

Due Regard for Constitutional Values: The South African Constitutional Court and Substantive Justice

Eric C. Christiansen*
Golden Gate University
United States

Substantive justice is an ever-elusive goal for constitution-makers. A desire to structure a system of government and draft rights protections that will advance genuine justice for their people is almost always a claimed aspiration of nation-builders, but it is a goal that is always met imperfectly, if not inadequately. Since the end of apartheid in the early 1990s, the Republic of South Africa has attempted an intentional process of remaking itself as a "human rights state," a nation that would espouse and accomplish substantive justice—justice demonstrated by more than formal, legal equality or the limited protection of negative liberties. The Preamble to the 1996 South African Constitution declared the new nation to be "a society based on democratic values, social justice and fundamental human rights..." with the express mission to "improve the quality of life of all citizens and free the potential of each person."

The 1996 Constitution was a reaction against the apartheid ideology and the tangible effects of more than forty years of political and socio-economic discrimination. And, because the injustice of apartheid was evidenced in more than purely legal ways, the constitutional response had to incorporate broader elements of justice. The new post-apartheid order would have failed to respond fully to apartheid—failed its mission of transformative constitutionalism—if the result was formal, legal equality only. Hence, the South African Constitution goes beyond the protection of standard civil and political rights ; it conceives of and pursues justice in its deeper dimensions as well.

The post-apartheid Constitution notably included social welfare rights in addition to traditional civil rights. But rights to healthcare, housing and education were not the Constitution's only tools to advance substantive justice. The desire for a transformative constitutional state also resulted in a particularly potent Constitutional Court. The Court's pre-eminence results from express constitutional provisions that equip the Court to oversee the numerous remnants of the apartheid-era judiciary and civil service. The post-apartheid courts were expressly granted the power of judicial review and the Constitutional Court was created as a capstone court over the judiciary in order to ensure the transformation of South Africa. Expansive procedural authority allows the Court flexibility and ensures its ultimate authority. Hence the Constitutional Court is equipped with broad subject matter jurisdiction (for a specialized court), allows multi-form access, exhibits very permissive standing criteria and has the capacity to issue any remedy consistent with the interests of justice.

South Africa has already demonstrated the viable (if reserved) justiciability of enumerated socio-economic rights and has shown, I believe, that the South African model of social welfare adjudication—one critical element of substantive justice—could be borrowed by

* Professor of Law, Golden Gate University School of Law and Director, GGU-Paris X (Nanterre) Summer Comparative Law Program,

other national courts. The conclusion of many critics has been that, although the Court (like the South African government generally) has been responsible for significant social and political progress, it has had only modest impact on the seemingly intractable problems of socio-economic injustice and substantive inequality.

However, for those critics—and I include myself among them—particularly interested in the Constitutional Court's ability to advance genuine social justice, several recent cases indicate the Court may be adding a new dimension to its experiment in transformative constitutionalism. Increasingly, the Court appears to be more creatively using certain elements of its institutional capacity (i.e., its access provisions, jurisdictional rules, remedial power and interpretive mandate) to promote justice rather than exclusively relying on substantive rights provisions directly. These developments, if they continue to be evidenced by future generations of the Court, are more easily exported to other nations because they do not require specific textual language (e.g., enumerated socio-economic rights) in the adopting nation's constitution.

By way of illustration, two recent cases highlight what appears to be a larger trend: using the Court's standard "purposive" interpretive model to give force and effect to the Constitution's fundamental values in a determinative manner that facilitates substantive justice. The first case of note, *Occupiers of 51 Olivia Road*,¹ concerned the authority of the City of Johannesburg to evict residents of unsafe and unsanitary buildings. Even though the city had satisfied the (substantial) formal legal requirements, the Constitutional Court prohibited the eviction of the current residents until the two sides to the dispute had come together in a process of "meaningful engagement" to discuss how best to address the current situation and the difficulties that would arise from the evictions.

The "reasonable measures" required by the Court's purposive reading of the constitutional right of access to adequate housing (in the seminal 2001 housing rights case, *Grootboom*) include that the City meaningfully engage in an open and honest, good faith process to anticipate and address the consequences of eviction prior to evicting even unlawful residents. A city that evicts in compliance with statutory law but without meaningful engagement "acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations..." Compliance with the legal requirements for eviction is necessary but not sufficient; a more substantive standard—with greater regard for constitutional values—will be enforced by the courts.

The second case evidencing this trend is the *Njongi* case, which concerned a decision by the provincial government to rely on a statute of limitations (prescription) defense to deny back-pay after erroneously withholding an individual's social welfare grant.² Writing for the Court in *Njongi*, Justice Yacoob stated "There is an inevitable and, in my view, moral choice to be made in relation to whether [the state] should plead prescription, particularly when the debt is due and owing." Consideration of this moral element is a duty placed on all state actors by the Constitution. In Ms. Njongi's circumstances, some of the important elements to be

¹ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*, 2008 (3) SA 208 (CC) (S. Afr.), <http://www.saflii.org/za/cases/ZACC/2008/1.pdf>.

² *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape*, 2008 (4) SA 237 (CC) (S. Afr.), <http://www.saflii.org/za/cases/ZACC/2008/4.pdf>.

considered were her poverty and vulnerability, her disability and the obligatory nature of the grant under the South African Constitution's social welfare provisions. Her circumstances should have resulted in a decision to not assert the government's otherwise legitimate statutory defense because a "decision by the State whether or not to invoke prescription in a particular case must be informed by the values of our Constitution."

The Court requires government entities to reflect on whether otherwise legal and neutral decisions are consistent with constitutional values. A failure to make such consideration violates the constitutional requirement that the values of the Constitution inform all state decision-making. This constitutional mandate implies that all state administrative decisions are subject to court challenge based on whether they exhibit due regard for constitutional values, not merely compliance with constitutional law. Indeed, the identified values of the Constitution are arguably raised to the level of enforceable law by the *Njongi* case.

The two cases highlighted above illustrate that the South African Constitutional Court is still pursuing justice as a central player in the transformative national drama. Furthermore, the novel uses of judicial power in cases like *Olivia Road* and *Njongi* demonstrate a potential for social justice that is a hopeful sign for the future of South Africa. This hope balances the disappointment of many commentators with the limited scope of the Court's social welfare jurisprudence. The Court has thought creatively and used its procedural authority expansively to advance fuller, more generous notions of justice. Its expanded procedural capabilities empower it to mandate due regard for the values of the Constitution.

The robust enforcement of constitutional values by the Constitutional Court is more easily justified by South Africa's history and by its particular Constitution, but all constitutions have important, fundamental values. And, at least among courts empowered with judicial review, some application of the fundamental values that undergird the constitution informs all interpretation and application of constitutional rights. The results may not be as dramatic in less overtly empowered judicial systems but the South African Constitutional Court can certainly inspire other countries' courts (like it does its own lower courts) to explore their commitment to their own deepest constitutional values and to substantive justice.