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THE NEW MANAGERIALISM: COURTS, POSITIVE DUTIES, AND ECONOMIC AND SOCIAL RIGHTS

KATHARINE G. YOUNG*

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ABSTRACT

An inseparable component of liberal constitutionalism is the respect accorded to so-called negative rights, which rest on duties of government restraint. But just as governments must have their hands tied, in this model, they must also work to secure rights, by actively and effectively planning, regulating, budgeting, and monitoring. These positive duties are particularly pronounced for so-called positive rights, which guarantee access to goods, services and opportunities such as social security, education, health care, land, food, water, sanitation, or to a clean environment. Of course, it is clear that so-called negative rights require both duties of commission and restraint; just as so-called positive rights call for the same. Nonetheless, the positive duties that attach to economic and social rights put particular pressure on courts, the executive, the legislature and civil society. Indeed, courts have become central in enforcing the negative and positive duties that arise from justiciable complaints about matters such as medical treatment denials, electricity and water shutoffs, evictions, schools and education outcomes, pollution levels, and food distribution schemes. The widespread adoption of economic and social rights in a majority of the world's constitutions, combined with a pronounced shortfall in the realization of such rights, herald a new managerialism in constitutional government.

This chapter, under review for the edited collection, *Constitutionalism and a Right to Effective Government*, takes one prominent jurisdiction, South Africa, and examines how its courts have enforced constitutional rights to access health care, housing, electricity, water and sanitation, particularly in the last decade. It describes both interpretive and institutional trends. As a matter of interpretation, courts invoke the textual guarantees of effective, co-operative, federal government and public administration, alert to the capacity needs of municipalities, alongside express economic and social rights. As an institutional matter, courts are increasingly favoring a managerial dynamic, co-originating in South Africa's case with the behaviour of the executive. Courts increasingly respond to ineffective government by personalizing responsibility, including through costs, joining state actors in private litigation, and supervising and controlling state assets. This chapter also shows how conventional alternatives to managerialism, such as dialogic or experimental review, have become more responsive to management deficiencies. This includes the dialogical suspension of orders, or when courts call on broader institutional actors, and or on existing duties on the state to budget and plan. It also occurs during experimental dispute resolution, when courts supervise a "meaningful engagement" between the parties, or other alternatives. Updating my earlier typology of judicial review, which argued that courts frequently

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acted as catalysts in provoking governmental or civil society responses, this chapter emphasizes a more urgent, managerial response.

Keywords

Economic and social rights, positive duties, constitutional law, new managerialism, dialogic review, experimentalism, weak-form review, principles of public administration, effective government, duty to budget and plan, principles of co-operative government, right to housing, right to education, right to water, joinder, personal cost orders

INTRODUCTION

The constitutional entrenchment of economic and social rights often requires courts to intervene directly in the administration of government. Such rights – to access goods, services and programs such as social security, education, and health care – are now present in over two thirds of the world’s constitutions.¹ Newer constitutional amendments extend such rights to housing, land, water and a clean environment, implicating a wide array of government actions or omissions. Moreover, despite the conventional wisdom that such rights should not be enforced by courts, and be entrenched at most as directive principles or other statements of aspiration, the duties on government that such rights create are increasingly justiciable.² For better or worse, courts have become central in enforcing both negative and positive duties, in complaints arising from such matters as medical treatment denials, evictions, education outcomes, pollution levels, or food distribution schemes.³

The scholarly response to these trends has largely been focused on two adverse and largely opposing consequences: the judicial usurpation of the elected branches, or the judicial abdication of the enforcement role. In both versions, the constitutional entrenchment of economic and social rights portends further pressure on governments already strained by other political and economic trends, such as a rise of anti-establishment, non-institutionally mediated populist politics or of pressures for outsourcing or privatization of government duties.⁴ And yet the judicial practice of enforcement, particularly in the Global South, has been far more complex than such criticisms assume. From South Africa, India and Colombia (as the most noted examples),⁵ as well as other

¹ Textual counts include Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions* 62 AM. J. COMP. L. 4, 1043–1098 (2014).

² Evan Rosevear, Ran Hirschl & Courtney Jung, *Justiciable and Aspirational Economic and Social Rights in National Constitutions*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS (Katharine G. Young, ed., 2019).

³ For a range of such examples, see THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS (Katharine G. Young, ed., 2019). See also ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER (2020), ch. 7; Daniel Brinks et al., *Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular*, 11 ANNUAL REV. OF L. AND SOCIAL SCIENCE 289 (2015).

⁴ See, e.g., CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark Tushnet, Sanford Levinson & Mark Graber, eds., 2019). While this chapter was written prior to the Covid-19 pandemic, and does not deal with the significant changes wrought by, the connection between government failures in this area, and earlier retrenchments of economic and social rights, was explicitly drawn in the UN Committee on Economic, Social and Cultural Rights statement: Committee on Economic, Social and Cultural Rights (CESCR), *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* para. 4 (2020).

⁵ E.g., CESAR RODRIGUEZ AND DIANA RODRIGUEZ-FRANCO, RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM ON SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH (2015). Argentina, Brazil, Costa Rica,

prominent jurisdictions, close analysis of particular periods and trends in jurisprudence indicate a varied repertoire of judicial enforcement, and a similarly assorted range of governmental responses. Within this variety, the muted enforcement of housing rights in the *Grootboom* case of South Africa has provided perhaps the most canonical example.⁶

This chapter magnifies this detail, in demarcating the trends of enforcement in South Africa over the last ten years. These trends suggest a heightened managerialism in enforcing positive duties, where courts directly manage and supervise the remediation of a rights complaint. Emerging forms of managerialism involve an increasing personalization of governmental responsibility, a broadening of duty-holders and stakeholders, and a rising urgency in responding to the government intransigence, incompetence or inertia that have led to findings of unconstitutionality. In particular, the chapter updates a past typology of judicial review of economic and social rights complaints, in which a “catalytic” court embraces different forms of review, by accessing postures of managerialism, dialogue, deference, supremacy or experiment in order to “catalyze” government (and broader public) action.⁷ That typology, which sought to unsettle a simple opposition between “weak” or “strong” courts in economic and social rights cases,⁸ confirmed the dynamism between those positions. In this analysis, the predicted trend that “weaker” stances become “strong” over time is observed, with both courts and other governmental actors – in particular the executive – co-creators of the dynamic. Part I of this chapter examines an increasing tendency of the courts to interpret rights, apply standards and order remedies through a theory of effective public administration. Parts II-IV of the chapter examine the evolving repertoire of managerial, dialogic, and experimental review, identifying a more personalized and urgent setting in which courts pursue the goals of effective, democratically responsive, government through constitutional rights.

I. POSITIVE DUTIES AND SOUTH AFRICAN CONSTITUTIONALISM

Due in part to its post-apartheid Constitution and the calibre of its first Constitutional Court, South African constitutionalism has become an influential model for economic and social rights enforcement, although examples from India in the 1980-1990s and Colombia in the early 2000s are also familiar entry-points. In South Africa, economic and social rights are entrenched in the following textual formulation:

1. Everyone has the right to have access to-
[health care services, including reproductive health care; sufficient food and water; social security ... adequate housing ... a basic education]
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. ...⁹

Latvia, Nepal, and even the U.S. state constitutions, provide interesting parallels, all beyond the scope of the present chapter. See generally THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 2.

⁶ Katharine G. Young, *The Canons of Social and Economic Rights*, in GLOBAL CANONS IN AN AGE OF UNCERTAINTY: DEBATING FOUNDATIONAL TEXTS OF CONSTITUTIONAL DEMOCRACY AND HUMAN RIGHTS (Sujit Choudhry, Michaela Hailbronner & Matthias Kumm, eds., forthcoming).

⁷ KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* (2012).

⁸ MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

⁹ See, e.g., STH. AFR. CONST., ss 26, 27, 29.

Section 7 also sets out the government’s duties to ‘respect, protect, promote and fulfil’ the rights in the Bill of Rights, Section 36 confirms that rights may be limited “only in terms of law of general application to the extent that the limitation is reasonable and justifiable”, and Section 39 mandates that courts interpreting rights consider international law and permits them to consider foreign law.

These textual guarantees have been interpreted to emphasize government accountability for rights-realization, rather than individual entitlement.¹⁰ For example, the South African Constitutional Court has emphasized the government’s duties to “take reasonable measures” to progressively realize these guarantees (that is, it has emphasized sub-section 2, above), in place of any self-standing notion of rights’ essential or ‘core’ content.¹¹ The Court has provided a theory of “reasonableness” in government action, injecting a heightened rights-responsiveness to traditional administrative law principles.¹² It has also been active in promoting remedial discretion, and the need to innovate with effective remedies.¹³ Such remedies include, as is discussed below, reading in, reading down, severance of words, the limiting and retrospective effect of the declaration of invalidity, or a suspension of the declaration of invalidity, the use of interdicts and the modification of the common law.¹⁴

A notable recent trend is the Court’s recourse to constitutional text to substantiate the standard of reasonableness. For example, the South African Constitutional Court has reiterated the basic principles of public administration – Section 195(1) – in successful economic and social rights claims. That detailed section requires that, for every sphere of government:

- a. A high standard of professional ethics must be promoted and maintained.
 - b. Efficient, economic and effective use of resources must be promoted.
 - c. Public administration must be development-oriented.
 - d. Services must be provided impartially, fairly, equitably and without bias.
 - e. People’s needs must be responded to, and the public must be encouraged to participate in policy-making.
 - f. Public administration must be accountable. ...
- [and g. transparent and h. actively instructed and i. representative]

This section is included alongside broader objects and duties of government, and rule of law principles.¹⁵ These overarching governance principles are themselves nonjusticiable. Yet their

¹⁰ For analysis, see David Bilchitz, *Towards a Defensible Relationship between the Content of Socio-Economic Rights and the Separation of Powers; Conflation or Separation?* in THE EVOLUTION OF THE SEPARATION OF POWERS: BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH 57 (David Bilchitz & David Landau, eds., 2018).

¹¹ *E.g. Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC).

¹² SANDRA LIEBENBERG, *SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION* (Cape Town: Juta Academic, 2010); see also Katharine G. Young, *Proportionality, Reasonableness and Economic and Social Rights*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES (Vicki C. Jackson & Mark Tushnet, eds., 2017).

¹³ *E.g., Fose v. Minister of Safety and Security*, 1997 (3) SA 786 (CC), para. 18-19, 69 (interpreting the Interim Constitution) (“In our context an appropriate remedy must mean an effective remedy”). See also Sth. Afr. Const., ss 38 and 172(1)(b), which provides that the Constitutional Court may make any order which is just and equitable.

¹⁴ See summary, Georgina Jephson & Osmond Mngomezulu, *Constitutional Litigation Procedure*, in PUBLIC INTEREST LITIGATION (Jason Brickhill ed., 2018) 135, 149.

¹⁵ *E.g., Sth. Afr. Const.*, s 4 (constitutional principle of co-operative government); s 41 (co-operative government among organs of state); s 100 (Justifying national intervention to assume responsibilities when necessary for

appearance in the reasoning and orders of recent cases has created, according to local advocate Nikki Stein:

a feedback loop, in terms of which the values and principles of good governance can be used to realize socio-economic rights, and litigation to advance socio-economic rights can be used to build and strengthen the principles set out in s 195.¹⁶

This is a very different picture from the formal and static separation of “rights” and “structural principles” in broader constitutional analysis. Of course, these developments are not restricted to economic and social rights enforcement – the South African Constitutional Court has ordered a response to other failures of constitutional duty, such as its order that the parliament had failed its constitutional duty to hold the president accountable for corruption proceedings – an act that arguably brought an end to Jacob Zuma’s 9 year presidency (2009-2018).¹⁷ Courts have been frustrated – or perhaps emboldened – by several egregious government lapses, and the economic and social rights jurisprudence should be read as part of these broader developments. Moreover, these juridical developments must be understood against a complex backdrop of what we might call post-liberal constitutional ambition. An increasing concern among constitutional and wider commentators has been the gap between a “politics of accountability” and a “politics of capability”.¹⁸ For this reason, it is worth revisiting the model of catalytic courts that attempted to tie accountability to capability.

A 2010 typology suggested that judicial enforcement occupied a range of distinctive positions, from managerialism (such as command-and-control style structural injunctions), to dialogue (such as suspended declarations), to experimentalism (such as participatory remedies), to more supremacist or deferential measures, depending upon the government’s failure of duty.¹⁹ For the remainder of this chapter, the trends towards new forms of managerialism, dialogue and experimentalism in South Africa are explored.

II. MANAGERIALISM – PERSONALIZING OR BROADENING RESPONSIBILITY

Judicial managerialism refers to the courts’ supervision of both the rights’ substantive content and the duty required of government when shortfalls are identified. This occurs, for example, when

essential national standards etc.); s 152 (stating the objects of local government and requiring municipalities to strive to achieve these objects); s 153(a) (providing that a municipality must “structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community”; s 154 (national and provincial governments to support municipalities); s 156 (authorising municipalities to carry out their functions).

¹⁶ Nikki Stein, *A Better Life for All: Using Socio-Economic Rights Litigation to Enforce the Principles Governing Public Administration* 34 STH. AFR. J. OF HUM. RTS. 91, 98-99 (2018).

¹⁷ Heinz Klug, *State Capture or Institutional Resilience: Is There a Crisis of Constitutional Democracy in South Africa*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet, eds., 2018) 295, 308 (describing a series of Constitutional Court cases that held the president – and parliament – accountable to the Constitution).

¹⁸ On the connection between these and the robust response to social security rights enforcement, see Stuart Woolman, *A Politics of Accountability: How South Africa’s Judicial Recognition of the Binding Legal Effect of the Public Protector’s Recommendations Had a Catalysing Effect that Brought Down a President* CONST. CT. REV 155 (2018).

¹⁹ YOUNG, *supra* note 7, at 142-66.

courts issue structured and/or mandatory forms of relief that require continuing, day-to-day, control, and raise the prospect of contempt proceedings against government officials if compliance is not achieved. The classic example is the structural injunction, and the U.S. template is, of course, *Brown II* and its progeny, when the court was involved in the management of desegregation through school registrations, busing, etc (prison reform is another obvious precursor in the U.S.).²⁰ In South Africa, lower courts have enthusiastically followed this path.²¹ An influential model prescribes such relief when government actors are “intransigent, incompetent or inattentive”.²² Orders to address incompetency – or government incapacity or ineffectiveness – sometimes recall bankruptcy reorganization.²³ Increasingly, courts call on managerialism when previous declaratory orders have not been complied with (as predicted by Mark Tushnet and others).²⁴ Below, I highlight a new and increasingly complex repertoire of managerial responses, that have arisen in complaints in relation to the constitutional rights to social security, education and housing.

Personalizing responsibility: One notable trend is the use of cost orders (often awarded, in South Africa, against the losing party), as personal to the responsible government official. For example, after a series of cases involving the failure to respect the right to social assistance, the Constitutional Court ordered the responsible Minister to pay 20% of the costs of the complainants, with the rest apportioned on the department and agency.²⁵ Noting that “it is a novel matter to hold a cabinet minister personally responsible for the costs of litigation”,²⁶ the Constitutional Court also directed the court’s registrar to forward the judgment and a commissioned report to the National Director of Public Prosecutions, to consider whether the Minister had lied under oath and, if so, whether she should be prosecuted for perjury.²⁷ Citing section 195 of the Constitution, the Constitutional Court affirmed the basic values and principles governing public administration and the seriousness of the Minister’s lapse, and her use of her position “as Minister of the Department

²⁰ *E.g.*, *Brown v. Board of Education* 349 U.S. 294 (“*Brown II*”, ordering schools to integrate “with all deliberate speed”). Such actions have been theorized in the US by, amongst others, Abram Chayes, Alexander Bickel, Owen Fiss, Judith Resnik, Malcolm Feeley and Ed Rubin.

²¹ In the famous *Grootboom* case, for example, the lower court had ordered the municipal government to promptly provide tents, latrines, etc, to repair the government’s failure to protect the rights of housing of children; the Constitutional Court, in a now common move, reversed the order and issued a declaration only (see below).

²² Kent Roach & Geoff Budlender, *Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?*, 122 S. AFR. L. J. 325 (2005).

²³ For a useful assessment of some predictable parallels, following Abram Chayes, see William H. Simon, Kathleen G. Noonan & Jonathan C. Lipson, *Reforming Institutions: The Judicial Function in Bankruptcy and Public Law Litigation*, 94 IND. L. J. 491, 538 (2019) (endorsing these parallels on the theory that “courts can induce reforms in both bankruptcy and [public law litigation] because they are removed from the causes of system failure and the political and market pathologies that often prevent extra-judicial reform”).

²⁴ TUSHNET, *supra* note 8. See, *e.g.*, Malcolm Langford, *Housing Rights Litigation: Grootboom and Beyond*, in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? at 187 (Malcolm Langford et al., eds., 2014).

²⁵ *Black Sash Trust v Minister of Social Development* [2018] ZACC 36; 2018 (12) BCLR 1472 (CC) (“*Black Sash III*”). There are parallels with the High Court holding President Zuma personally responsible for legal costs for his application to prevent the Public Protector from “finalizing and releasing” her report on state capture; see Klug, *supra* note 17, at 306. After the completion of this chapter, in February 2021, Zuma refused to appear before the Commission on State Capture, defying a court order; the issue of contempt is currently before Constitutional Court.

²⁶ *Black Sash III* [2018] ZACC 36, at para 16. See also *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government* (620/2012) [2013] ZASCA 67; 2013 (5) SA 24, at para. 54 (SCA) (“It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers”).

²⁷ *Id.*, at para. 1 (Minister Dlamini).

to place herself between constitutionally enshrined rights and those entitled to them.”²⁸ When the Court later faced the question of holding the Public Protector to a personal cost order, the majority emphasized how the common law tests of bad faith and gross negligence are “infused” by constitutional obligations.²⁹ This consideration outweighed any potential threat of personal costs to her independence,³⁰ including in her handling of powerful and well-resourced persons or office holders, and the majority also allowed the punitive cost order to stand.

Personal joinder and inquiry: The enormity of these lapses in the coordination of social assistance had led to other remedial innovations. The government department – and its Minister – had left the payment system for social grants in limbo for a period of 5 years, after an earlier declaration of the unconstitutionality of the initial contracts. This inaction risked disrupting the payment of social grants affecting some 17 million South Africans. Before issuing the personal costs order described above, the Constitutional Court ordered the Minister to provide reasons why she should not be ordered to pay the cost of the application.³¹ When her returning affidavit stated facts which conflicted from those given by members of the department, the Constitutional Court joined her in her personal capacity,³² and appointed a referee to conduct a fact-finding inquiry.³³ The results of this inquiry, which determined she had sought to mislead the court, were made public.

Control of state assets: Similar frustration has been expressed by lower courts enforcing the right to a basic education. In one case, when the relevant education department had not reimbursed schools for the payment of teacher’s salaries, despite an order to do so, the court was asked to declare the salaries as public debts under state liability legislation. Attorneys then took steps to attach state property – the motor vehicles used by the Minister of Education and her Director General – to have it sold at sales in execution to realize the moneys owed.³⁴ The salaries were immediately paid.³⁵ A corollary can be found in High Court orders directing the auctioning of municipal vehicles to settle debt, including debt owed to water service providers.³⁶ At the same time, the latter disputes have resulted in court orders preventing water service providers from

²⁸ *Id.*, at para 12 (citing s. 195 and the Public Administration Management Act 11 of 2014 (pending proclamation of commencement)). The Court also noted the “The Department of Social Development ... is as much responsible for the realisation of rights outlined in the Constitution as this Court”.

²⁹ *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) \para 154 (refusing to set aside order to pay 15% of the South African Reserve Bank’s costs). The High Court had found the Public Protector, Ms Busisiwe Mkhwebane, abused her office in issuing reports on the Reserve Bank, which had caused severe harm to the South African economy.

³⁰ *Id.* *Compare with* para 6 (Mogoeng CJ dissent, emphasizing the “chilling effect” of personal cost orders).

³¹ *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC) (Black Sash I), para 76.

³² *Black Sash Trust v Minister of Social Development* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) (Black Sash II) para 24.

³³ Order dated 2 August 2017.

³⁴ Cameron McConnachie & Samantha Brener, *Litigating the Right to Basic Education*, in PUBLIC INTEREST LITIGATION IN SOUTH AFRICA (Jason Brickhill, ed.), 281, 299; following *Linkside v. Minister of Basic Education* [2015] ZAECGHC 36.

³⁵ *Id.*

³⁶ *Auctioning of Kopanong’s fleet halted*, Bloemfontein Courant (February 10, 2021) (noting debts to Bloem Water).

restricting their bulk water supply below certain levels, when they had threatened to do so in order to enforce payments from financially strapped municipalities (later placed in administration).³⁷

Joinder of state actors: In other litigation involving evictions and the right to adequate housing, initial suits which have ostensibly not involved state actors have resulted in their joinder, or other orders of information and reports. Where private landowners have sought to evict occupiers from private land, the Constitutional Court has requested, in reviewing whether the eviction is just or equitable, information from local municipal authorities. Because of the constitutional duty to provide temporary accommodation to those threatened with homelessness, which applies to those occupying public land, private land, and to those residing in a contractual relationship of tenancy, the municipal authority has been deemed implicated and the courts have relied on both s 26 and s 152.³⁸ Indeed, a rule of practice has developed so that the relevant local authority *must* be joined as a party in any large-scale eviction, in order to provide information about foreseeable disruption, and possibilities for providing alternative accommodation.³⁹

Supervision of timing: As well as issuing dates as to when each step must be complied with, in classic structural mode, the Constitutional Court has also sequenced each step to avoid a rights violation. For example, in another evictions case, the date of eviction was required to be 14 days after the City's obligation to provide accommodation – thus allowing the occupiers “some time and space” to be certain of their accommodation and to make arrangements for relocation. The private occupier was required to exercise “a degree of patience” in this respect, and (unlike in an earlier case involving a longstanding property owner and recent squatters⁴⁰) no compensation was ordered for this time period. In finessing its order, the date of eviction was also delayed: it “should not follow too soon after the date of the judgment”,⁴¹ according to the Court.

Issuing interim relief: Lower courts have also sought to relax the procedural rules on interim injunctions. For example, the North Gauteng High Court sought to prohibit the levying and collection of tolls pending further proceedings for final relief as to whether the government possessed the power to declare certain roads as toll roads.⁴² Although later reversed by the Constitutional Court, many local commentators had recommended that such an excessive intervention was justified according to a reordered conception of the separation of powers,⁴³ and the guarantee of economic and social rights.

³⁷ *Bloem Water heads to High Court in battle against Mangaung Metro*, Bloemfontein Courant (September 20, 2019). See further *infra* note 57 (ordered prevention of electricity interruption). With thanks to Danie Brand for pointing out this corollary.

³⁸ Gustav Muller & Sandra Liebenberg, *Developing the Law of Joinder in the Context of Evictions of People from their Homes*, 29 SAJHR 554 (2013).

³⁹ This rule is now contained in practice directives of the various divisions of the High Court. Since the completion of this chapter, the government elected to suspend all evictions during the lockdowns required for suppression of Covid-19, Government Gazette, 26 March 2020.

⁴⁰ *President of the Republic of South Africa v. Modderklip Boerdery (Pty.), Ltd.*, (2005) (5) SA 3 (CC) (ordering compensatory damages to the private landowner for the period before eviction could be carried out, with alternative land available).

⁴¹ *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties (Pty) Ltd* [2011] ZACC 33, 2012 (2) SA 104 (CC).

⁴² *National Treasury v. Opposition to Urban Tolling Alliance (OUTA)* [2012] ZACC 18, 2012 (6) SA 223 (CC).

⁴³ See Mia Swart and Thomas Coggin, *The Road Not Taken: Separation of Powers, Interim Interdicts, Rationality Review and E-Tolling in National Treasury v Opposition to Urban Tolling* CONST. CT. REV. 346.

“*Deeming*”: The right to education cases also involved complaints about the education department’s failure to appoint teachers, despite earlier court orders. The courts then “deemed” teachers to have been formally appointed, if they had complied with a statutory and policy requirement in terms of qualification and hiring. The posture recalls a more peremptory form of review, beyond managerialism.⁴⁴ Early on, the Constitutional Court had engaged in peremptory review when it had “read in” rights-respecting words into otherwise rights-infringing legislation, thereby correcting them without further inter-branch involvement. In the remedial context involving positive duties, such peremptory review can involve an act of “amending” legislation (instead of overturning it) or “reading in” new words to “cure” legislation, rather than severing it.⁴⁵ Here, the deeming provisions were directed against the executive.

Substantive outcome decrees: As well as these structural interventions related to government actors, lower courts have, unsurprisingly, also issued a series of substantive outcome decrees. For example, the supreme court and lower courts have ordered structural relief in relation to a number of discrete requirements for basic education, such as textbooks,⁴⁶ student chairs and desks,⁴⁷ teachers’ salaries,⁴⁸ and school transport.⁴⁹ Yet such orders have revealed a basic incapability to comply, especially in the province of Limpopo, where litigation exposed “a deep rot in the provincial department, which ... paralysed them in their attempts to deliver the building blocks of basic education ... from textbook delivery ... dilapidated school infrastructure, shortages of teachers, shortages of school furniture and the failure to provide adequate funding for schools’ day-to-day needs”.⁵⁰ In this context, after only scattered compliance, the court was forced to reorient its orders to the more basic competencies of public administration, such as data collection on schools or textbooks. After repeated failures of structural orders, complainants sought declaratory relief, in part in order to maintain their own control over the delivery, rather than rely on the court’s schedule, as well as to limit further opportunities, on the part of the department, to seek extensions.⁵¹ Such declaratory relief can avoid the unintended consequences, and rushed and ineffective action, that accompany structural orders, when planning systems are inadequate.⁵²

III. DIALOGUE – INCREASING URGENCY AND INSTITUTIONAL ENGAGEMENT

An emphasis on dialogue occurs, not when courts attempt to directly manage the correction of a rights-dispute, but rather when they invite an inter-branch response. This is done by a less detailed interpretation of the right and a more declaratory remedy. Yet the theorized tropes of dialogue –

⁴⁴ YOUNG, *supra* note 7 (noting the features of peremptory review).

⁴⁵ *Khosa v. Minister of Social Development*, 2004 (6) SA 505 (CC) (making “citizens and permanent residents eligible for social security grants).

⁴⁶ *Minister of Basic Education v. Basic Education for All*, 2016 (4) SA 63 (SCA).

⁴⁷ *Madzodzo v. Minister of Basic Education*, 2014 (3) SA 441 (ECM).

⁴⁸ *Centre for Child Law v. Minister of Basic Education*, 2013 (3) SA 183 (ECG).

⁴⁹ *Tripartite Steering Committee v. Minister of Basic Education*, 2015 (5) SA 107 (ECG).

⁵⁰ Stein, *supra* note 16, at 101.

⁵¹ Faranaaz Veriava, *The Limpopo textbook litigation: a case study into the possibilities of transformative constitutionalism* (2016) 32 STH. AFR. J. HUM. RTS. 321.

⁵² For the acknowledgement of such dangers, see McConnell and Brener, above. Concerns of polycentricity are also raised. For broader analysis, see JEFF KING, *JUDGING SOCIAL RIGHTS*; Kent Roach, *Polycentricity and Queue-jumping in Public Law Remedies: A Two-Track Response* 66 U. TORONTO L.J. 3 (2016).

declarations of invalidity, suspended orders, pre-legislative parliamentary committees, legislative overrides – are complicated in respect of economic and social rights, particularly in relation to positive duties. From the early, famous, displays of dialogue in the declaratory orders of *Grootboom* and *TAC*,⁵³ where the Court found no reason not to trust the government to comply with the standard of reasonableness in designing housing or health care policy, the Constitutional Court can no longer assume compliance.⁵⁴ It thus has engaged in forms of dialogue notable for their urgency and broader institutional engagement, seeking responses not only from the legislative and executive branches, but also from a broader array of governmental and non-governmental actors. This stance is demonstrated in a series of disputes related to housing and social security rights, and is indicated by the following:

Suspension of declarations: The suspension of declarations has a long provenance in dialogue theory: that is, providing a timed delay before action is required by the order, which allows the government to design and deliver its own response to a constitutional infringement. Unlike managerialism, this form of review moves closer to the resolution of the representation problems of constitutional rights enforcement. In positive provisioning cases, however, the suspension has revealed a different justification: a suspension helps to ensure that rights-holders receiving an entitlement as part of a positive obligation are not subject to disruption or discontinuity. For example, in the social assistance cases described above, the Constitutional Court had to ensure that grant payments, although declared unconstitutional, could continue. This required a supervisory double-act: first declaring the original disbursement contract null and void, and then suspending this order of invalidity for a year in order to ensure the continuing disbursement of grants. Later, the original contract was reinstated, in order to ensure the protection of the beneficiaries' personal data and to ensure the transparency and accountability of the payment process.

Broader institutional involvement: The Constitutional Court has also regularly called on other organs of state to assist in enforcing positive duties, through monitoring and other responsibilities. In this respect, auditors, treasury reporters, human rights commissions, health ombudspersons, and even private actors (such as law societies) have been named by the court in “unofficial” orders seeking particular action or accountability. Early on, in *Grootboom*, the Constitutional Court called on the South Africa Human Rights Commission to monitor the order.⁵⁵ But in follow up cases, an array of other actors have assisted, often in response to complainant requests.⁵⁶ In this respect, the Constitutional Court refers to the role obligations of each institutional actor – like s 195(1) and the duties of public management, or duties on municipal authorities, principles of co-operative government and the like. When electricity providers attempted to terminate supply to an entire municipality, for example, in order to extract payment from delinquent municipalities, the

⁵³ *Government of the Republic of South Africa v Grootboom*, [2000] ZACC 19; 2001 (1) SA 46 (CC).

⁵⁴ *See generally*. CONSTITUTIONAL TRIUMPHS, CONSTITUTIONAL DISAPPOINTMENTS: A CRITICAL ASSESSMENT OF THE 1996 SOUTH AFRICAN CONSTITUTION'S LOCAL AND INTERNATIONAL INFLUENCE (Rosalind Dixon & Theunis Roux, eds., 2018).

⁵⁵ *Grootboom*, at para 97.

⁵⁶ *See, e.g., Black Sash I, supra* note 31, at paras 37, 71-74 (appointing the Auditor-General to review the interim contract, at the request of the Black Sash Trust.)

Supreme Court noted the duties of national and provincial governments to intervene, as well as those of the electricity provider itself to avert the disastrous consequences.⁵⁷

Duties to budget and plan: Economic and social rights raise, of course, fiscal concerns, and yet the courts have been reluctant to order, by decree, that executive officials with taxing or borrowing authority exercise it in any general or specific way.⁵⁸ Instead, the posture of dialogue assumes that such response will be met. Yet even under this approach, the Constitutional Court has increasingly called on the functions and powers of local government, including those of budgeting and planning. In response to the city's argument that it was not obliged to go beyond its available resources to deal with emergency housing needs, the Court noted that "it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations".⁵⁹ It ordered the alternative accommodation and the eviction, but also declared that the City's housing policy was unconstitutional, in so far that it had excluded, in its catering for emergency accommodation, persons evicted by private property owners.⁶⁰

Common law development: Common law development resembles a dialogic judicial stance, insofar as the legislature is free to override such development in response. In one case, for example, the Constitutional Court suggested that the constitutional guarantee of economic and social rights might provide a justification to depart from a prohibition against periodic payments in compensation in personal injury claims.⁶¹

IV. EXPERIMENTALISM – LOCALISM AND MODELS OF ALTERNATIVE DISPUTE RESOLUTION

Managerialism and dialogue highlight different orientations for courts in enforcing positive duties, and can be situated along a spectrum of strong-form versus weak-form responses. A third model, experimentalist review, seeks to dislodge the inertia of inter-branch relations, and inject a more directly democratic response, by requiring the participation and involvement of wider "stakeholders" in the interpretation and the discharge of the government's positive duties. This third model sees courts directing the parties to engage together to devise their own iterative solutions to ensure the realization of the complained about right. Many of the practical features of experimentalism draws on the insights of behavioural law and economics (i.e. nudging rather than prescribing) and the economic sociology of institutions (i.e. destabilizing public institutions from

⁵⁷ Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others; [2020] ZASCA 185; [2021] 1 All SA 668 (SCA) (court holding that the interruption of electricity services to the entire municipality was inimical to constitutional obligations); see also Bloem Water interruptions, *supra* note 37.

⁵⁸ Cf. Missouri v. Jenkins, 495 US. 33 (1990) (holding that, as a remedy against school segregation, the court may order the defendant school board to increase taxes).

⁵⁹ City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties, 39 (Pty) Ltd [2011] ZACC 33; 2012 (2) SA 104(CC) at para 74.

⁶⁰ While it is beyond the scope of this chapter, it is worth noting that a wider discourse of budgeting with respect to constitutional rights has developed: see, e.g., Sandra Liebenberg, *Budget Must Take Human Rights into Account*, City Press (21 March 2021) (noting submission of Michael Sachs, acting chairperson of the Financial and Fiscal Commission, detailing the obligations of the government to justify its decision "to reduce expenditure on socioeconomic rights-related budgetary items and to lower the tax burden on constitutionally mandated priorities").

⁶¹ Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ, [2017] ZACC 37; 2018 (1) SA 335 (CC).

inertia and coordinating different actors in reflexive, problem-solving mode).⁶² In South Africa, features of experimentalism have evolved in the context of an increasingly contentious politics and urban violence, putting pressure on its utility in securing rights to housing, health care and education cases.⁶³ This pressure may be observed in the following:

Supervising meaningful engagement: In South Africa, experimentalism is exemplified by the remedy of “meaningful engagement”, in which the Court orders that the parties engage with each other to reach a solution. In an early evictions case, the order was issued in order to upend the adversarial postures of the occupiers and city landlord seeking eviction, in a right to housing complaint. Since then, it has been utilized in additional evictions cases, finding appeal in its capacity to transform hostile parties into coordinated negotiators, and to stimulate organizing on behalf of complaints. More recent complaints involving the right to education have also been resolved through the meaningful engagement order, although the capacity to coordinate “engaged” parties has been limited when the complainants are unorganized.⁶⁴ In litigating the availability of school textbooks, and other resources, meaningful engagement has again been used, with greater organizing on behalf of parents’ groups leading to greater compliance.⁶⁵ Further calls have been made for an “extra-judicial” (non-court centric) application of this model in bringing protest groups together in making demands against government.⁶⁶

Alternative dispute resolution (ADR): Finally, alternative dispute resolution, rather than litigation, has found renewed emphasis in large scale institutional violations, particularly when a constitutional infringement has been conceded.⁶⁷ In the *Life Esidimeni* arbitration, the Gauteng health department had conceded its liability for violating the rights to health and other rights on the part of some 1,300 mental health care users, after it had terminated its contract with providers and moved rapidly to deinstitutionalize. In responding to an earlier interdict of the discharge, the health department had signed a settlement agreement undertaking to consult meaningfully with several mental health NGOs, such as the South African Depression and Anxiety Group and the South African Society of Psychiatrists and to develop a reasonable plan for discharge and placement. It breached this agreement, as a later report by the health ombud revealed; that report recommended ADR, with the aim of providing redress and restoring trust in the leadership of the

⁶² Influential commentators in the U.S. from each include Cass Sunstein and Richard Thaler, on the one hand, and Roberto Unger, Charles Sabel, William Simon, Michael Dorf, on the other.

⁶³ Irene de Vos and Dennis Webster, *No Place for the Poor: The Governance of Removal in Zulu and SAITF*, CONST. CT. REV 321 (2018).

⁶⁴ *Governing Body of the Juma Masjid Primary School v. Essay NO 2011*, (8) NBCLR 761 (CC); see BRIAN RAY, *ENGAGING WITH SOCIAL RIGHTS: PROCEDURE, PARTICIPATION AND DEMOCRACY IN SOUTH AFRICA'S SECOND WAVE* (2016); see also chapters by Sandra Liebenberg and Roberto Gargarella, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS*, *supra* note 2.

⁶⁵ For general commentary on the importance of organized social movements in such claims, see *SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK* (Malcolm Langford, Cesar Rodriguez-Garavito & Julieta Rossi, eds., Cambridge: Cambridge University Press, 2017); T Madlingozi, *Social Movements and the Constitutional Court of South Africa* in *TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA* (OV Vieira, U Baxi & F Viljoen, eds., 2013) 537.

⁶⁶ Sameera Mahomed, *Extra-judicial engagement in socio-economic rights realisation: Lessons from #FeesMustFall*, 36 STH. AFR. J. ON HUM. RTS 49-73 (2020).

⁶⁷ For an examination of more community-centred and participatory alternatives to litigation, borrowing from a focus on organising, conscientizing and mobilising (OCMS) during the apartheid struggle, see Dhaya Pillay, *Moving Litigation from Dispute Resolution to Conflict Management, Problem Solving and Building Organisation* (Unpublished thesis, 2020, on file with author).

health department.⁶⁸ Deputy Chief Justice Moseneke was appointed, and later delivered an innovative award, spanning constitutional damages, the provision of counselling and support, the construction of a monument, and instituting a reporting process to the health ombud of the Government's recovery plan.

CONCLUSION

This chapter has examined and updated a previous “catalytic” model of judicial review in enforcing the positive duties that arise from economic and social rights complaints, using the South African example. A clear trend towards a more personalized managerialism, more insistent dialogue and a more contentious experimentalism can be observed, as well as judicial attempts to open up complaints to a broader net of governmental actors and stakeholders. One of the strengths of both earlier “catalytic” and “weak-form” models was the touted “representation-reinforcing” role of judicial review, given that courts had arrogated to themselves neither the final word on rights-interpretation, nor a peremptory remedial power. In the last decade, however, with further examples of governmental dysfunction, “weak-form” review has given way to a stronger, and particularly more managerial, function. Some dialogic remedies have become managerial once the declaration went unheeded; others went in the reverse direction, when supervisory jurisdiction failed and complainants sought greater potential leverage in declaratory orders. In interpreting what is “reasonable” in realizing economic and social rights, courts have emphasized the values of public administration, with explicit reference to the non-justiciable, structural, principles of s 195(1). It is notable that these, and not the constitutional values of dignity or equality,⁶⁹ have helped the courts define the duties in recent cases.

This is not to suggest that judicial enforcement will always proceed on these terms. While in the case of South Africa, such managerialism has served to counter inept and corrupt government action, and various other forms of incompetence, comparative analysis reveals increased deference to government and even hostility towards economic and social rights claimants in some places. Moreover, it would be a mistake to view managerialism as a solely court-led intervention, as these forms of judicial review have developed in interaction with both recalcitrant governments and heavily involved non-governmental actors in South Africa. Successful complainants in economic and social rights cases are often represented by sophisticated public interest organizations, who themselves coordinate with organized social movements and provide vital political pressure for compliance, and often draft their own preferred remedies for the court. This, we might conclude, has led to a form of governance that is highly reactive to litigation, and dependent on the premise that courts will not themselves be tainted by the features of dysfunction that they serve to guard against.

⁶⁸ Health Ombud report, *see* Stein, *supra* note 16, at 109. Compare with observed retrenchments in court access and their implications: Judith Resnik, *Courts and Economic and Social Rights/Courts as Economic and Social Rights*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 2.

⁶⁹ *Cf.* Dennis Davis, *The Scope of the Judicial Role in the Enforcement of Social and Economic Rights: Limits and Possibilities viewed from the South African Experience*, in SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE (Helena Alviar García et al, eds., 2015).