

The Avoidance of Substance in Constitutional Rights

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I INTRODUCTION

Avoidance, on the part of the judiciary, calls to mind a number of judicial postures. We might imagine a court declining to hear a certain matter, by denying cert or dismissing a writ or refusing an appeal. Or we might imagine a court deciding a case on other grounds, avoiding a hotly contested issue by choosing to deal with an apparently more straightforward legal argument. Such avoidance techniques are entirely familiar to the comparative observer of economic and social rights. Quintessentially ‘political’, quintessentially ‘contested’, economic and social rights have long been cast as political questions or as non-judicially manageable standards or in other ways set up for familiar avoidance measures.¹ Avoidance calls to mind an act of refraining, refusing, rejecting: to which the judicial silence around economic and social rights – silence only really brought to an end in the past two decades, and then only in some places – attests.

Yet this is not the kind of avoidance that Brian Ray, in his lead article ‘Evictions, Avoidance and the Aspirational Impulse’, has in mind. Avoidance, for Ray, is both more subtle and more involved than this familiar use of the term. In dialogue with earlier South African commentary, Ray’s categorisation of avoidance signals an active posture of economic and social rights decision-making that limits the substantive development of constitutional doctrine, cedes to current legislation or policy the frame of rights analysis, and deliberately marginalises the judicial role.²

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¹ For example, in turning to the question as to whether Australia should recognise economic and social rights within a new legislative charter of human rights, the then Commonwealth Solicitor-General of Australia (now High Court Justice), and Senior Legal Advisor, suggested that economic and social rights were non-justiciable, as late as 2009: Stephen Gageler SC and Henry Burmester QC, ‘In the Matter of Constitutional Issues Concerning a Charter of Rights’ Opinion, SG No 40 of 2009, 15 June 2009 [Initial Opinion]; and Stephen Gageler SC and Henry Burmester QC, ‘In the Matter of Constitutional Issues Concerning a Charter of Rights’ Supplementary Opinion [Supplementary Opinion], SG No 68 of 2009, 7 September 2009. These opinions are reproduced in National Human Rights Consultation Committee, National Human Rights Consultation Report (2009) Appendix E (Australia).

² ‘Avoidance’ meant, in the early years of the Constitutional Court’s work, that the Court should avoid deciding matters on constitutional grounds if non-constitutional grounds were available. See *S v Mhlungu* [1995] ZACC 4, 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59; *Zantzi v Council of State, Ciskei* [1995] ZACC 9, 1995 (4) SA 615 (CC) at para 8. See also I Currie ‘Judicious Avoidance’ (1999) 15 *South African Journal on Human Rights* 138, 147 (Distinguishes certain avoidance-favouring rules of justiciability and procedure from a more general posture of minimalist avoidance in South Africa.) For further notes on the South African debates associated with decisional minimalism, see below at note 15.

Thus for Ray, the South African Constitutional Court's avoidance techniques include the use of reasonableness review, the creation of new procedural remedies, the deployment of either extremely abstract constitutional deliberation or extremely fact-specific deliberation (without, he contends, the moderate use of either), and a tendency to find infringements of the obligations attached to social rights only in the face of clearly unconstitutional conduct, or 'easy cases'³, with a retreat to deference in harder cases.⁴

Ray is critical of these techniques because of their cumulative effect: together, they signify avoidance because they 'tend to push the Court away from playing an independent role in interpreting and enforcing the social rights'.⁵ By itself, each technique may be a productive contribution to social rights realisation. Indeed, Ray himself has celebrated the creative design of the meaningful engagement remedy.⁶ Taken together, however, the techniques give the political branches the latitude to give substance to such rights, at the cost of the Court.⁷ Over time, the use of such techniques can lead to the weakening of the Court's institutional authority, and 'severely constrains its capacity to act as an independent partner in developing and implementing the social rights provisions'.⁸

This is not to say that Ray clearly advocates the embrace of substance. He does not fall into the minimum core camp; which camp would advise the Court to give explicit substance to minimum levels of housing, health care or other economic and social rights and rule accordingly, whether as a rule or standard. While Ray wants a court to give an 'independent, normative account of what the socio-economic rights require',⁹ he is ambivalent about the degree of substance that should be settled alone by the Court. He wants the Court to stop avoiding substance. Whether it should do so by adding a new technique to displace the cumulative effect of the Court's current practice, or by desisting from one or other of the current techniques, is left unstated. Ray advocates what he terms 'thick subsidiarity', building on Andre van der Walt's original proposal for aligning judicial power with democracy.¹⁰

Thick subsidiarity supports the Court's reliance on Constitution-enforcing legislation or policy, rather than the common law or the Final Constitution.¹¹ Put slightly differently, it favours statutory interpretation that allows for the elaboration of constitutional substance. This allows the Court to maintain an

³ D Brand 'Proceduralisation in Rights and Democracy' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33; D Brand 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' 22 *Stellenbosch Law Review* 616 (2011).

⁴ Brian Ray, 'Evictions, Aspirations and Avoidance' (2013) 5 *Constitutional Court Review* 219.

⁵ *Ibid* at 181.

⁶ B Ray 'Extending the Shadow of the Law: Using Hybrid Mechanisms to Establish Constitutional Norms in Socioeconomic Rights Cases' 2009 *Utah Law Review* 797 (2009).

⁷ Ray (note 4 above) at 174, 188.

⁸ *Ibid* at 182.

⁹ *Ibid* at 192.

¹⁰ AJ van der Walt, 'Normative Pluralism and Anarchy' (2008) 1 *Constitutional Court Review* 77' (2008); AJ van der Walt 'The Constitutional Property Clause: Striking a Balance between Guarantee and Limitation' in J McLean (ed) *Property and the Constitution* (1999).

¹¹ Ray (note 4 above) at 190, 198, 203, 205.

expansive view of its own authority, at the same time as advancing a broad construction of a legislative power. In the evictions context, this means a pro-rights interpretation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 or the Rental Housing Act 50 of 1999 which would allow the Court both temporarily to limit private property rights (in *Blue Moonlight*¹² and *PPC Quarries*¹³) and to require evicting cities to provide alternative accommodation to any occupiers (whether they be on public or private property) within a specific timeline and prior to eviction (*Golden Thread*¹⁴). Ray is generally supportive of these recent judgments. They have managed to address the messy issues of the state's obligations in private property and public housing conflicts. That said, he remains critical of the Court's general failure to spell out more adequate guidelines for the resolution of future evictions scenarios.

Ray uses the avoidance category to castigate the Court while giving coherence to a seemingly disparate number of judicial techniques, some of which, as we know, he encourages. In this comment, I take issue with the category of avoidance, and its corollary, of substance, which I suggest complicates the descriptive and normative picture that Ray seeks to tell. I then present an alternative reading of the Court's social rights jurisprudence, by depicting a typology that encompasses the Court's ability to catalyse the resolution of the problems obstructing the right in question. I contrast this model with alternative judicial postures in comparative settings – in Colombia, India and the United Kingdom – which offer judicial role conceptions that we can heuristically understand as supremacist, engaged or detached roles respectively. I suggest that substance, and the avoidance of substance, is a blunt and misleading category distinction for this type of comparative analysis.

II AVOIDING SUBSTANCE?

Ray's account of the Court's substance avoidance is descriptively and normatively unsettled. On descriptive grounds, the category of avoidance is difficult to attach to the various techniques of political enforcement, procedural creativity, easy cases, and adjudicating at the abstract or fact-specific extremes. Avoidance, even when delinked with the more familiar curial techniques described in the opening paragraph of this comment, implies a static posture of adjudication. It is one that deflects constitutional responsibility by non-deciding. In the South African context, avoidance is also related to the preference stated by the Constitutional

¹² *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33, 2012 (2) SA 104 (CC).

¹³ *Occupiers of Skuurveelaas 353 JR v PPC Aggregate Quarries Ltd* [2011] ZACC 36.

¹⁴ *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* [2011] ZACC 35, 2012 (2) SA 337 (CC).

Court, in its earlier decisions, for slow and incremental doctrinal development.¹⁵ Avoidance is difficult to reconcile, then, with the Court's alteration of existing legislation to include a new category of welfare recipients in *Kbosa*¹⁶ – surely a stunning work of non-avoidance – or the active design of a new standard of review and remedy to ensure a meaningful deliberation between rights claimants and duty-holders in *Olivia Road*.¹⁷ The description of the Court's preference for ruling in easy cases, too, fails to account for the selectiveness of the litigation brought: not so much the work of an avoiding Court, as a wily public interest sector.¹⁸

On normative grounds, too, the category is opaque as prescription or criticism. For supporters, avoidance aligns with the Court's 'passive virtues' of the non-elected, counter-majoritarian, branch.¹⁹ A long tradition of constitutional scholarship supports the refusal to decide cases on substantive grounds if narrower grounds exist,²⁰ the minimalist rejection of expansive pronouncements

¹⁵ Eg *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para 20 (joint judgment of Ackermann J, O'Regan J and Sachs J); Currie, note 2 above. Stu Woolman has taken vigorous issue with the practice of avoidance, elevated to a principle of decisional minimalism: S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 763–764; S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 28–30, 38–40 (Suggests, among other criticisms, that the posture of avoidance subverts the dialogue and interpretive guidance otherwise available between the Constitutional Court and other courts, other branches, private parties, the legal profession, law schools and the public, and, to be an attractive theory, relies on a normative consensus lacking in South Africa); Compare with F Michelman 'On the Uses of Interpretive Charity': (2008) 1 *Constitutional Court Review* 1 (Disputes the inevitability of a connection between decisional minimalism and a flight from substance).

¹⁶ See J Dugard & S Wilson 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' (2011). 22 *Stellenbosch Law Review* 664 (2011).

¹⁷ *Occupiers of 51 Olivia Road Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* [2008] ZACC 1, 2008 (3) SA 208 (CC). For notable advancements on this theme, see *Joe Slovo I* and *Joe Slovo II. Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC) ('*Joe Slovo I*') (Court order of supervised eviction with numerous conditions, including engagement) and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2011] ZACC 8, 2011 (7) BCLR 723 (CC) ('*Joe Slovo II*') (Court rescinding eviction order). See also *Governing Body of the Juma Masjid Primary School & Others v Essay NO & Others* [2011] ZACC 13, 2011 (8) BCLR 761 (CC) (Court holding that right to basic education applied to both private parties and organs of state – both required to hammer out a solution before any final determination by the Court.)

¹⁸ While the Court has signalled a receptiveness to economic and social rights litigation, this openness can appear to take the form of rhetoric, rather than doctrinal invitation. See *Mazibuko v City of Johannesburg* [2009] ZACC 28, 2010 (4) SA 1 (CC) at paras 159–165. On the connections behind earlier rhetorical strategies by the Constitutional Court and the pressures of enforcement, see T Roux *The Politics of Principle: The Constitutional Court of South Africa, 1995–2005* (2013) 383–386.

¹⁹ The counter-majoritarian difficulty has a distinctive set of responses in South Africa, which depart from the conventional US terms of the debate. While here is not the place to canvas the distinctions in full, some have made the case that the Constitution's limitation clause was consciously designed to overcome the counter-majoritarian dilemma, and that dilemma is not a dilemma when the text of the Constitution itself can be traced directly back to a Constitutional Assembly (consisting of Members of Parliament) elected by all of South African citizens on 27 April 1994: see S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, 2006) Chapter 34. See, in particular, *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) at paras 27–30.

²⁰ See A Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

of law,²¹ or other postures of judicial modesty or restraint.²² Ray departs from this standpoint by celebrating a more maximal authority on the part of the court, but one that is shared with the other branches: thus breaking the inverse relation that inevitably equates the power of the court to a weakening of the legislature. He borrows this insight from US scholar Pamela Karlan, who notes that '[e]ven a court with an expansive view of its own authority may, as a practical matter, leave a great deal of room for the political branches' choices if it takes a broad view of enumerated powers'.²³

Karlan has in mind the Warren Court in the United States: a Court with a 'distinctively optimistic view of the potential of politics to serve constitutional values',²⁴ which combined its famous exercises of counter-majoritarian enforcement of the Constitution, such as in *Brown*,²⁵ with significant deference to legislative innovations, especially in voting and election law. Karlan sets out to contrast the Warren Court to its much later successor in the Roberts Court: a Court disdainful of politics and the innovations of the legislator, which she suggests has set out to reverse the core of the Warren Court's legacy.²⁶ The Roberts Court, like the Warren Court, maintains an expansive view of judicial power yet combines this assertiveness with a narrow view of federal power. This position has clear ideological overtones: it threatens any positive realisation on the part of the state of the constitutional values of liberty, equality or dignity.²⁷

We might expect such a contrast to have less heft in the context of the South African Constitutional Court, despite the similarities with Warren Court sensibilities.²⁸ The Warren Court was obviously a differently composed Court from the South African Constitutional Court, despite the unusual appointments made in each Court. It was also dealing with a different legislature. The Warren Court could defer to the innovations that arose from the Voting Rights Act of 1965 and the Civil Rights Act of 1964, in ways that may be more complicated for a Court dealing with the dominant-party democracy of the ANC.²⁹ In short, the interplay of maximal authority with inter-branch synergies is contingent: in the US context, as in South Africa circa 1994 and South Africa circa 2014. And where Karlan's intervention is a pointed attack on the negative constitutionalism of the

²¹ See C Sunstein 'Beyond Judicial Minimalism' 43 *Tulsa Law Review* 825 (2008); I Currie, note 2 above.

²² See J Thayer 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129.

²³ P Karlan 'Foreword: Democracy and Disdain' (2011) 126 *Harvard Law Review* 1, 12 (2011).

²⁴ *Ibid* at 13.

²⁵ *Brown v Board of Education of Topeka, Kansas* 347 US 483, 74 SCt 686, 98 LEd 873 (1954) ('*Brown I*') supplemented by *Brown v Board of Education of Topeka, Kansas* 349 US 294, 75 SCt 753, 99 LEd 1083 (1955) ('*Brown II*').

²⁶ Karlan (note 23 above) at 11.

²⁷ As Karlan puts it, 'In a world where liberty, equality and dignity may depend on the provision of government services, the political branches might often be better equipped than the courts to vindicate values.' *Ibid* at 125.

²⁸ See K Young 'Provocation: The Comparative Turn: Accident, Coincidence, or Fate?' (2012) 125 *Harvard Law Review Forum* 236.

²⁹ See T Roux *The Politics of Principle: The First 15 Years of the South African Constitutional Court* (2013) 363.

Roberts Court, it follows that it possesses less traction where positive obligations on the part of the state are explicit, and are pretty well accepted.

III CATALYSING SUBSTANCE

Let me provide an alternative reading of the Court's social rights jurisprudence. In many cases, I suggest that the Court has acted dynamically rather than statically, and actively rather than obstructively. Indeed, it has adjudicated so eclectically – by sometimes acting deferentially, other times conversationally, and on still other occasions with an experimentalist, managerialist or peremptory bent – that a typology is appropriate to capture its multifaceted role.³⁰ Hence, although the Court's coercive authority is used to a different degree in each case, this is not a simple case of weak versus strong authority or a spectrum of avoidance techniques:³¹ the power the Court deploys in enforcing economic and social rights is multidimensional. For example, the Court may interpret the right at hand in a minimal or maximal way; it may evaluate the government's actions as against a standard or a rule or by exercising different degrees of scrutiny; it may design remedies which oversee deliberations or rewrite legislation or force new policy, conditional upon various criteria being met.

The deferential mode of review is most familiar to us, and describes the deference to the epistemic and democratic advantages of legislation or policy over judicial decision-making. Deference captures the earliest denial of social rights relief in *Sobramoney*³² as well as something of the modesty shown towards housing policy in *Grootboom*.³³ With conversational review, the Court is instead reliant on the ability of an inter-branch dialogue to resolve the determination of rights. This goes further than deference by stressing the representative accountability of the legislature and executive to their electors, and instituting a judicial dialogue to undergird this accountability: an example of this was the Court's finding that the government's HIV policy was unreasonable and its order that the government facilitate access to the anti-retroviral drugs in question in *Treatment Action Campaign*.³⁴

A third type of review, experimentalist review, captures the way in which the Court seeks to involve the relevant stakeholders – government, parties, and other interested groups – in solving the problem which obstructs a provisional benchmark of the right.³⁵ The remedy of meaningful engagement first devised

³⁰ See K Young *Constituting Economic and Social Rights* 143 (2012). The following analysis draws on my recent monograph. See also K Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 *International Journal of Constitutional Law* 385.

³¹ See M Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009).

³² *Sobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17, 1998 (1) SA 765 (CC).

³³ *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC).

³⁴ *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC).

³⁵ This posture displays the central features of the experimentalist programme outlined by US scholars such as Michael Dorf, Chuck Sabel and Bill Simon. See, eg, M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (1998) 103 *Columbia Law Review* 267; C Sabel & W Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1016.

in *Port Elizabeth*³⁶ is an approximate example. Managerial review occurs when the court assumes a direct responsibility for interpreting the substantive contours of the right and supervising its protection with strict timelines and detailed plans: more commonly observed in lower courts adjudicating social rights in South Africa.³⁷ Finally, peremptory review is involved when the court registers its superiority in interpreting the right, again a stance entirely familiar to us (and to critics who favour avoidance), and pretty clearly demonstrated in *Khosa*.³⁸

In the context of evictions, this typology provides a myriad of strategies open to the Court: whether in deferring to city zoning, nudging long-term improvements to housing policy, supervising negotiations, or dictating and managing detailed housing reforms. The Court is variously active or passive, ambitious or modest, involved or restrained. In all counts, it is not the embrace or avoidance of substance that separates the decisions. My work suggests that it is the pragmatic sense of catalysing a resolution to the problem at hand: in this case, of the Court requiring other actors – the legislature, bureaucracy, City, landlords, eviction companies, occupiers, and social movements to work together to realise the right to housing.³⁹

The metaphor of the catalyst suggests that the Court lowers the political energy that is required to change the protection of economic and social rights, in a non-neutral way.⁴⁰ As the best reading that could be given to the development of South African economic and social rights jurisprudence, I argue that this catalytic mode of review has come about by a court's calibrated response to the degree of intransigence, incompetence or inattentiveness observed in the other branches of government⁴¹ – postures that disrupt the work of public power and are often immune to political control. In celebrating the ability of the Court to 'shape, prod, control', Ray is himself supporting the catalytic role. Hence, the catalytic court occupies a procedural position that is substantively inflected all the way down.

³⁶ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC).

³⁷ See *Grootboom v Oostenberg Municipality* [1999] ZAWCHC 1, 2000 (3) BCLR 277 (C).

³⁸ *Khosa v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC).

³⁹ Woolman offers an entirely sympathetic, if not entirely identical, set of arguments regarding the nature of experimental constitutionalism, as well as its alignment with a socially democratic, judicially determined cast to substantive Bill of Rights provisions, and a very similar construction of the Court's emerging experimentalist jurisprudence, in *The Selfless Constitution* (note 15 above). Indeed, the critique of avoidance outlined in that work, and its distillation of the norms fleshed out in Amartya Sen's development theory and Martha Nussbaum's capabilities approach, bear strong parallels to my own analysis. See S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) (drawing on, for example, M Nussbaum 'Constitutions and Capabilities: "Perception" against Lofty Formalism' (2007) 121 *Harvard Law Review* 4; A Sen *Development as Freedom* (1999); M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (note 35 above).

⁴⁰ Young *Constituting Economic and Social Rights* (note 30 above) at Chapter 6.

⁴¹ See also K Roach & G Budlender, *Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?* 122 *South African Law Journal* 325, 345–350 (2005), citing C Hansen 'Inattentive, Intransigent and Incompetent' in SR Humm (ed) *Child, Parent and State* (1994) 224, 232.

IV COMPARATIVE APPROACHES TO SUBSTANTIVE DECISION-MAKING

Such a typology is useful comparatively. Let us take the example of economic and social rights in another new constitutional democracy. Colombia's 1991 Constitution contains the protection of what it terms the social state governed by the rule of law, with important protections of rights to such goods as health care.⁴² As in South Africa, the new Colombian Constitutional Court is seen as a key part of the new constitutional settlement. The Constitution devised new access to justice procedures, the most innovative of which is the *tutela* action, which allows any individual to seek protection of his or her constitutional rights.⁴³ A successful *tutela* can result in an injunction on any public authority. It is important to see how radical such instruments are. They are instituted in lower courts and ratified by the Colombian Constitutional Court – that Court has in fact received over a million *tutelas*. Many of these involve social rights, especially the right to health.

The Colombian Constitutional Court has embraced the substance of rights in an explicit, public way, in a form I term supremacist. In a reinterpretation of its civil law traditions, the Colombian Constitutional Court has gathered information, prepared large-scale public hearings, dictated policy and managed resources.⁴⁴ It has issued a substantive conception of economic and social rights, and redrawn the government's list of health entitlements to award claimants access to health treatments that they had been denied.⁴⁵ In a series of cases the Colombian Constitutional Court has followed a substantive, core right to health that borrows expressly from international law.⁴⁶ In Ray's terms, the Court is not avoiding substance: although it is also not engaging in the thick subsidiarity he commends. If we were to examine this jurisprudence through the typology above, we would find an example of managerial review – the Court has dictated which aspects of health care must be supported in the government's scheme.

Individual claimants have indeed been satisfied in seeking certain health care entitlements. Yet, what have followed have been many of the shortcomings of managerialism that we can predict – from examples in the United States.⁴⁷ Managerialism has taken up a huge amount of judicial resources and has led to a perception of queue jumping.⁴⁸ The unintended effects of the cases have included an unprecedented cost burden on the health system, a peremptory order in 2008

⁴² Constitution of Colombia, 1991, art 1 (social state of law, *estado social de derecho*), chapter 2 (social, economic and cultural rights).

⁴³ Constitution of Colombia, 1991, art 86.

⁴⁴ See, eg, Decision T-760 of 2008, C.C., (Julio 31, 2008), Sentencia T-760/08 (slip op.), available in Spanish at <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm>. See, further, MJ Cepeda-Espinoza 'Transcript: Social' and Economic Rights and the Colombian Constitutional Court' (2011) 89 *Texas Law Review* 1699.

⁴⁵ K Young & J Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa*, 26 *Harvard Human Rights Law Journal* 179 (2013). See also A Yamin, O Parra-Vera and C Gianella 'Colombia: Judicial Protection of the Right to Health: An Elusive Promise?' in A Yamin & S Gløppen (eds) *Litigating Health Rights* (2011) 103.

⁴⁶ Young & Lemaitre (note 45 above).

⁴⁷ The resonant precursors at the appellate court level are *Brown I* and *Brown II*. See, further Young *Constituting Economic and Social Right* (note 30 above) at 156–162.

⁴⁸ See D Landau 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard International Law Journal* 198 (offering a general critique based, in part, on Colombian case studies).

by the Colombian Constitutional Court for the legislature to reform the health system, a counter-response to override the Colombian Constitutional Court through an emergency decree, followed by a heated cycle of public protest.⁴⁹ It is quite difficult to measure whether these dynamics have led to a greater protection of fundamental interests in health over the longer term: risks that Ray would probably not be willing to endorse.

This troubling uncertainty can be profitably contrasted with the Indian Supreme Court's inclination toward forms of conversational and experimentalist review. The Constitution of India entrenches a range of economic and social rights, predominantly as directive principles of state policy.⁵⁰ These rights are, or were, purportedly non-justiciable. However, the Supreme Court has interpreted the constitutional right to life broadly with reference to these principles. As a result, we see the Court adjudicating and enforcing economic and social rights in public interest litigation (PIL) cases.⁵¹

For example, the Indian Supreme Court held that particular food programmes were constitutionally required during conditions of drought, hunger and unemployment in 2001.⁵² From its original filing in the state of Rajasthan, the Indian right-to-food litigation campaign has been expanded to apply to all state governments, and to enforce eight public food programmes, which included a Mid-Day Meal scheme to be implemented in government schools, requiring cooked meals for children within six months.⁵³ As part of ongoing interim orders, the Supreme Court appointed Commissioners, who became critical intermediaries between the court, state and central governments, campaigners and the public.⁵⁴ Despite a range of small-scale controversies involving the administration of the meals, commentators now report that 100 million children in India get a cooked meal at school, assisting in the realisation of educational rights. Again, it is hard to attribute the success of this campaign to the Indian Supreme Court itself – 'success' itself raises difficult questions of cause and effect in multi-causal scenarios.⁵⁵ Yet it is clear that it is not the judicial decree of a substantive doctrine that is doing the work here, so much as the engaged posture of judicial review that determines substance in cooperation with other actors.

⁴⁹ Young & Lemaitre (note 45 above).

⁵⁰ Constitution of India, art 21 (fundamental right to life), art 21A (fundamental right to education), part IV (directive principles of state policy).

⁵¹ Young *Constituting Economic and Social Rights* (note 30 above) at 200–206; *Francis Coralie Mullin v Adm'r* (1981) 2 SCR 516, 518 (Indian Supreme Court) ('The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter ...'). See, further, S Fredman *Human Rights Transformed* (2008), 124–149.

⁵² *People's Union for Civil Liberties v Union of India, Writ Petition* (Civil) No 196 of 2001 (India) (Nov 28, 2001 interim order), available at <http://www.righttofoodindia.org/orders/nov28.html>.

⁵³ *Ibid.* For background and other orders, see <http://www.righttofoodindia.org>.

⁵⁴ The Supreme Court has relied on the Constitution, art 32, for authority to appoint commissioners. See *People's Union for Civil Liberties v Union of India, Writ Petition* (Civil) No 196 of 2001 (May 8, 2002 interim order); (May 2, 2003 interim order). See L Birchfield & J Corsi 'Between Starvation and Globalization: Realizing the Right to Food in India' 31 *Michigan Journal of International Law* 691, 728 (2010).

⁵⁵ Young *Constituting Economic and Social Rights* (note 30 above) 139–142 (Discussing how criteria and methodology can impact notions of 'success').

A last example, from courts in the United Kingdom, involves elements of detachment which draw on deferential or conversational modes of review.⁵⁶ We see examples of the weakest form of remedy available here: of declarations of incompatibility, where a court simply declares an aspect of a policy incompatible with the Human Rights Act 1998 (UK) ('HRA'), (which implements the obligations of the European Convention on Human Rights ('ECHR')), and waits for electoral responses to take their course.⁵⁷ A potentially more powerful response lies in interpreting statutes in a way that is compatible with the HRA.⁵⁸ The result is considerably more muted than South Africa's economic and social rights protections. However, it cannot be said that the courts are entirely avoiding the substance of the ECHR rights that have a decided impact upon housing and other material interests.

For example, in an early HRA case involving a challenge to a mandatory eviction procedure under the Housing Act 1988 (UK), as incompatible with the right to respect for family life,⁵⁹ the Court of Appeal considered the housing association to be a functional public authority and subject to duties under the HRA. Nonetheless, it found that there was no breach of the right to family life, because the interests of others dependent on public housing as a whole justified the system of mandatory evictions of those holding interim accommodation.⁶⁰ From a comparative perspective, the decision falls short of the developing South African standard, since the Court refused to interpret the Housing Act as requiring evictions only to be ordered when 'reasonable to do so',⁶¹ and the Court refused to consider the different degrees of vulnerability of those in need of housing (apart from the legislative distinction between those intentionally homeless or not).⁶² Notwithstanding this result, this and other judicial developments under the HRA are significant, and even substantive,⁶³ despite the fact that the work is done through a detached conception of the judicial role.

This variety of comparative approaches is best explained by features of institutional design as well as of constitutional culture in different legal traditions. The typology allows us to talk about both (which are of course quite different conversations).⁶⁴ The design elements are critical here – access to courts, standing rules, and the availability of different remedies have all influenced the meaning of economic and social rights in various jurisdictions, as well as implied or express understandings of the substance of economic and social rights.

⁵⁶ Ibid at 206–212.

⁵⁷ HRA, s 4 (Declaration of incompatibility).

⁵⁸ HRA, s 3 (Interpretation), outlined in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (House of Lords, UK).

⁵⁹ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 3 WLR 183 (Court of Appeal in England (Civil Division) UK); HRA, s 8.

⁶⁰ Ibid at para 69.

⁶¹ Ibid at para 77 compare with FC s 26; *Occupiers of 51 Olivia Road Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* [2008] ZACC 1, 2008 (3) SA 208 (CC).

⁶² Ibid at paras 37, 67–69 compare with *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC).

⁶³ See, further, E Palmer *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007).

⁶⁴ For diagrammatic representations, see Young *Constituting Economic and Social Rights* (note 30 above) 168, 174, 194.

V CONCLUSION

The Constitutional Court of South Africa has not avoided the substance of economic and social rights, despite its endorsement of reasonableness review, deliberative remedies, apparently abstract or fact-specific extremes, or easy cases. A substantive conception of economic and social rights is ubiquitous. It is in the liberal substance of the standard of reasonableness adopted in *Grootboom* and the more neo-liberal substance of the standard that was held to have been met in *Mazibuko*. Ray's distinction between pro-poor aspirations and anti-rights avoidance obscures this effect. What we are seeing, I suggest, is a series of judicial postures that catalyse a substantive notion of democracy-supporting economic and social rights (and a series of postures that have sometimes misfired). While a typology of these positions appears distinctively South African, elements of deference, conversation, managerialism, experimentalism and peremptory review are evident in other jurisdictions enforcing economic and social rights. Our evaluations are often limited by what we know about the legislative and executive branches in such jurisdictions; nonetheless, the substance given to economic and social rights is present in many findings of liability and remedy. Avoidance, I suggest, lies with the countless jurisdictions that still fail – judicially or legislatively – to recognise economic and social rights as law.