996 Constitution	15
	A Objections to social rights	19
	1 Democratic legitimacy	19
	2 Institutional competence	20
	3 The “myth” of rights	21
	B Alternative forms of judicial review	23
	1 Weak rights and remedies	24
	2 Democratic experimentalist review	27
	C Social rights and alternative forms of judicial review	29
	1 Theory	29
	2 Practice	30
	D Justiciability and the 1996 Constitution	33
	1 Entrenching social rights	34
	2 Politics and justiciability	37
	3 Text and structure	39
	E Conclusion	43
3	The first-wave cases	45
	A The First Certification judgment	46
	B <i>Soobramoney</i>	48
	C <i>Grootboom</i>	51
	D <i>Treatment Action Campaign</i>	57
	E <i>Khosa</i>	64

Cambridge University Press

978-1-107-02945-3 - Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's SecondWave

Brian Ray

Frontmatter

[More information](#)

vi

CONTENTS

F	<i>Port Elizabeth, Jaftha, and Modderklip</i>	69
1	<i>Port Elizabeth</i>	70
2	<i>Jaftha</i>	75
3	<i>Modderklip</i>	77
G	Conclusion	81
4	A “curious divergence”	83
A	Weak-form dialogue	84
B	Proceduralization	86
C	Assessing the divergence	88
1	Weak-form review without dialogue	89
2	Proceduralization without deference	91
3	Proceduralization and politics	93
D	Conclusion	101
PART II Procedure and the second wave		103
5	The second-wave cases	105
A	Evictions and meaningful engagement	109
1	<i>Olivia Road</i>	111
2	<i>Joe Slovo</i>	118
3	<i>Abahlali</i>	126
B	Basic services and proceduralization’s triumph	129
1	<i>Joseph</i>	129
2	<i>Mazibuko</i>	134
3	<i>Nokotyana</i>	143
C	Conclusion	144
6	The eviction cases	146
A	Rise of managerial judging	149
1	<i>Blue Moonlight</i>	150
2	<i>Maphango</i>	159
3	<i>Blue Moonlight’s</i> companion decisions	169
a	<i>PPC Quarries</i>	170
b	<i>Golden Thread</i>	171
B	Extending the managerial approach	173
1	Broadening the definition of “eviction”	175
2	Anti-land invasions and the third-generation eviction cases	178
3	Managerial judging and other rights	181
C	Conclusion	185
7	Patterns and possibilities in the second wave	187
A	Patterns in the second-wave cases	192
1	Avoiding substance	192

Cambridge University Press

978-1-107-02945-3 - Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's SecondWave

Brian Ray

Frontmatter

[More information](#)

CONTENTS

vii

2	Creative procedure	194
3	Managing individual cases	196
B	Patterns and politics	200
C	Revisiting the “curious divergence”	206
1	Administrative-law review	207
2	Weak-form review	209
3	A stronger interpretive role	211
D	Experimentalist and catalytic courts	218
1	Democratic experimentalism	219
2	Catalytic courts	224
E	Conclusion	229
	PART III Procedure’s potential	231
8	The eviction model	233
A	<i>Grootboom’s</i> transformation	237
B	The eviction model	241
1	Incremental substantive development	242
2	Procedural authority and engagement	248
C	Extending the eviction model	261
1	<i>Joseph</i> and basic-service disconnections	262
2	<i>Mazibuko</i> and legitimate expectations	264
D	Limits of the eviction model	267
1	Substantive limits	267
2	Procedural limits	269
E	Conclusion	273
9	Democratic engagement	274
A	Social rights and participatory democracy	280
1	The participatory democracy decisions	281
2	Meaningful engagement and participatory democracy	287
B	Social rights, participation legislation, and democratic engagement	293
1	Community-participation legislation and policy	293
2	Community participation in practice	296
3	Local protests and invented spaces	299
C	Participation, experimentalism, and legalized accountability	302
1	Democratic engagement in theory	306
2	Democratic engagement as legalized accountability	312
3	Participation’s pitfalls	316
D	Conclusion: the limits of democratic engagement	322

Cambridge University Press

978-1-107-02945-3 - Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's SecondWave

Brian Ray

Frontmatter

[More information](#)

viii

CONTENTS

10	Conclusion: real rights	330
	A Justiciability and social change	333
	B Social rights and social change	337
	C The support structure for social rights	339
	D The eviction model's impact	344
	1 Municipal policies	345
	2 Middle-class capture and regulatory effects	346
	3 Backlash	349
	4 Limitations	351
	E Engagement's potential	353
	1 Social rights and policy legalization	355
	2 Legalized accountability	358
	F Conclusion	366
	<i>Index</i>	369

Cambridge University Press

978-1-107-02945-3 - Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's SecondWave

Brian Ray

Frontmatter

[More information](#)

ACKNOWLEDGMENTS

I have taken far longer than I anticipated to complete this book, and I am grateful to many people and institutions for support, advice, and good counsel along the way. Funding for the research was generously provided by the Fulbright Commission, the Cleveland State Faculty Scholarship Initiative, and the Cleveland-Marshall Fund.

My interest in South African constitutional law was sparked by Richard Goldstone's serendipitous invitation to apply for a foreign clerkship with him at the Constitutional Court in 2003. Jim Brudney is responsible for arranging that invitation (and for turning me into an academic). I will be forever grateful for that opportunity and for Richard's and Jim's support and mentorship throughout my career.

I first learned of the remarkable meaningful engagement remedy in conversations with Stuart Wilson and Jackie Dugard at the 2006 Law and Society Conference, when both were at the Centre for Applied Legal Studies, and Stuart, before he was a lawyer, was in the midst of negotiating the favorable settlement that resulted from the very first engagement process in the *Olivia Road* case. Both Stuart and Jackie have generously shared their expertise and insights over the years as I've grappled with the Court's social rights jurisprudence, and I could not have written this book without that assistance.

Penelope Andrews is the reason I was able to attend that conference as a new academic. I am grateful for her generosity (in that and many other instances) and to the rest of the African Collaborative Research Network, especially Mark Kende and Jonathan Klaaren, for welcoming me wholeheartedly into the fold. I am indebted to Jonathan Klaaren more specifically for repeatedly challenging me to think more critically about engagement's limits and for organizing a seminar at the University of Witwatersrand in 2008 that forced me to stop thinking about these issues in purely theoretical terms. During that same trip, David Bilchitz graciously arranged for me to present my early ideas on engagement at the South African Institute for Advanced Constitutional, Public, Human

Cambridge University Press

978-1-107-02945-3 - Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave

Brian Ray

Frontmatter

[More information](#)

Rights and International Law (SAIFAC). That was the first of several times I have profited from David's critical engagement with my work over the years.

I completed much of the book in 2013 while I was a Fulbright Scholar at the Socio-Economic Rights and Administrative Justice Research Project (SERAJ) at the University of Stellenbosch and the Socio-Economic Rights Project at the University of the Western Cape's Community Law Centre (CLC). Both institutions provided excellent facilities and stimulating intellectual environments. At Stellenbosch, Sandy Liebenberg graciously opened her home to me and my family and helped us navigate the complexities of the move to South Africa. Sandy and the talented faculty and graduate students at SERAJ, especially Geo Quinot, André van der Walt, and Shanelle van der Berg, were invaluable in helping me work through these ideas. The book is infinitely better for the many opportunities, both formal and informal, their gracious engagement with me and my ideas provided during that visit.

At the CLC, Ebenezer Durojaye, Gladys Mirugi-Mukundi, and Keathélia Sapto graciously incorporated me into their important work with several community organizations and gave me the opportunity to see how democratic engagement might work in practice. CLC hosted a community seminar on meaningful engagement co-organized by SERAJ that year, and I am indebted to them and the participants in the seminar who deepened my understanding of the challenges implementing engagement processes in practice.

During my Fulbright stay in South Africa, the inimitable Stuart Woolman invited me to participate in the 2013 Constitutional Court Review (CCR) conference. The crucible of that event helped me to sharpen my ideas on the eviction decisions and to identify them as part of the distinctive model this book describes. I owe a large debt to Stuart and the participants in that conference, in particular to David Bilchitz, David Landau, and Katie Young for providing thoughtful and critical commentary on my work, and to Stuart Wilson and Jackie Dugard for their deeply informed analyses of those same decisions.

A stimulating and extended e-mail exchange with Frank Michelman regarding the *Maphango* decision was the basis for the CCR piece. Frank's thoughtful engagement with the Court's decisions is a model I aspire to emulate, and the influence of his work permeates the book. I also rely extensively on Chuck Epp's work, and he graciously provided very helpful suggestions for refinements to Chapters 8 and 9.

Cambridge University Press

978-1-107-02945-3 - Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave

Brian Ray

Frontmatter

[More information](#)

ACKNOWLEDGMENTS

xi

My colleagues at Cleveland-Marshall provided helpful feedback on several draft chapters I presented at faculty colloquia. Eric Tucker, our distinguished visitor from Osgoode Hall Law School, gave me much needed encouragement and guidance throughout the process and provided insightful comments on several chapters. Eric also arranged for me to present these ideas to the Osgoode Hall faculty at a relatively early stage, which gave me confidence to pursue the book project. Our talented and dedicated librarians, in particular Amy Burchfield, Sue Altmeyer, and, more recently, Neeri Rao, went out of their way to respond to every request. Neeri also coordinated the excellent citation check and edit by the library's research assistant, Kyle Connell.

It was a real pleasure working with Cambridge University Press. John Berger was extremely helpful in guiding me through this process as well as patient with my delays. Steven Acerra put together a wonderful cover, and Anamika Singh and Holly Monteith were careful and thorough editors.

This manuscript developed out of two earlier articles: "Evictions, Aspiration and Avoidance," 5 *Constitutional Court Review* 173 (2014), and "Proceduralism's Triumph and Engagement's Promise in Socio-Economic Rights Litigation," 27 *South African Journal of Human Rights* 107 (2011). I am grateful to Juta for permission to adapt portions of each article, which appear in parts of Chapters 6 and 9. The CLC graciously permitted me to use the summary of the *Hlophe* decision in Chapter 8, which was published in "Courts, Capacity and Engagement: Lessons from *Hlophe v City of Johannesburg*," 14 *Economic and Social Rights Review* 3 (2013).

Finally, I am deeply indebted to my parents, Roy and Frances Ray, for their long support and to my wife, Kim, for too many things to list. I dedicate this book to her for all of those things, but especially for taking a chance on South Africa, and to my four children, Audrey, Iain, Evelyn, and Adrian, who make it all worthwhile.