

Book review: *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta, Claremont, 2010, xxv + 541 pp, R610.00) ISBN 978-0-70218-480-2 (pb)

Katharine G. Young*

Every so often time and place and effort converge to bring about something transformative in law's promise to justice. And every so often, a discrete book stands in to document, theorize, contextualize and even help to create this shift. If South Africa's entrenchment of justiciable economic and social rights represents such a legal transformation, Sandra Liebenberg's *Socio-Economic Rights: Adjudication under a Transformative Constitution* has all the makings of such a book. Of course, South Africa's post-apartheid Constitution of 1996 has produced a rich literature across many fields of law,¹ but this book is distinct in the way that it focuses on the constitutional ambition to realize economic and social rights against a backdrop of endemic poverty and inequality, a theme that is used to orient the broader legal changes that are now authorized and mandated under these provisions.

Perhaps unexpectedly, in light of this undertaking, this is a lawyer's book. Liebenberg provides a close engagement with South Africa's evolving case law, being attentive to both its aims and its limitations. One quickly perceives the two major challenges that face the South African Constitutional Court in being called upon to adjudicate economic and social rights: poverty (how best to address it) and democracy (how best to respect it). In 541 pages, Liebenberg provides a history of the drafting of economic and social rights, of which she was, as technical advisor to the Constitutional Assembly's "Theme Committee" on Fundamental Rights, a participant. She presents a tour of the current models, both theoretical and institutional, for economic and social rights entrenchment and enforcement. She describes the emergence of certain fixed points in the South African Constitutional Court's economic and social rights jurisprudence: its original approach to "reasonableness review", which is given extensive treatment in chapter 4, and to the forms of constitutional redress which Liebenberg labels "responsive remedies", in the highly instructive chapter 8. In these two aspects of its jurisprudence, the Constitutional Court has engaged in a standards-based assessment of economic and social rights complaints, drawing from constitutional and administrative law examples of scrutiny and reasoning, and disparate doctrines from fields such as alternative dispute resolution and labor law. This has been achieved with close reference to international and comparative law, as required by the Constitution (s 39), and with an inclusiveness of sources that *Adjudication under a Transformative Constitution* seeks to document and to emulate.

Substantively, Liebenberg provides a study of the Constitution's rights to have access to education (s 29), children's rights (s 28), and detainees' rights (s 35). Hence, chapter 5 outlines the main conceptual challenges to the effective operation of these rights (such as the language dimensions of education, or the family's role in protecting children's rights), and the Constitutional Court's current approaches to addressing them. Liebenberg also describes the right to access health care, social security and water (s 27), through the lens of "reasonableness review", although she does not entertain the different legal challenges that are raised by these disparate public goods and their at times distinctive beneficiaries

* Senior Lecturer of Law, Australian National University College of Law. S.J.D. 2009 (Harv) BA/LL.B. (Hons) (Melb).

¹ See, e.g., ALBIE SACHS, *THE STRANGE ALCHEMY OF LIFE AND LAW* (2009) (a prominent example from South Africa); MARK S. KENDE, *CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES* (Cambridge Univ. P., 2009) (an explicit comparative example).

(and constituencies).² It is in her treatment of the right to housing and evictions cases (under s 26), in which her analysis (like the Constitutional Court's jurisprudence) signals the greatest developments that economic and social rights are currently raising for South African law. Her close analysis of a "new paradigm for evictions law" and of "socio-economic rights in private law", in chapters 6 and 7, indicates how the right to access housing can change the dynamics of a government's housing policy, as well as the legal options available for private mortgages, tenancies and property investment decisions.

For those seeking a prediction of whether economic and social rights can provide a solution to increasing inequality and mass poverty, this book does not offer an answer. *Adjudication under a Transformative Constitution* will not tell us whether the Occupy Wall Street or anti-austerity movements will adopt the economic and social rights discourse, or whether such a strategy would likely bring success. It will not tell us whether global efforts to curb growing inequality, within the United Nations human rights system, the Millennium Development Goals infrastructure, the World Trade Organization or the World Bank and International Monetary Fund, will benefit from a careful adoption of economic and social rights. It will not tell us, even, whether South Africa's laudable constitutional aims will succeed.

Nonetheless, this book certainly provides some informed clues about these questions. For the observers of current fiscal-policy protests, Liebenberg's study of the "struggle for recognition" in chapter 1 is illuminating. In providing the history and context of the inclusion of justiciable economic and social rights in the South African Constitution, from the anti-apartheid struggle to the current apartheid legacy, this chapter emphasizes the social dynamics from which economic and social rights emerge. Indeed, the entrenchment of economic and social rights followed an uncertain path, as opposition was taken, for distinct reasons, by commentators on both the right and the left.³ While a consensus towards economic and social rights, as a path to safeguard democracy and equality, emerged, this was not from a straightforward application of the anti-apartheid Freedom Charter or the influence of international human rights law. Liebenberg's delicate treatment of the non-linear acceptance of such rights is suggestive of the current uncertainties of, as well as potential resolutions, for current protest movements.

For the observers of global efforts to address inequality and extreme poverty, her analysis of the innovation of "reasonableness review" provides useful instructions for other adjudicatory or supervisory arrangements, whether for international courts and committees, or for national courts, like those in Latin America, South Asia and other jurisdictions, which are increasingly embracing economic and social rights.⁴ The United Nations Committee on Economic, Social and Cultural Rights, in

² A proposal to separate the application of such rights in South Africa, especially the right to health care, has been made by DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS* (2007). See also HEALTH & DEMOCRACY: A GUIDE TO HUMAN RIGHTS, HEALTH LAW AND POLICY IN POST-APARTHEID SOUTH AFRICA (Adila Hassim, Mark Heywood, Jonathan Berger eds, 2007).

³ For the dissent from the left, see Dennis Davis, *The Case Against Inclusion of Socio-Economic Rights in a Bill of Rights Except as Directive Principles*, 8 Sth Afr. J. Hum. Rts 475 (1992).

⁴ See, e.g., the edited collections, *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* (Daphne Barak-Erez & Aeyal M. Gross, eds., 2007); *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Varun Gauri & Daniel M. Brinks, eds., 2008); *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN*

particular, will benefit from the lessons of South Africa as it begins to consider communications under the new Optional Protocol on Economic, Social and Cultural Rights, now ratified by eight State Parties and only two ratifications short of entry into force.⁵ As Liebenberg presents it, reasonableness review is a judicial approach that combines seemingly transparent criteria with normative flexibility. In asking whether governments have behaved reasonably, the approach inquires into how programmes are resourced, how they are coordinated, how they balance short, medium and long term needs, and how they respect human dignity (at 151-7). She suggests that this standard of review can provide an answer to the quagmires of progressive realization and non-retrogression, and to the conundrums of the so-called minimum core. Indeed, that the Optional Protocol itself names reasonableness as a relevant standard,⁶ rather than minimum core obligations or other thresholds, suggests that South Africa's doctrinal experience will provide an ongoing reference point for this international body.⁷

The comparative lessons will carry different weight and meaning in different domestic systems. Already, South Africa has become an oft-cited comparator in the literature on justiciability.⁸ More than showing the potential of what can be done, South Africa can also trigger reflection and commentary on the variety of paths that judges can follow. India, for example, is a much-cited jurisdiction in which many economic and social rights, constitutionalized as directive principles of state policy, have become justiciable for all intents and purposes. The Indian Supreme Court's role, which this reviewer has characterized elsewhere as "engaged" in character, replicates many of the creative instances of judicial involvement documented in South Africa.⁹ The Colombian Constitutional Court, on the other hand, has engaged in far more managerial procedures in relation to adjudicating economic and social rights, marking a distance between two approaches with common democratic goals.¹⁰ "Reasonableness

INSTITUTIONAL VOICE FOR THE POOR? (Roberto Gargarella, Pilar Domingo & Theunis Roux., eds., 2006).

⁵ Optional Protocol to the International Covenant of Economic, Social and Cultural Rights, G.A. Res. 63/117, UN Doc. A/RES/63/117 (10 December 2008). Its eight State Parties include Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Slovakia and Spain. There are 40 signatories (as at May 28, 2012).

<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en>.

⁶ Ibid, article 8(4).

⁷ E.g., Bruce Porter, *The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins*, 27 NORDIC JOURNAL OF HUMAN RIGHTS 39, 49ff (2009) (documenting the drafting history of the Optional Protocol, and the influence of the *Grootboom* precedent).

⁸ E.g., CASS R. SUNSTEIN, *A SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (Basic Books, 2004); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (Princeton Univ. P. 2008)

⁹ For an extensive treatment, see KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* (OUP, forthcoming, 2012) (documenting the disparate juridical approaches of South Africa, Colombia, India, and the United Kingdom).

¹⁰ Ibid. See also Alicia Ely Yamin, Oscar Parra-Vera and Camila Gianella, "Judicial Protection of the Right to Health: An Elusive Promise?" in *LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH?* in Alicia Ely Yamin and Siri Gloppen eds., (2011), 103 (describing integration of a core obligation in health care in Colombia).

review” appears against these examples as a somewhat relaxed, but nevertheless proportionate mode of ensuring that duties to respect and protect these rights are fulfilled.¹¹

Finally, Liebenberg shines a more considered light on South African trends over its 15 year history, both the good and the bad.¹² We are given a clearer line from the famous *Grootboom* case, in which the failure to cater for a homeless community was held to contravene the right to access housing,¹³ to the less well-known case of *Jaftha*, in which the Court held that defaults on housing mortgages could not be triggered by a mere failure to pay a petty debt.¹⁴ Other lesser known, but equally important, private law and property cases, lead up to the striking recent case of *Maphango* (decided after the book’s publication), in which the right to housing was held to provide a safeguard against landlord efforts to upgrade, escalate rent, or alternatively evict.¹⁵ Liebenberg’s analysis of the right to housing gives context to this development, which we may see repeated in other economies under stress. On the other side, we are shown the parallels between the Constitutional Court’s insistent stand against a recalcitrant government which had obstructed access to antiretrovirals for pregnant women in the *Treatment Action Campaign* case,¹⁶ to the less insistent stand, using the same doctrinal criteria of reasonableness review, against commodified pre-paid water meters in *Mazibuko*.¹⁷

In *Treatment Action Campaign*, the Court had insisted on a rigorous scrutiny of the government’s reasons, holding these up against countering professional and scientific views as grounds for a lack of reasonableness; in *Mazibuko*, the Court was far readier to accept the government’s marketizing approach for the appropriate distribution of public goods, finding that the foreseeable impacts of such policy on certain poor populations were nevertheless reasonable. In her postscript on the latter case, Liebenberg decries the Constitutional Court’s process-oriented retreat, its “a-contextual and formalist” application of equality, and its selective rereading (and diminishment) of its earlier doctrinal stand in *Treatment Action Campaign* (466-480). Arguably, in the careful steps of *Maphango* and the deference in *Mazibuko*, cases in which the fairness of a profit-oriented landlord investment was queried as against the needs of poor tenants, on the one hand, and in which the efficiency-oriented scheme for rationalizing water use was accepted, on the other, we can see the uncomfortable fit between economic and social rights and liberal markets. These tensions are brought into much higher relief than in the famous *Grootboom* and *Treatment Action Campaign* cases of the last decade, which involved less nuanced redistributive decisions of government.

In conclusion, this book will appeal to readers in constitutional law and theory, international human rights law, and administrative law. Indeed, *Adjudication under a Transformative Constitution* is a perfect example of how these fields are so rapidly converging, as they develop in new directions.

¹¹ For general praise of the Constitutional Court’s deployment of reasonableness, see Wojciech Sadurski, *Reasonableness and Value Pluralism in Law and Politics*, in REASONABLENESS IN LAW (Giorgio Bongiovanni, Giovanni Sartor, and Chiara Valentini, eds, 2009) 129, 135.

¹² For critique of a “South African obsession” in this field, see David Landau, *The Reality of Social Rights Enforcement*, 53 Harv. Int’l. L.J. 189 (2012). For a general statement of the cherry-picking enterprise in comparative constitutional law, see Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am. J. Comp. L. 125 (2005).

¹³ Government of the Republic of South Africa v. *Grootboom* 2001 (1) SA 46 (CC).

¹⁴ *Jaftha v. Schoeman, Van Rooyen v. Stoltz* 2005 (2) SA 140 (CC).

¹⁵ *Maphango v. Aengus Lifestyle Properties (Pty Ltd)* Case CCT 57/11 [2012] ZACC 2 (March 13, 2012) (CC).

¹⁶ *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC).

¹⁷ *Mazibuko v. The City of Johannesburg* 2010 (4) SA 1 (CC).