Sandra Liebenberg. ***Socio-Economic Rights. Adjudication under a Transformative Constitution***. Claremont: Juta, 2010. Pp. xxv + 541. R610. ISBN: 9780702184802.

Writing in 2001 shortly after the South African Constitutional Court decided the celebrated housing-rights case *Grootboom*,[1] Cass Sunstein hailed the Court's 'extraordinary decision' as establishing 'a novel and promising approach to judicial protection . . . for each person whose socio-economic needs are at risk'.[2] Sunstein was referring to the Court's application of what it called 'reasonableness review' to issue an order requiring future modification of the challenged housing policies rather than a direct injunction providing housing for the plaintiffs in *Grootboom* who were facing eviction. For Sunstein – who only eight years earlier had argued strongly *against* inclusion of social rights in the constitutions of developing East European democracies[3] – the 'distinctive virtue' of the *Grootboom* approach was that it 'suggests that such rights can serve, not to preempt democratic deliberation, but to ensure democratic attention to important interests that might otherwise be neglected in ordinary debate'.[4] In a short response, Theunis Roux wrote that *Grootboom's* limited remedy 'was not extraordinary enough' because the Court's failure to, at a minimum, oversee compliance with even the very general terms of its order (much less provide any direct relief to the plaintiffs) fell far short of the expectations of advocates for the poor in South Africa and South African constitutional law experts more generally. [5]

That exchange captures the central divide in the debate over the South African Constitutional Court's approach to enforcing the social-rights provisions in the 1996 Constitution. On the one hand, many commentators (predominantly, but not exclusively, from outside South Africa) like Sunstein have found in the Court's measured approach the potential to avoid judicial usurpation of legislative and executive power over budgets and core policy priorities while still enforcing these rights.[6] Some on this side of the debate have linked the Court's approach to the broader literature on what Mark Tushnet has called 'weak-form review', in which the judiciary shares interpretive and enforcement authority over the constitution with other branches of government.[7] Critics, on the other hand, have charged the Court with failing to give social rights the teeth necessary to live up to their transformative potential, and in the process ignoring the harsh realities faced by the vast majority of South African citizens.[8]

Socio-Economic Rights: Adjudication Under a Transformative Constitution by Sandra Liebenberg, the HF Oppenheimer Professor of Human Rights Law at Stellenbosch University, provides a new

1 *Government of the Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC) ('*Grootboom*').

2 Sunstein, 'Social and Economic Rights? Lessons from South Africa', 11 *Constitutional Forum* (2000–2001) 123, at 123.

3 Sunstein, 'Against Positive Rights: Why Social and Economic Rights *don't* Belong in the New Constitutions of post-Communist Europe', 2 *E European Constitutional Rev* (1993) 35, at 35–38.

4 Sunstein, *supra* note 2, at 123.

5 Roux, 'Understanding Grootboom – A Response to Cass R. Sunstein', 12 *Constitutional Forum* (2002) 41, at 42.

6 See, e.g., Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation', 27 *S African J Human Rts* (2011) 107; M. Kende, *Constitutional Rights in Two Worlds: South Africa and the United States* (2009), at 260–275.

7 M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008). See also Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review', 8 *Int'l J Constitutional L* (2010) 385; Dixon, 'Creating Dialogue About Socioeconomic Rights: Strong-form Versus Weak-form Judicial Review Revisited', 5 *Int'l J Constitutional L* (2007) 391.

8 See, e.g., Brand, 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa', *Stellenbosch L Rev* (2011) 614; Wesson, 'Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v City of Johnnesburg*', 11 *Human Rts L Rev* (2011) 390.

and theoretically rich perspective on this debate. Drawing on Karl Klare's famous characterization of the South African Constitution as 'transformative', Liebenberg argues that the social-rights provisions in the Constitution are part of an 'enabling legal framework for redressing the injustices of the past and creating a transformed society' (at xxi).[9] Achieving this requires courts that are willing to develop a 'jurisprudence which opens up sustained and serious engagement with the normative purposes and values which socio-economic rights should advance within the historical and social context of South African society' (at xxi). It also means courts willing to abandon traditional, formalistic approaches to legal interpretation and understandings of separation of powers in favour of more 'flexible and dialogic models' (at xxii). While ultimately falling in the critics' camp within the broader debate over the Constitutional Court's approach, Liebenberg develops a nuanced, deeply textured, and theoretically informed account of how the Court's existing jurisprudence can be developed into a more aggressive and more effective judicial role. In the process, Liebenberg provides a technically rich and nearly encyclopaedic description of social rights in South Africa.

The book's ten chapters begin with an historical account of the constitutional negotiations over social rights and the close connection between these rights and the *apartheid* legacy. This establishes the background for Liebenberg's larger argument that meaningful enforcement of the social-rights provisions is an integral part of the overall transformation of South African society promised by the Constitution and necessary to overcome the effects of *apartheid.*

Chapter 2 introduces Klare's concept of transformative constitutionalism and explains the radical departures transformation requires from the classic, liberal conceptions deeply embedded in South Africa's legal tradition. Liebenberg identifies transformation with a commitment to participatory and deliberative democracy. She argues that court enforcement of social rights should reflect the flexibility and inclusiveness that characterize deliberative democracy but also must accept the responsibility for identifying the 'normative commitments' in these rights. This means courts that 'seek to stimulate participatory strategies by government and civil society to give effect to constitutional rights' (at 41), but also courts that provide 'substantive interpretation of socio-economic rights' and '[e]laborat[e] on the normative commitments and purposes of these rights' (at 40). Liebenberg acknowledges that '[t]here is clearly a tension between adjudication as a forum for authoritative decision-making according to binding legal norms, and its potential to serve as a forum for deliberation over the meaning and implication of the normative commitments in a Constitution' (at 33–34). But she insists that, as they are fully justiciable rights in the Constitution, courts need to embrace their responsibility to interpret the substance of these rights.

Here we see the major fault line that runs beneath Liebenberg's careful attempt to both acknowledge and still move beyond the classic critique of court control over social policies. Liebenberg clearly recognizes that giving courts too large a role in the difficult details of things like housing and health-care policy cannot remedy the deep inequalities that permeate South African society: '[a]n approach premised on the courts possessing all the answers on how best to realise socio-economic rights can also have negative repercussions for democratic transformation' (at 40). At the same time, she wants South African courts to embrace a much more aggressive role in identifying specifically what the social-rights provisions require: '[i]t does not follow that the courts should avoid developing a substantive interpretation of socio-economic rights' (at 40). Liebenberg's solution is to call for a managerial role for courts that '[w]herever possible . . . seek[s] to stimulate participatory strategies by government and civil society' but without relinquishing the courts' ultimate control over – and responsibility for identifying – 'the normative standards these rights impose' (at 41).

[9] Klare, 'Legal Culture and Transformative Constitutionalism', 14 *S African J Human Rts* (1998) 146.

Chapter 3 places social rights within the larger context of the overall Bill of Rights, and also connects them to international human rights, especially the International Covenant on Economic, Social and Cultural Rights (ICESCR). The next several chapters trace the judicial development of several specific social-rights provisions, beginning with the Constitutional Court's reasonableness review standard and moving through the rights of children and other vulnerable groups in Chapter 5, evictions and housing law in Chapter 6, and finally an extended consideration of the potential effect social rights can have on private law in Chapter 7.

In each of these chapters, Liebenberg offers fresh insights on cases that have received considerable attention from other commentators (as well as Liebenberg herself), and also presents a comprehensive discussion of the state of the law in each area. The theoretical argument developed in Chapter 2 that courts should be committed to a deliberative and democratic jurisprudence that nonetheless imposes strong substantive interpretations provides the central organizing framework for the discussion throughout these chapters.[10]

Chapter 4, 'Reconceiving Reasonableness Review', provides the most concrete development of Liebenberg's prescription for an interpretive approach that will permit courts to straddle the line between a democratic jurisprudence and judicial control. While the reasonableness review that the Constitutional Court developed in its initial social-rights cases in many ways 'provides the courts with a flexible and context-sensitive basis for evaluating socio-economic rights claims' that appropriately 'avoids closure and creates the ongoing possibility of challenging various forms of socio-economic deprivations', it does not go far enough for Liebenberg (at 174). Specifically, the Court's approach suffers from two major flaws. First, it conflates interpretation of the substance with discussion of the resources-justification that most social rights contain. Secondly, this conflation has impoverished the Court's analysis of what each right requires in the abstract, creating a 'normative vacuum' that undermines meaningful challenges to the measures the state has adopted to fulfil its obligations under each right.

Liebenberg argues for a revised and expanded version of reasonableness that requires courts in every social-rights case independently to develop 'the content and values' not only of the social rights themselves but also in their connection to other rights in the Constitution, including, most prominently, the rights to life, equality, and human dignity (at 224). Liebenberg points to the High Court's opinion in *Mazibuko* – a water-rights case where the court held that 50 litres of water per person per day was the minimum that section 27 required – as an example of the kind of substantive engagement she envisages.[11] She also cites international and comparative models including a housing-rights decision by the European Committee on Social Rights that provides specific guidance on the contours of the right requiring policies that "'promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and include essential services (such as heating and electricity)'".[12]

Here the tension between Liebenberg's desire to increase judicial control through stronger substantive intervention and her recognition of the need for a participatory, dialogic approach

[10] See, e.g., at 134 ('I argue for a reconceived model of reasonableness review which is grounded in a substantive interpretation of the socio-economic rights protected in ss 26 and 27'); at 242 ('[i]f claims brought on behalf of children for access to socio-economic rights are to be evaluated in terms of the reasonableness standard, it is apposite, given the special needs and vulnerability of children, that the courts require stringent standards of justification from the State'); at 267 ('[e]nforcing [the duties imposed by the social-rights provisions] clearly requires a delicate and skilful interaction with the other branches. But it should not result in a denial of their distributional implications, nor an abdication on the part of courts of their duty to craft innovative and effective remedies when breaches are identified').

[11] *Mazibuko v. The City of Johannesburg* (Centre on Housing Rights and Evictions as *amicus curiae*), [2008] 4 All SA 471 (W).

[12] Liebenberg at 179 (quoting *European Roma Rights Centre v. Greece*, Complaint No. 15/2003, at para. 24).

to enforcing these rights re-emerges. Liebenberg again addresses this tension directly, noting that '[a] robust judicial role in developing the content of the socio-economic rights in ss 26 and 27 appears at first blush to detract from the deliberative, participatory forms of democracy which I have argued transformative constitutionalism seeks to foster' (at 224). She nonetheless argues that courts can 'enhance deliberative democracy by stimulating dialogic engagement by other branches of government and the broader public' while still fulfilling their 'responsibility to pronounce on the meaning and implications of the rights in the Bill of Rights' (at 224).

Liebenberg never completely reconciles the tension between courts as both participants in a broader dialogue with the political branches and the source of strong substantive interpretations. Thus, she maintains that '[d]eveloping the substantive meanings [of these rights] should not imply arriving at a comprehensive and final definition' and that 'the normative content of socio-economic rights should always remain contingent and incomplete' (at 180). But she does not provide many specific examples of ways in which courts can maintain the incompleteness necessary to permit continued democratic dialogue while issuing stronger substantive decisions.

At times, it appears that substantive reasonableness review may require nothing more than an expanded analysis of the overall content of each right in the abstract. For example, Liebenberg applauds the *Grootboom* judgment's recognition that '"housing entails more than bricks and mortar"' as the kind of substantive development she seeks.[13] But she goes on to criticize the Court's meagre 'engagement with various important purposes and values protected by the right to housing', suggesting that the Court could have developed a robust version of reasonableness review through extended discussion of housing's central role on both a practical and theoretical level (at 177). Yet, Justice Yacoob in *Grootboom* explicitly recognized the 'close relationship between [the right to housing] and the other socio-economic rights' as well as its interconnectedness to other core constitutional values, including the right to be free from unfair discrimination, and the complementary role these rights collectively play in addressing the 'legacy of deep social inequality' of *apartheid*.[14] It is not clear how a more extensive discussion in this same vein would have contributed to the kind of development Liebenberg envisages.

Liebenberg later suggests that the real deficiency was the Court's failure to issue an order that either told the state how to change its policies or retained supervision over the state's independent development of new policies to ensure that they complied with section 26 (or possibly some combination of both) – an approach that seems to eliminate or severely constrain democratic dialogue.[15]

Although Liebenberg does not offer many concrete examples to illustrate how substantive reasonableness review can navigate the challenge of strengthening court interventions while still maintaining the commitment to participatory and democratic development of these rights that is its hallmark, she develops a unique vision of the judicial role that draws on both sides of the debate over court enforcement of social rights. Perhaps the best example of this deft incorporation of competing approaches is her simultaneous rejection and re-assimilation of the 'minimum core' approach that many critics have argued the Constitutional Court should adopt in social-rights cases.

Drawn from interpretations of the ICESCR, the minimum core concept imposes an unqualified duty on the state to satisfy a defined minimum essential level of benefit for every person (at 148 and n. 85). After extensive discussion of the arguments for and against the concept, Liebenberg rejects the strong version of it. On the one hand, she writes, the minimum core is

[13] *Grootboom*, *supra* note 1 at para. 35.

[14] *Ibid.*, at paras 22–25.

[15] Liebenberg acknowledges that the purely declaratory order 'may have been warranted in the light of the fact that it was the first major test case in which the Court elaborated' on s. 26's requirements (at 409). But the *Grootboom* situation arguably failed the criteria she says must be met for a court to issue a purely declaratory order.

overly rigid, risking 'closure in broader deliberative and discursive processes' for interpreting these rights (at 167). On the other, the core's promise to establish a clear baseline for enforcement is reductionist and risks 'encouraging minimalism in social provisioning' that undermines the transformative potential of social rights (at 169). Rather than completely jettisoning the concept, however, Liebenberg argues for incorporating it into substantive reasonableness as an analytical tool for developing the substantive content of social rights. This both avoids the rigid two-tier approach she finds problematic and also frees the core from the 'survival-based standard' that threatens to diminish social rights.

The book carefully develops the foundation for a more robust court role out of the Constitutional Court's existing jurisprudence, but, at bottom, Liebenberg appears to believe that the existing jurisprudence falls short of what is required to make social rights an effective transformative tool. She makes this plain in the final three chapters, beginning with Chapter 8, where she insists that courts must be much more willing to use direct remedies to enforce these rights, and then even more prominently in Chapter 9 where she castigates the Constitutional Court's reversal of the lower court's decisions in the water-rights case *Mazibuko*.[16]

Chapter 8 provides a specific and detailed analysis of the range of remedies that courts can employ to enforce the social-rights provisions. Liebenberg covers the full range of constitutional remedies and considers the particular concerns that social rights raise for the application of each. The core of the chapter is her argument that the Constitutional Court's social-rights cases generally have failed fully to 'come to grips with the fact that [social rights] violations are the product of systemic injustices perpetrated against classes of people over generations' (at 379).

Grootboom illustrates this failure. There the Court limited its remedy to a declaration that the state's housing policies violated the right to access to adequate housing by failing to provide any meaningful plan for addressing the emergency needs of people facing imminent homelessness or otherwise living in intolerable conditions.[17] Liebenberg celebrates the 'far-reaching impact' *Grootboom*'s declaration has had in preventing unconstitutional evictions and the leverage the decision has created for housing-rights advocates (at 406–407). Despite this significant effect, implementation of the central aspect of the order – reforming the state's overall approach to housing – took several years, and many question whether the policies that resulted satisfy *Grootboom*'s requirements. Liebenberg argues that this experience highlights the severe limitations of declaratory relief where (1) individuals seeking relief face serious consequences from delay; (2) the state lacks a clear definition of its constitutional obligations; and (3) other similar groups will face substantial obstacles in enforcing the terms of the Court's order.

The answer lies in a greater willingness to adopt injunctive relief, including long-term structural injunctions where courts retain supervisory jurisdiction and provide substantive guidance on the obligations these rights impose. Liebenberg recognizes that remedies must be context-specific and many cases will require less direct court intervention, but she concludes by emphasizing the need for remedies that promote ongoing interactions among the state, civil society, and affected communities – a process that structural interdicts are well-suited to stimulating.

The book closes with a somewhat pessimistic Postscript in Chapter 9 discussing three cases the Constitutional Court decided as the book was being prepared for press. The focus is on the *Mazibuko* decision that Liebenberg says 'represents the antithesis of the substantive, contextually sensitive approach' the book presents (at 463). There the Constitutional Court rejected two lower-court opinions that held unconstitutional the City of Johannesburg's policy of installing pre-paid water meters that limited each household's free water to 6 kilolitres per month.[18] Liebenberg's close reading and impassioned critique of the Court's analysis provides the most

[16] *Mazibuko v. City of Johannesburg*, 4 SA 1 (CC) (2009).

[17] *Grootboom*, *supra* note 1, at para. 99 (Order 2(b) and (c)).

[18] *Mazibuko*, *supra* note 11.

concrete example of the direction she thinks the Court must take to convert reasonableness review into a substantive standard. She first takes the Court to task for 'reduc[ing] the analytical work performed by ss 26(1) and 27(1) to almost negligible proportions' by dismissing out of hand each of the substantive challenges to the City's water policy without offering anything beyond generic 'process-orientated' standards by which to assess state policy (at 470).

Liebenberg points out several ways in which the Court could have developed a more substantive analysis without imposing an inflexible and unreasonable standard. For example, the Court dismissed the Supreme Court of Appeal's finding that the City misunderstood its obligation under section 27(1) when developing the water policy because it did not think it was required to provide any specific amount of water to each person or household. It also rejected arguments by the residents that the policy inflexibly ignored the large variation in size of individual households as well as statutory arguments that the installation of pre-paid meters violated the terms of the City's own policy. Finally, the Court ignored the clearly retrogressive effect of replacing a policy of providing unlimited free water with one that imposed an automatic cut off. Each of these arguments offered the Court a context-specific way to provide some degree of substantive guidance without completely (or, in the case of the statutory argument, even minimally) displacing the government's own policies.

Socio-economic Rights is at the vanguard of a growing literature that both engages with the long-standing debate over democratic legitimacy and courts' capacity to enforce social rights and seeks to move beyond it by addressing the knottier and more complex challenges of identifying effective court enforcement mechanisms.[19] The seeds of this new, more pragmatic enforcement discussion were sown in the earlier legitimacy/capacity debate. Defenders of constitutional social-rights guarantees often pointed towards what Frank Michelman has described as 'ho-hum' forms of judicial action – declaratory orders, case dismissals, and other interventions that would keep courts on the sidelines of policy and budget decisions while still permitting them to referee a democratic discussion by asking hard questions about these rights.[20] There seems to be a growing consensus that stopping at 'ho-hum' forms of action may not be enough.[21] The harder and still unresolved question is how to make court enforcement more effective without straining too far these perceived capacity and legitimacy limits.

Liebenberg develops a provocative range of possible answers and adds a rich contribution to the social-rights literature in the process.

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[19] Recent examples include K.G. Young, *Constituting Economic and Social Rights* (2012); J. King, *Judging Social Rights* (2012); Landau, 'The Reality of Social Rights Enforcement', 53 *Harvard Int'l LJ* (2012) 189; Brand, *supra* note 8.

[20] Michelman, 'The Constitution, Social Rights, and Liberal Political Justification', 1 *Int'l J Constitutional L* (2003) 13, at 16. A famous example of this during the debate in South Africa is Etienne Mureinik's article 'Beyond a Charter of Luxuries: Economic Rights in the Constitution', 8 *S African J Human Rts* (1992) 464.

[21] I do not mean to attribute to Michelman the view that ho-hum forms are sufficient only to acknowledge him as the source of the description.