Socio-Economic Rights: Adjudication Under a Transformative Constitution (review)

Elizabeth Brundige, Sital Kalantry

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BOOK REVIEWS

Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Co. Ltd., 2010), 541 pages, ISBN 9780702184802.

I. INTRODUCTION

The South African Constitution is heralded for the broad protections it affords social and economic rights. In *Socio-Economic Rights: Adjudication under a Transformative Constitution*, Professor Sandra Liebenberg offers a thoughtful examination of the socioeconomic rights jurisprudence developed by South African courts since the adoption of the country's current constitution fifteen years ago. In meticulous detail, she describes how the jurisprudence of the Constitutional Court and other South African courts has evolved in the area of socioeconomic rights. At the same time, she offers an incisive critique of this jurisprudence, identifying how it has too often been shaped by a narrow and formalistic conception of rights that overlooks their social justice purposes and reinforces deeply unequal social and economic relationships. Finally, Liebenberg offers suggestions for the future development of this jurisprudence in ways that would be more consonant with the transformative purposes of the South African Constitution. [1]

This nuanced and engaging account stands as a masterful reference work for scholars and legal practitioners interested in the development of South Africa's socioeconomic rights jurisprudence. At the same time, the very detail and comprehensiveness of the book's discussion of this jurisprudence tends, in some places, to overshadow Liebenberg's normative analysis. Additionally, it is not always readily apparent, particularly to readers who are not well-versed in South African case law, where the book's descriptive passages end and Liebenberg's prescriptions begin. However, the normative proposals that Liebenberg offers are both principled and practical, and they make an important contribution to global debates about how courts can and should give effect to social and economic rights.

Among other things, Liebenberg points out the challenges that South African courts have encountered in deciding cases involving socioeconomic rights. South Africa's constitution is unique in its robust protection of a wide array of socioeconomic rights,[2] express commitment to substantive equality and social justice,[3] embrace

1. Sandra Liebenberg, Socio-Economic Rights: Adjudication Under a Transformative Constitution (2010).
2. S. Afr. Const., 1996, §§ 26 (right to have access to adequate housing), 27 (rights to have access to health care, food, water, and social security), 28 (children's rights, including socioeconomic rights), 29 (right to education), 35(2)(e) (socioeconomic rights of persons deprived of their liberty).
3. *E.g.*, S. Afr. Const., 1996, Preamble ("We . . . adopt this Constitution as the supreme law of the Republic so as to . . . heal the divisions of the past and establish a society

of international and foreign law,[4] and horizontal application of rights to disputes between private parties.[5] Nonetheless, courts around the world confront many of the same challenges South African courts have dealt with when they seek to enforce socioeconomic rights.

We focus on three of the most salient problems and demonstrate how a court in another country (the New York Court of Appeals) has wrestled with and addressed these challenges. We also discuss Liebenberg's prescriptions for how courts should engage with these issues. First, courts have struggled with creating an appropriate framework to evaluate government policies (or lack of policies) with regard to socioeconomic rights. In adjudicating socioeconomic rights cases, courts must develop a vision of the appropriate approach the government should take. Courts are reluctant to do this for a host of reasons, including a belief that such work is inconsistent with the role of the judiciary. Second, if a court does determine that a government action or inaction violates the constitution, then it encounters difficulty in crafting appropriate remedies, in part because the appropriate remedies in these cases often impact many individuals and require potentially sweeping policy changes. Linked to both of these points is a set of challenges relating to the doctrine of separation of powers. When courts adjudicate cases that affect budgets or have wide-scale impact, they confront internal and external concerns about the decision's potential to impinge upon the authority of the legislative or executive branch of government.

Courts in the United States, not generally known for their receptivity to socioeconomic rights, have addressed these challenges in the context of the right to education. Because the US national constitution does not guarantee socioeconomic rights, international scholars and practitioners rarely look to American jurisprudence when comparing approaches to socioeconomic rights adjudication. However, the constitutions of all US states but one include right-to-education provisions.[6]

This essay focuses on cases from the state of New York relating to the right to education and highlights how New York courts have wrestled with and addressed some of the challenges Liebenberg identifies in her book. While the courts of New York and other US states have much to learn from South Africa's experience with socioeconomic rights adjudication, we suggest that they, too, offer a valuable com-

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based on democratic values, social justice and fundamental human rights."), §§ 9(2) ("Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."), 39(1)(a) ("When interpreting the Bill of Rights, a court . . . must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.").

4. S. Afr. Const., 1996, § 39(1)(b)–(c) ("When interpreting the Bill of Rights, a court . . . must consider international law; and may consider foreign law.").
5. *E.g.*, S. Afr. Const., 1996, §§ 8(2) ("A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right."), 39(2) ("When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.").
6. William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 Va. L. Rev. 1639, 1661 (1989).

parative perspective and indeed provide insight into how several of Liebenberg's normative prescriptions have been realized in practice in another context.

II. ADJUDICATION OF SOCIOECONOMIC RIGHTS CASES BY SOUTH AFRICAN COURTS

Liebenberg deftly documents the arch of constitutional jurisprudence on socioeconomic rights in South Africa. The book's careful examination of South African socioeconomic rights jurisprudence illustrates how competing strains in South African legal culture—formalistic and transformative—have operated in particular lines of cases, including those addressing the evictions of people from their homes, the right to education, and disputes between private parties. Below, we describe Liebenberg's analysis of how the South African courts have evaluated governmental policy, created remedies, and addressed separation-of-powers concerns in the context of socioeconomic rights cases. We also examine her proposals for developing the jurisprudence on these issues to more fully support the social justice purposes of the South African Constitution.

A. Developing a Framework to Evaluate Governmental Policy

In evaluating government policy with respect to socioeconomic rights, the Constitutional Court of South Africa, South Africa's highest court on constitutional matters, has adopted an approach that evaluates the reasonableness of those policies or lack of policies. Liebenberg argues that the Constitutional Court has shied away from developing a substantive account of the content of socioeconomic rights in favor of a deferential standard of review of reasonableness.[7] The Court has relied on the text of the Constitution in developing this approach. Most provisions relating to socioeconomic rights require only that the government take "reasonable" legislative and other measures.[8] The drafters of the Constitution may have thought that inclusion of the word "reasonable" would give more teeth to socioeconomic rights provisions as compared to international standards. For example, the International Covenant on Economic, Social and Cultural Rights does not require the government to take "reasonable" measures but contains a weaker permutation—the government must simply "take steps."[9]

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7. Liebenberg, *supra* note 1, at 134–63.
8. S. Afr. Const., 1996, §§ 26(2) ("The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right [to housing]."), 27(2) ("The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights [to health care, food, water, and social security]"). *See id.* § 29(1)(b) ("Everyone has the right . . . to further education, which the state, through reasonable measures, must make progressively available and accessible.").
9. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 2 (1), U.N. Doc. A/6316 (1966), 993

Whatever the drafters' intent may have been in including the word "reasonable" in most of the Constitution's socioeconomic rights provisions, Liebenberg points out that the Constitutional Court has adopted a standard of review that focuses on the reasonableness of the government's actions. Instead of interpreting what the Constitution guarantees in regard to a particular right and then evaluating the governmental policy in light of that interpretation, the Constitutional Court has, for the most part, chosen simply to evaluate whether or not the policy in question is reasonable. Moreover, it has rejected as an independently enforceable right the "minimum core obligation" concept developed in international law, which posits that states have an obligation to ensure at least minimum essential levels of each socioeconomic right.[10] While the Court has identified factors that are relevant in assessing reasonableness,[11] it has afforded broad deference to the policy choices of the political branches.[12]

For example, in the 2009 case of *Mazibuko v. City of Johannesburg*, the Constitutional Court unanimously dismissed a challenge to the sufficiency of a free basic water supply afforded to the residents of Phiri, a township in Johannesburg. The residents had argued that the City of Johannesburg's policy that supplied each household, regardless of income, with 6 kiloliters of free water per month was inadequate and

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U.N.T.S. 3 (*entered into force* 3 Jan. 1976) [hereinafter ICESCR], ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."). The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which was adopted in 2008 but has not yet entered into force and which creates an individual complaint mechanism for violations of the treaty, appears to read a reasonableness requirement into States' obligation to "take steps." Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, *adopted* 10 Dec. 2008, GA Res. A/RES/63/117, art. 8(4) ("When examining a communication under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant.").

10. *Minister of Health v. Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at 29 ¶ 39 (S. Afr.); *see also Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) at 27 ¶ 33 (S. Afr.). The Court did leave open the possibility that "evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable." *Treatment Action Campaign* 2001 (1) SA ¶ 34.

11. These factors include, among others, whether the government's program is transparent, comprehensive, coherent, balanced and flexible, capable of facilitating realization of the right, reasonably conceived and implemented, backed by appropriate human and financial resources, and inclusive of short-term provision for those whose needs are most urgent. *See* Liebenberg, *supra* note 1, at 152–55 (discussing factors applied by the Constitutional Court in the *Grootboom* and *Treatment Action Campaign* cases).

12. As the Constitutional Court explained in its landmark case on the right of access to health care, *Minister of Health v. Treatment Action Campaign (No. 2)*,

> The Constitution contemplates rather a restrained and focused role for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of those measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications but are not themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve the relevant balance.

Minister of Health v. Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) ¶ 38.

insufficiently flexible, in violation of section 27 of the Constitution, which provides that "[e]veryone has the right to have access to . . . sufficient . . . water."[13] They presented detailed evidence, including the testimony of community members and experts, of the amount of water needed to meet their basic needs.[14] The High Court and Supreme Court of Appeals both found in favor of the Phiri residents and concluded that the right to "sufficient water" required the City to provide substantially more water than it was doing under the current policy.[15]

In contrast to the lower courts, the Constitutional Court did not evaluate the parties' evidence about the substantive content of the right to water as applied to the people of Phiri. Rather, it disavowed any competence to determine in quantitative terms what the right to "sufficient water" requires, holding that "[i]t is institutionally inappropriate for a court to determine what the achievement of a particular socioeconomic right entails and what steps government should take to ensure the progressive realization of the right."[16] Instead, the Court's review began and ended with a deferential analysis of the reasonableness of the measures undertaken by the government. The Court held that the positive obligation to realize socioeconomic rights like the right to water required at least that the government take some steps to realize the right.[17] Indeed, the Court explained, it is through the "reasonable and other legislative measures" undertaken by the state that the Constitution's socioeconomic rights acquired content.[18] Those measures are subject to the constitutional standard of reasonableness, which includes providing for people most in need, not imposing unreasonable limitations or exclusions, setting clear and transparent targets for the achievement of the right, and continually reviewing its policies to ensure that the right is progressively realized over time.[19] The Court found that the City's water policy was not unreasonable and did not violate section 27 of the Constitution or the national legislation regulating water services.[20]

As Liebenberg suggests, the reasonableness standard of review adopted by the Constitutional Court allows courts to be sensitive to the various contexts of different socioeconomic rights cases.[21] However, it has also tended to reduce the review process to an abstract and deferential assessment of the state's justifications for its action or inaction that is disconnected from the content of the right itself. This leaves the government and the people it represents with little guidance as to the sort of

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13. *Id.* ¶ 19.
14. *See* Liebenberg, *supra* note 1, at 468.
15. *Id.* (*citing Mazibuko v. City of Johannesburg* 2008 (4) All SA 471 (W) ¶¶ 167–81 (S. Afr.); *City of Johannesburg v. Mazibuko* 2009 (3) SA 592 (SCA) ¶ 24 (S. Afr.)).
16. *Mazibuko v. City of* Johannesburg 2010 (4) SA 1 (CC) ¶ 60; *see* Liebenberg, *supra* note 1, at 469.
17. *Id.* ¶ 67.
18. *Id.* ¶ 66.
19. *Id.* ¶ 67.
20. *Id.* ¶¶ 89, 97, 157. The petitioners had also argued that the installation of pre-paid water meters that cut off water supply when a household used up its allocation and could not pay for more, rather than the credit meters installed in wealthier communities, was discriminatory and unlawful. The Court rejected this claim as well, finding that the installation was consistent with national legislation and municipal by-laws and the applicants had not shown it to be either unfair or discriminatory."
21. Liebenberg, *supra* note 1, at 174–75.

measures and policies that are consistent with socioeconomic rights.[22] According to Liebenberg, this "deferential and normatively thin concept of reasonableness review . . . weakens the capacity of socio-economic rights jurisprudence to contribute meaningfully to transformative social change."[23]

Importantly, Liebenberg does not simply critique the Constitutional Court's interpretative approach but also offers a compelling alternative. She claims that it is both possible and desirable for courts to engage with the substantive content and purposes of socioeconomic rights within the basic framework of assessing the reasonableness of the government's actions. Her model of reasonableness review would include two stages. In the first stage, a court would interpret the content of the right. In the second stage, the court would assess the reasonableness of the measures taken by the state to realize that right in light of its content. Once the applicants established that they lacked access to a socioeconomic right guaranteed by the Constitution, the burden of persuading the court of the reasonableness of the state's actions or omissions would rest squarely with the state itself, which is well placed to explain the resource constraints and other policy considerations that motivated its decisions.[24]

Of course, calling upon courts to interpret the substantive content of socioeconomic rights, including those that hold the government accountable for omissions, does not resolve the question of how courts should approach such an interpretation. Liebenberg offers some suggestions for how this might be achieved. First, she rejects the idea that constitutional interpretation of socioeconomic rights should seek to arrive at a fixed and detailed definition of the relevant right. Rather, she argues that "the normative content of socioeconomic rights should always remain contingent and incomplete, allowing space for the evolution of new meanings in response to changing contexts and forms of injustice."[25]

In interpreting a socioeconomic right, Liebenberg suggests, courts should provide an account of the purposes and values that the right seeks to promote, taking into account its fluid historical, social, and political contexts, and its interdependence with other constitutional rights.[26] Philosophical, social, and political theory may be

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22. *Id.* at 223, 228–67. The Constitutional Court has even extended this basic interpretative approach to cases involving the socioeconomic rights of children or of persons deprived of their liberty, rights that are articulated in the Constitution as direct entitlements, unencumbered by the internal limitations of progressive realization and resource availability.
23. *Id.* at 480.
24. *Id.* at 163–206. Liebenberg's model would bring the courts' standard of review in cases involving an alleged breach of the state's positive duty to "take reasonable legislative and other measures" to realize a socioeconomic right closer to the more stringent reasonableness standard applied by the courts when considering whether a infringement upon a right in the Bill of Rights is reasonable and justifiable under the Constitution's § 36(1) general limitations clause. S. Afr. Const., 1996, §§ 25(5), 26(2), 27(2), 36(1) ("The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including [each of five specific considerations]."). *Id.* § 36(1).
25. Liebenberg, *supra* note 1, at 180.
26. *See id.* at 47–54, 97–101, 179–80. *See also Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) ¶ 23 (S. Afr.) (emphasizing the interdependence of all of the rights in the Bill of Rights, including both social and economic rights and civil and political rights).

useful in understanding the normative commitments underlying the right.[27] International and comparative law also offers important interpretative guidance.[28] Moreover, Liebenberg argues that the interpretation of socioeconomic rights should take into account diverse views about their content, including those of the political branches of government; litigants, lawyers, expert witnesses, and others involved in the court proceedings; and the broader public.[29]

Liebenberg's "reconceived reasonableness" approach has its roots in the judgments of some South African courts. A number of the decisions discussed in Liebenberg's book have engaged substantively with the content of socioeconomic rights. For example, the High Court in the *Mazibuko* case anchored its reasonableness analysis in the content of the right to water, considering detailed evidence produced by the parties regarding the water needs of the affected community, expert testimony, relevant international law, and the relationship between the right to water and other constitutional rights.[30] Likewise, several of the Constitutional Court's landmark eviction cases have engaged with the constitutional provision that protects peoples' interests in their homes when faced with eviction and have promoted participatory engagement between parties to the litigation.[31] These decisions suggest that Liebenberg's interpretative approach would not represent a radical departure from current South African jurisprudence. Rather, it would build upon and lend theoretical cohesion to what some courts have already done and, in doing so, would strengthen the potential of socioeconomic rights adjudication to advance the transformative purposes of the Constitution.

B. Crafting Remedies

In adjudicating socioeconomic rights, South African courts struggle not only with questions of interpretation but also with the question of how to select appropriate, meaningful, and effective remedies in response to socioeconomic rights violations. A frequent objection to the judicial enforcement of socioeconomic rights is that courts are not well-positioned or institutionally competent to craft meaningful remedies. Socioeconomic rights violations often cannot be addressed by traditional compensatory remedies such as individualized and backward-focused monetary damages. Because violations are often omissions—the state's failure to implement reasonable measures to progressively realize a right—their remedy may require court orders or interdicts (injunctions) that compel the government to take positive action. Moreover, as Liebenberg points out, the harm caused by socioeconomic rights violations affects not only the individual litigants, but often a much larger group of people, and even

27. Liebenberg, *supra* note 1, at 99.
28. S. Afr. Const., 1996, § 39(b)–(c); Liebenberg, *supra* note 1, at 101–29, 178–79.
29. Liebenberg, *supra* note 1, at 70–71, 224, 487.
30. *Id.* at 181 (discussing *Mazibuko v. City of Johannesburg* 2008 (4) All SA 471 (W) (S. Afr.)).
31. *See e.g., Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.); *Occupiers of 51 Olivia Road v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.); *see* Liebenberg, *supra* note 1, at 268–316.

society as a whole.[32] On the one hand, traditional remedies may not be sufficient; on the other hand, courts within and outside of South Africa have been understandably anxious to avoid the specter of sweeping court orders with significant and perhaps unanticipated consequences for state policies and budgets.

Liebenberg's chapter on remedies explores the wide range of possibilities that are available to courts in providing redress for violations of constitutional socio-economic rights.[33] She suggests that the courts have, on the whole, demonstrated an appropriately flexible approach to the design of remedies.[34] These have ranged from declaratory orders setting out the nature of the state's constitutional obligation and leaving it up to the government to implement the appropriate program,[35] to mandatory orders requiring the government to provide benefits or services to the applicants or individuals who are similarly situated,[36] and to orders requiring parties in an eviction dispute to engage meaningfully with each other in exploring a mutually acceptable solution.[37]

However, South African courts, and the Constitutional Court in particular, have remained reluctant to impose remedies that require structural reforms to be adopted over time under the periodic supervision of the court.[38] A structural interdict typically consists of a court order that outlines the broad goals that must be achieved for constitutional compliance but affords some discretion to the government and applicants to craft a plan to remedy the constitutional violation. The parties are thus charged with entering into a process of engagement to determine the specific measures that are to be taken to achieve these goals. The court usually remains seized of the case and periodically evaluates whether the plan being created and its implementation comply with the court order.[39]

South African high courts have issued structural orders in several cases. For example, in *N v. Government of Republic of South Africa (No. 1)*, the KwaZulu-Natal High Court ordered the government to remove obstacles that prevented HIV-positive prisoners in a particular facility from accessing anti-retroviral treatment; to provide

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32. Liebenberg, *supra* note 1, at 378.
33. *Id.* at 377–462.
34. *Id.* at 489.
35. *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) ¶ 99 (S. Afr.) (declaring that the Constitution required the state to implement a program progressively to realize the right of access to adequate housing, that this included measures to respond to emergency housing needs, and that the state policy in the petitioners' area fell short of the Constitutional requirement).
36. *Minister of Health v. Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC) ¶ 135 (S. Afr.) (ordering the government to remove the restrictions to the provision of Nevirapine, an anti-retroviral drug shown to be effective in preventing mother-to-child-transmission of HIV, in public hospitals and clinics; to allow and facilitate its use in order to reduce the risk of mother-to-child transmission of HIV; to take reasonable measures to extend hospital testing and counseling to facilitate the use of the drug; and to provide for counselors trained to counsel in the use of the drug).
37. *Occupiers of 51 Olivia Road v. City of Johannesburg* 2008 (3) SA 208 (S. Afr.) (issuing an interim order that required the City of Johannesburg and residents of a building whom the city sought to evict to engage meaningfully with each other and report back to the court on the outcome of that engagement).
38. Liebenberg, *supra* note 1, at 424–38, 461–62.
39. *Id.* at 424–25, 434–35.

treatment to the applicants and similarly situated prisoners; and to report back to the court regarding the manner of implementation.[40] Liebenberg suggests that the structural interdict led to serious negotiations between the parties and the adoption of a new government policy on and improvements in the provision of anti-retroviral drugs to prisoners.[41] Unlike the lower courts, however, the Constitutional Court has remained reluctant to assume or endorse the active judicial involvement required of a structural remedy.[42]

In appropriate cases, Liebenberg suggests, namely those where the socioeconomic rights violation cannot easily be remedied with a single court order, structural interdicts can further the transformative purpose of the Constitution.[43] Such orders would "catalyse a structured process of dialogic engagement between the parties and other stakeholders on the precise standards and measures needed to remedy the particular violation as well as the indicators for measuring compliance with the steps specified in the agreed plan."[44] In doing so, these remedies would call for continual interaction between the judiciary and other branches of government, facilitate the participatory engagement of the litigants and other stakeholders, and promote sustainable solutions to complex socioeconomic rights problems.[45]

C. Addressing Separation of Powers Concerns

Socio-Economic Rights confronts head on the challenge that the separation of powers doctrine poses for the interpretation and enforcement of socioeconomic rights. Courts face criticism when they issue decisions that affect the allocation of resources or have wide-scale impact on the basis that they are encroaching on the role of the executive or legislature. Judiciaries (with limited exceptions) are unelected institutions and arguably do not have the democratic mandate or the institutional capacity to venture into areas of policymaking traditionally reserved for the political branches. The type of transformative constitutionalism that Liebenberg advocates may be particularly vulnerable to this critique as it urges courts not to shy away from developing the content of socioeconomic rights or from applying robust remedies that, in appropriate cases, initiate a mandatory process of structural reform over which the court exercises supervision.

Liebenberg acknowledges that the approach to socioeconomic rights adjudication that she develops is incompatible with a narrow conception of the separation of powers between the judicial, executive, and legislative branches of government. She argues instead for a more flexible and consultative model of separation of powers in which the three branches of the government participate in an ongoing "constitutional dialogue" involving a process of mutual interaction and engagement through

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40. *Id.* at 431–33 (discussing *N v. Government of Republic of South Africa (No. 1)* 2006 (6) SA 543 (D)).
41. *Id.* at 432–44.
42. *Id.* at 462.
43. *Id.* at 434–38.
44. *Id.* at 436.
45. *Id.* at 434–38.

which the limits of each branch's power are continually redefined.[46] According to this model, courts must make decisions about the standard of review and the scale and scope of the remedy imposed in light of the particular context of each case.[47]

Liebenberg's explanation of how courts should approach issues of separation of powers and institutional competence may not assuage the concerns of those who worry about the potential for courts to substitute their own views for democratic deliberation on critical issues. Moreover, her suggestion that courts employ a variable standard of scrutiny in socioeconomic rights cases may afford courts little guidance, making it difficult to achieve consistency across cases. Notwithstanding these potential concerns, the approach to the interpretation and enforcement of socioeconomic rights that Liebenberg develops illustrates how the adjudicative process, far from being inherently anti-democratic, can be a site of engagement among the different branches of government and the people themselves, and can lead to informed resolutions that give effect to the rights and values of the Constitution.

First, a robust and contextual approach to the interpretation of socioeconomic rights that takes seriously their normative content opens up new spaces for democratic engagement. If the reasonableness of the measures adopted by the state to realize a given right are assessed in light of the content of the right itself, then the court's review will likely stimulate, indeed, may depend upon, "dialogic engagement by the other branches of government and the broader public on the meaning and implications of socio-economic rights."[48]

This engagement may occur in multiple ways. As Liebenberg explains, her interpretative approach envisions a process in which "lawyers, civil society organizations and others involved in socio-economic rights litigation . . . place before the court a rich tapestry of historical and social evidence pertaining to the claim."[49] The detailed evidence presented by the parties on the current and historical context in which the claim arises, the particular situation of the petitioners, and the impact of the state's policies helps to ensure that courts have the information they need to make reasoned decisions that are sensitive to context and particularly to the systemic poverty, marginalization, and inequality that typically underpin socioeconomic rights claims.[50]

Another form of inter-branch dialogue may occur when courts look to standards developed by the political branches themselves for guidance in interpreting the content of a socioeconomic constitutional right. Liebenberg alludes to this possibility but does not develop it in any detail. For example, she observes that in the *Mazibuko* case, the High Court relied in part on the definition of "free basic water supply" under the Water Services Act to "defin[e] the normative criteria which are relevant for determining the sufficiency of the right of access to 'sufficient' water in § 27(1)(b) of the Constitution."[51]

In addition, remedies for socioeconomic rights violations—particularly the types of structural mandatory orders that Liebenberg urges courts to consider in appropriate

46. *Id.* at 66–71.
47. *Id.* at 70–71, 186, 226, 461–62.
48. *Id.* at 224.
49. *Id.* at 487.
50. *Id.* at 224.
51. *Id.* at 467.

cases—provide another opportunity for participatory deliberation. Such orders direct the government to come up with a plan to remedy the constitutionally deficient policy, following a process of engagement between the parties and potentially the broader public. The substantive guidance provided by the court on the content and purpose of the right and its continued involvement in the remedial stage helps to ensure that this plan does in fact remedy the constitutional violation. At the same time, within the broad limits of the Constitution, it is the government and the people themselves who determine the specific measures to be undertaken to give effect to the constitutional right and the budgetary allocations required to finance those measures.[52]

This notion of socioeconomic rights litigation as a participatory, democratic process is not a novel one in South Africa. Many of South Africa's social and economic rights cases have presented opportunities for constitutional dialogue and participation, including, in some cases, the participation of vulnerable or marginalized people for whom litigation affords a unique opportunity to be heard.[53] Even in the deferential *Mazibuko* decision, the Constitutional Court explained:

> A reasonableness challenge requires government to explain the choices it has made . . . . If the process followed by the government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought. In this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation.[54]

Liebenberg, too, sees socioeconomic rights litigation as an essentially democratic process. However, as she persuasively argues, it is difficult to hold the state truly accountable without providing judicial guidance on the content of the right at stake and the purposes it seeks to achieve.[55] The interpretative approach that she outlines would anchor review of the reasonableness of a state's actions in an understanding of the content and purposes of the right under review. This approach, coupled with meaningful and appropriately robust remedies, offers a creative yet workable way to both strengthen accountability and increase opportunities for participatory deliberation. Below we turn to a discussion of the right-to-education cases in the United States, with a focus on a line of cases in New York, to illustrate the ways in which one jurisdiction has grappled with many of the issues discussed in Liebenberg's book.

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52. *See id.* at 434–38.
53. *See, e.g.*, *Occupiers of 51 Olivia Road v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.); *see* Liebenberg, *supra* note 1, at 293–303 (discussing how, in *51 Olivia Road*, court-ordered "meaningful engagement" between poor residents of urban buildings and the city officials who sought to evict them, coupled with the continued involvement of the court in scrutinizing the outcome of that engagement, resulted in a comprehensive settlement agreement that protected the rights of the residents).
54. *Mazibuko v. City of Johannesburg* 2008 (4) All SA 471 (W) ¶ 71 (S. Afr.).
55. *See, e.g.*, Liebenberg, *supra* note 1, at 224.

III. ADJUDICATION OF SOCIOECONOMIC RIGHTS CASES BY US STATE COURTS

All US state constitutions—with the exception of Mississippi's—include provisions requiring the state government to provide education.[56] Many states amended their constitutions to include education provisions in response to the "common school movement" of the nineteenth century.[57] That movement stressed the importance of free public education as a way to mix the classes and integrate the newly arrived Irish and Italian immigrants in the United States.[58]

Because they pre-date the development of modern international human rights law, which fractured rights into immediately enforceable civil and political rights (e.g., free speech) and progressively realized economic, social, and cultural rights (e.g., the right to education), the US state right-to-education constitutional provisions do not contain limiting concepts such as "maximum available resources" or "progressive realization" that in other jurisdictions make these rights difficult to enforce. As a result, state courts in the United States may have a greater ability to enforce right-to-education provisions than courts, like those in South Africa, that are bound by constitutions that do contain limiting language.[59]

Despite the constitutional guarantee of education in state constitutions, there are still stark inequalities within the American educational system. Since the early twentieth century, schools have been financed by local property taxes, resulting in disparities in the quality of schools based on the income of residents.[60] Consequently, neighborhoods with higher-value houses are able to raise more money for education. Advocates brought cases in the 1970s arguing that inequitable school funding violated equality provisions in the constitution.[61] In 1973, the US Supreme Court heard *San Antonio Independent School District v. Rodriguez* and held that education is not a fundamental right under the US Constitution.[62] Consequently, school funding schemes that interfere with its exercise are not subject to a heightened standard of review and, under the ordinary standard of review, the Court found that the challenged financing system did not violate the equal protection clause of the Fourteenth Amendment.[63]

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56. Thro, *supra* note 6, at 1661.
57. Vinay Harpalani, *Maintaining Educational Adequacy in Times of Recession: Judicial Review of State Education Budget Cuts,* 85 N.Y.U. L. Rev. 258, 259 (2010).
58. Janice Petrovich, *The Shifting Terrain of Educational Policy: Why we Must Bring Equity Back,* in Bringing Equity Back: Research for a New Era in American Educational Policy 3, 5 (Janice Petrovich & Amy Stuart Wells eds., 2005).
59. For example, the South African constitution states that "everyone has a right to further education, which the state, through reasonably measures, must make progressively available and accessible." S. Afr. Const., 1996, § 29(1)(b). But note that with respect to the right to basic education there is no such limiting language. S. Afr. Const., 1996 § 29(1)(a).
60. Petrovich, *supra* note 58, at 6.
61. National Access Network, School Funding Litigation Overview: National Historical Background, *available at* http://www.schoolfunding.info/litigation/overview.php3.
62. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 37–38 (1973).
63. *Id.* at 55.

Since *Rodriquez* signaled a dead end in federal courts for reform of the educational system, plaintiffs began to turn their attention to US state constitutional provisions relating to education.[64] The first wave of litigation focused on equality of funding between school districts. Plaintiffs argued that states' public school funding schemes violated provisions of state constitutions that guaranteed equal protection of the law.[65] Plaintiffs won some initial cases but were not widely successful overall; defendants won in about two-thirds of those cases, in part because judges lacked manageable standards for determining what amount of funding was equitable or for overseeing legislative formulas.[66]

Since 1989, plaintiffs have changed their strategy from arguing that the government should provide an equal education to everyone to emphasizing that the government must provide a baseline acceptable level of education to everyone. The assumption was that in order to provide this acceptable level of education, the government must spend a certain level of resources on education. Plaintiffs have won twenty of twenty-nine of those cases.[67]

As an illustration of the approach taken in these cases, we focus on a series of cases from New York State. Plaintiffs in the case *Campaign for Fiscal Equity (CFE) v. the State of New York* were a collection of non-profit organizations, school boards, school districts, parents, and students.[68] Their case focused on whether New York City schools' financing system failed to provide students with an adequate education in violation of the New York constitution. The New York State Constitution requires the state legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[69] In a previous case, the Court of Appeals of New York, New York's highest court, read the word "education" in the Constitution to mean "sound basic education."[70]

In the first CFE case (hereinafter "*CFE I*"), the Court of Appeals overturned the lower court's dismissal of the plaintiffs' complaint, holding that they had stated a cause of action and setting out a "template" for what constitutes a "sound basic education"[71] Based on the mandate of the Court of Appeals decision, the trial court held a seven-month trial and concluded that the New York City education system violated the constitutional requirements.[72] The intermediary appellate court, the Appellate Division, overturned the ruling of the trial court.[73] The Court of Appeals then

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64. National Access Network, *supra* note 61.
65. Michael Rebell, *Equal Opportunity and the Courts*, 89 Phi Delta Kappan 432–39 (2008).
66. *Id.* at 435.
67. Michael A. Rebell, Courts and Kids: Pursuing Educational Equity through the State Courts 2–3 (2009).
68. Campaign for Fiscal Equity, Inc. v. State of New York (*CFE I*), 655 N.E.2d 661, 663 (N.Y. 1995).
69. N.Y. Const. art. XI, §1.
70. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 27, 48 (N.Y. 1982).
71. *CFE I,* 655 N.E.2d at 666.
72. Campaign for Fiscal Equity, Inc. v. State of New York, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001). *See* reference to the trial in Campaign for Fiscal Equity, Inc. v. State of New York (*CFE II*), 801 N.E.2d 326, 328 (N.Y. 2003).
73. Campaign for Fiscal Equity, Inc. v. State of New York, 744 N.Y.S.2d 130, 148 (N.Y. App. Div. 2002).

reversed the Appellate Division's dismissal of the case.[74] It found that the New York City schools did not provide students with a "sound basic education" as required by the Constitution and ordered the state to come up with a plan that would satisfy the constitutional requirement (hereinafter "*CFE II*").[75] The governor appointed a state commission on education reform that concluded that $1.93 million needed to be invested in the New York City educational system to ensure that students receive a sound basic education.[76] The legislature failed to adopt this plan.[77] The trial court then appointed its own referees, who concluded that $5.63 billion should be invested.[78] The Court of Appeals found that the trial court should not have appointed its own referees to develop an alternative plan and instead reviewed the governor's plan to determine whether it was rational.[79] The Court found that the governor's plan was rational (hereinafter "*CFE III*").[80] Below we evaluate how the highest court of New York State dealt with the challenges highlighted in Liebenberg's book.

A. **Developing a Framework to Evaluate Government Policy**

Many right-to-education provisions in various US state constitutions, including New York's, are vague—they typically state that the government must provide free or sound basic education but do not articulate what that means.[81] The New York Court of Appeals used an innovative framework to evaluate whether New York State was in compliance with the constitutional mandate. Much in line with Liebenberg's proposal that the South African courts give content to the rights they are adjudicating, the New York Court of Appeals first gave content to the standard set forth in the constitution. Second, it stated that to fulfill its obligation, the government must invest certain "inputs" into the educational system. Third, the Court then looked at the "outputs" of the education system. Finally, the Court evaluated whether there was a causal link between the inputs (or lack thereof) and the outputs (or lack thereof).

First, the Court found that "sound basic education" for purposes of the Constitution meant a "meaningful high school education."[82] In *CFE II*, the Court of Appeals overturned the lower court ruling that had held that an eighth or ninth grade education satisfied the Constitution and instead reinstated the trial court opinion that "took evidence on what 'the rising generation' needs in order to function productively as civic participants, concluding that this preparation should be measured with reference to the demands of modern society and include some preparation for employment."[83] In doing so, the Court clearly understood that the content of the right to

74. *CFE II*, 801 N.E.2d at 350.
75. *Id.* at 348.
76. Campaign for Fiscal Equity, Inc. v. State of New York (*CFE III*), 861 N.E.2d 50, 55 (N.Y. 2006).
77. *Id.*
78. *Id.* at 56.
79. *Id.* at 57.
80. *Id.* at 59.
81. *See* Thro, *supra* note 6, at 1661–70.
82. *CFE II*, 801 N.E.2d at 332.
83. *Id.* at 330.

education is not fixed but varies depending upon the circumstances, which is in line with Liebenberg's view.[84] Indeed, the Court noted, "a sound basic education back in 1894, when the Education Article was added, may well have consisted of an eighth or ninth grade education, which we unanimously reject. The definition of a sound basic education must serve the future as well as the case now before us."[85]

The dissent in *CFE II* argued that the New York Constitution is far from explicit about what constitutes appropriate levels of education and that courts do not have appropriate standards.[86] However, this is true of even civil or political rights—the US constitution's provision on free speech does not answer the question of whether flag burning is speech, whether selling video games to minors is speech, or whether corporations are exercising their free speech rights. Yet, courts do not feel constrained from developing and elaborating standards based on these provisions.

Additionally, the New York Court connected the definition of "sound basic education," to civil and political rights. The Court noted that it included "the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."[87] Thus, the Court construed the issue in the case as "whether the State affords New York City schoolchildren the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants."[88] Indeed, most state courts that have decided education cases over the past twenty years have agreed that a constitutionally adequate education is critical to a properly functioning democracy.[89]

These cases support Liebenberg's view that courts have much to gain from exploring the connections between socioeconomic rights and other rights protected by the constitution.[90] This is so both because rights are, in fact, deeply interrelated and interdependent, and because recognizing these linkages enables courts to more fully develop the content and scope of these rights. Engaging with these connections can also give courts a degree of comfort in interpreting and applying socioeconomic rights by suggesting that they are not so different from civil and political rights and should not be considered unenforceable or subjected to an overly deferential standard of review.

Second, to evaluate whether students in New York City had an opportunity for a meaningful high school education, the Court considered the "inputs" children received, which included "teaching, facilities and instrumentalities of learning."[91] Here the Court of Appeals was attempting to wrestle with the same issues that many foreign courts and international tribunals confront when asked to adjudicate rights that affect large groups of people. It found an innovative way to do this well before the United Nations developed guidelines on how to utilize indicators in the context

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84. *See supra* note 25 and accompanying text.
85. *CFE II*, 801 N.E.2d at 349.
86. *Id.* at 361.
87. *Id.* at 330.
88. *Id.* at 332.
89. Michael Rebell, *Educational Adequacy, Democracy, and the Courts*, *in* Achieving High Educational Standards for All 239 (Timothy Ready et al., eds., 2002).
90. *See* Liebenberg, *supra* note 1, at 51–54.
91. *CFE II*, 801 N.E.2d at 332.

of human rights.[92] While social scientists and development professionals have long used indicators in their work, over the last several decades, human rights scholars, advocates, and jurists have become increasingly interested in employing indicators to measure compliance with human rights obligations.

Indicators are essentially proxies for the fulfillment of socioeconomic rights.[93] They often utilize statistical or quantitative data. The category of "inputs" identified by the New York Court of Appeals can be seen as "process" indicators in the language of the UN guidelines.[94] Process indicators are measures of the level of efforts being made by a government to fulfill its obligation to provide socioeconomic rights.[95] For example, the New York Court viewed the quality of teachers being provided to New York City students as a measure of whether New York was fulfilling its obligation. The indicators used by the Court to determine the quality of teachers were "certification rates, test results, experience levels and the ratings teachers receive from their principals."[96]

In deciding whether the indicators suggested a constitutional violation, the New York courts had to determine benchmarks for those indicators. Benchmarks represent goals or measuring sticks for particular indicators. For example, the Court of Appeals had determined minimum level of acceptable teacher certification rates for purposes of the constitutional standard. In grappling with appropriate benchmarks, for each input the Court relied on data from other parts of New York State to show that New York City was relatively worse off. In other words, the benchmarks used by the Court to evaluate the performance of New York City schools compared it to the performance of schools in other parts of New York State. However, the Court made it clear that it did not believe that absolute equality between the various school districts was necessary;[97] rather, "intrastate comparisons" were used to determine the "constitutional floor" i.e., the baseline level of acceptable education as per the constitution.[98] For these inter-state comparisons, the Court used the state government's own reported quantitative data.[99]

Third, after having determined that the "inputs" into the New York City educational system did not satisfy the minimum requirements of the New York State Constitution,

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92. *See, e.g.*, UN Int'l Hum. Rts. Instrument, Report on Indicators for Monitoring Compliance with International Human Rights Instruments (2006), *available at* http://www.unhcr.org/refworld/category,REFERENCE,HRI,,,4a54bbd5d,0.html.
93. The United Nations defines a human rights indicator as "specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights." *Id.* ¶ 7.
94. *Id.* ¶ 18.
95. *Id.*
96 *CFE II*, 801 N.E.2d at 333.
97. *Id.* ("To be sure, the Education Article guarantees not equality but only a sound basic education.").
98. *Id.* at 336.
99. The court relied on data from the annual 655 report submitted pursuant to Chapter 655 of the State Education Laws of 1987 which requires the Board of Regents and the State Education Department to submit an annual report to the Governor and the Legislature with respect to "enrollment trends; indicators of student achievement in reading, writing, mathematics, science, and vocational courses; graduation, college attendance and employment rates." *Id.* at 333.

the Court went on to evaluate the "outputs" such as student test scores. The category of "outputs" can be viewed as outcome indicators, which measure the actual results of the efforts made by the government.[100] One output used by the Court was school completion rate. The Court found that only 50 percent of New York City students graduate high school within four years and that this rate of completion "compares unfavorably with both state and national figures."[101] The Court also looked at test scores of New York City students and determined that they do not comport with the constitutionally-mandated opportunity for a sound basic education. In determining the benchmark for an unacceptably low level of test results, the Court relied on the state's own tests and benchmarks for those tests. New York State administers tests to all third and sixth graders and sets what is considered minimal standards for students who take those tests known as "state reference points" (SRP). The Court found that "[b]etween 1994 and 1998, the undisputed evidence showed that upwards of 30 percent of New York City sixth graders scored below the SRP in reading," and 35–40 percent of third graders scored below the state reference point.[102] Consequently, the Court found that "whether measured by the outputs or the inputs, New York City schoolchildren are not receiving the constitutionally-mandated opportunity for a sound basic education."[103]

Like the New York courts, other state courts adjudicating education cases have used indicators for several decades now in the field of education. This was made possible by the standards-based reformation occurring in the United States in the late 1980s when evidence had emerged through numerous commission reports that most American students were not receiving a sufficient education to enable them to compete in a global economy.[104] Concern about the failures of the US education system led to a national movement for standards-based reform, which focused on the development of extensive standards for major subject areas and the reform of all other aspects of the educational system—teacher training, teacher certification, curriculum frameworks, textbooks, student assessments—to conform to those standards.[105] Courts then began to use the standards to evaluate governmental policy. Courts would find violations of the Constitution where the education system failed to meet the benchmarks articulated by the states.[106] This does not mean that courts have unquestioningly accepted the benchmarks set by the state that defined adequate levels of education.[107] Yet in reviewing state educational standards, courts have found

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100. UN Int'l Hum. Rts. Instruments, Report on Indicators for Monitoring Compliance with International Human Rights Instruments ¶ 19 (2006), *available at* http://www.unhcr.org/refworld/category,REFERENCE,HRI,,,4a54bbd5d,0.html.
101. *CFE II*, 801 N.E.2d at 336–37.
102. *Id.* at 338.
103. *Id.* at 340.
104. Michael A. Rebell, *Adequacy Litigations: A New Path to Equity*, *in* Bringing Equity Back, *supra* note 58, at 17; Rebell, *Educational Adequacy, supra* note 89, at 229.
105. Rebell, *Adequacy Litigations, supra* note 104, at 18.
106. Rebell, *Educational Adequacy, supra* note 89, at 239–44.
107. *See, e.g.*, Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001) (rejecting the plaintiffs' argument that newly promulgated state education standards necessarily provide content for the constitutional standard because "this approach would essentially define the ambit of a constitutional right by whatever a state agency says it is" and would "fail[] to give due deference to the State Constitution and to courts' final authority to say what the law is") (internal quotation marks omitted).

a strong relationship between those standards and the constitutional requirements and, in some cases, have incorporated them into their constitutional definition.[108] In this way, the educational adequacy cases reflect "a multi-faceted dialogue between state courts and legislatures" on the question of how to define the constitutional right to an adequate education.[109]

The final part of the Court's analysis was causation; the Court noted that to prevail, the plaintiffs were required to "establish a correlation between funding and educational opportunity."[110] The Court found that the causal link was satisfied by a showing that increased funding could provide "better teachers, facilities and instrumentalities of learning."[111] For example, it relied on testimony of social science experts to conclude that better teachers often resulted in better student outcomes.[112] The state of New York argued that the poor student performance in New York City schools was caused by other factors such as the socioeconomic conditions of the parents and New York City's mismanagement of existing funds.[113] The Court concluded that in establishing the requirement of causation the plaintiffs need not "eliminate any possibility that other causes contribute to that failure," but that they must simply establish that the present funding system is one cause of the failure of the New York City schools.[114]

B. Crafting Remedies

Another challenge in socioeconomic rights litigation confronted by the New York Court of Appeals was in creating remedies. As the Court of Appeals acknowledged that "[c]hallenging as [it was to determine a constitutional violation, it] pale[s] by comparison to the final question: remedy."[115] The Court was clearly conscious of its role vis-à-vis the state legislature on education policy and trod carefully. It did not want to issue detailed guidelines to the legislature about how it should restructure the education system in New York City. On the other hand, it did not want to abdicate its responsibility to provide guidance on the proper remedy for fixing New York City's education system, as the state had requested it to do.[116] Instead, in *CFE II*, it asked the state to "ascertain the actual cost of a sound basic education" to New York City students and report back to it in just over a year after it issued its decision.[117] In *CFE II*, the court found a middle ground; it ordered the government to come up with a plan that satisfied the Constitution but reserved for itself the opportunity to review the plan again rather than mandating a specific education financing plan or simply

108. *See, e.g.,* Idaho Sch. for Equal. Ed. Opp. v. Evans, 850 P.2d 724, 734 (Idaho 1993).
109. Rebell, *Educational Adequacy, supra* note 89, at 238 (quoting George D. Brown, *Binding Advisory Opinions: A Federal Court's Perspective on State Court School Finance Decisions*, 35 B.C. L. Rev. 543, 567 (1994)).
110. *CFE II*, 801 N.E.2d at 340.
111. *Id.*
112. *Id.*
113. *Id.* at 341–32.
114. *Id.* at 343.
115. *Id.* at 344.
116. *Id.* at 345.
117. *Id.* at 348–49.

finding a constitutional violation without anything more. To the extent courts do not have adequate knowledge to devise education policy, one way to address this is by doing what the New York court did—order a "cost study."[118] This type of engagement between the branches of government in the formulation of an appropriate remedy is one way of giving effect to the notion of "constitutional dialogue" that Liebenberg envisions as an important aspect of socioeconomic rights adjudication.

However, the next time the case came back to the Court of Appeals, the court retreated and showed a much greater deference to the executive, applying a weak standard of review to its assessment of the government's plan. After the *CFE II* decision, the governor of New York appointed a commission to determine the amount of money that should be invested in New York City schools to ensure students a sound basic education.[119] The commission concluded that $1.93 billion should be infused into New York City schools and the governor endorsed the plan, but the legislature refused to adopt it.[120]

The trial court then appointed its own panel of judicial referees to devise a plan that would meet the constitutional mandates.[121] After numerous hearings, the referees concluded that $5.6 billion dollars should be invested to ensure that New York City students receive a sound basic education. The Court of Appeals found that the trial court had erred in commissioning its own study and instead should have determined whether the governor's study was rational.[122] Here the court specifically noted that "[o]ur deference to the Legislature's education financing plans is justified not only by prudent and practical hesitation in light of the limited access of the Judiciary 'to the controlling economic and social facts,' but also by our abiding 'respect for the separation of powers upon which our system of government is based.'"[123] Surprisingly, the Court of Appeals accepted the governor's financing plan despite the fact that the legislature had rejected it.[124] After this ruling, the New York legislature itself adopted a financing plan for New York on 1 April 2007 that laid out a historic $7 billion in school funding phased in over the next four years.[125] Much of this funding may be eroding now with the deep budget cuts in education and other areas facing state governments.

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118. Thirty-nine state courts ordered such studies, but they have mostly not mandated the specific methodology that states should use and instead left it to the discretion of the State. Rebell, Courts and Kids, *supra* note 67, at 65.
119. *CFE III*, 861 N.E.2d at 53.
120. *Id.* at 55.
121. *Id.* at 55–56.
122. *Id.* at 57.
123. *Id.* at 58.
124. Yet, in other contexts such as torts or contracts, courts regularly come up with number figures. For example, they quantify how much the value of a life is or how much damages should be paid by a party in a contract dispute. However, when it involves developing a budget plan to fund constitutional rights, courts feel they are treading near the function of a legislature. While it may be true that it is the role of the legislature to allocate funds between various priorities, this does not mean that the courts do not or cannot have a role in determining adequate expenditures. Campaign for Fiscal Equity, Inc. v. State of New York, 8 N.Y.3d 14, 27 (2006).
125. Campaign for Fiscal Equality [CFE], *Our History: Codification of CFE Victory into Law*, *available at* http://www.cfequity.org/static.php?page=our_history&category=about_us._

The differing approaches of the same court in New York State illustrate the conflicting factors courts face when designing remedies in socioeconomic rights cases. The New York court's first attempt at crafting a remedy in the *CFE I* case was akin to the structural remedy that Liebenberg advocates. In *CFE II*, the court gave the executive discretion to devise an appropriate plan that would remedy the constitutional violation but retained jurisdiction as a way to hold the executive accountable. It did not indicate that it would accept any plan promulgated by the government and by retaining jurisdiction suggested that it would independently evaluate it. On the other hand, in *CFE III*, the court's approach was more deferential—its methodology was to determine whether the plan proposed by the governor was "rational." This approach is more akin to that of the South African courts that have simply evaluated government policies on the basis of an abstract reasonableness test.

C. Addressing Concerns of Separation of Powers

Socioeconomic rights cases inevitably raise separation of powers concerns for courts that adjudicate them. The New York cases illustrate that socioeconomic rights litigation does not necessarily pose a threat to the doctrine of separation of powers that is crucial in democratic governments. On the other hand, picking up on the theories Liebenberg presents, such litigation can support democratic engagement.

First, Liebenberg proposes that socioeconomic rights litigation can and should involve broad public engagement.[126] The plaintiffs in the New York case actively engaged citizens in New York State shortly after the first Court of Appeals ruling in the case. As one of the lawyers for the plaintiffs in the case, Michael Rebell, states, "to help prepare for trial and to begin to think strategically about possible remedies, we initiated a series of three all-day conferences for our core New York City constituents. Representatives of approximately one hundred education advocacy, parent, and community groups participated in these events."[127] As a result of this process, the plaintiffs determined that their strategy would be to ask for more funding for New York City from the state government. This funding should come from other parts of the state budget and should not take away money from other school districts outside of New York City.[128] Then they broadened the dialogue across the state in the next year. They promoted dialogue even within the affluent communities regarding the appropriate direction for reform. They held 16 forums in all parts of the state organized with the assistance of school boards, teachers' organizations, and parent-teacher associations.[129]

The definition of "sound basic education" presented and adopted by *CFE II* was developed throughout this engagement process.[130] After *CFE II*, CFE organized a statewide Sound Basic Education Task Force to develop remedial proposals to the issues directed by the court. All of the major education, parent, and business groups

126. Liebenburg, *supra* note 1, at 487.
127. Rebell, Courts and Kids, *supra* note 67, at 97.
128. *Id.*
129. *Id.* at 98.
130. *Id.*

as well as representatives from the state education and city education departments participated in these deliberations. These legislative-type assemblies were composed of the people rather than their elected representatives.[131] In this way, the plaintiffs were able to get to the primary source—the people—rather than rely solely on the views of their elected representatives. In many ways, voting citizens were able to have more impact on the development of education policy in New York State through these forums than they would have had all the discussions and deliberations occurred within the legislature.

Second, Liebenberg points out that socioeconomic litigation can promote a "constitutional dialogue."[132] In the New York cases, this was certainly apparent during the remedies phase of *CFE II* where the court asked the executive to formulate a plan that would satisfy the constitutional requirements articulated by the court. Additionally, another way in which we see constitutional dialogue is through the New York Court's use of standards developed by the legislature in determining whether the state had violated the constitution. For example, the New York Court of Appeals found that the test results of New York City students were unacceptably low. The state administered a reading test to all third graders and also set a reference point for that test known as the "state reference point." In finding that the output factors suggested that students in New York City were not receiving a sound basic education, the court attached significance to the fact that 30–40 percent of New York City students performed below the state reference point while only 10 percent of the students in the rest of the state performed below the state reference point.[133] In this way, the court adopted a measure articulated by the legislature and used it to determine whether or not a constitutional violation had occurred. Put another way, the court was engaging the political branches as constitutional actors and holding the state accountable to the policy it had set.

Finally, in Liebenberg's model of successful socioeconomic rights adjudication, courts should hear evidence from numerous stakeholders.[134] In the New York case, the trial court heard testimony of seventy-two witnesses and reviewed 4,300 documents over the course of a seven-month trial.[135] Through this process of deliberation, the court obtained the information and expertise necessary to evaluate government budget decisions. Indeed, the decision made by the trial court was probably more rational than a decision made through the political process, which often does not have the capacity to carefully evaluate multiple sources of information free from the pressures of organized special interests and lobbyists.

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131. CFE, *Sound Basic Education Task Force Ensuring Educational Opportunity for All* (2004) at 24, *available at* http://www.cfequity.org/static_pages/pdfs/SBETFfinalaccountabilityproposal.pdf.
132. Liebenburg, *supra* note 1, at 69.
133. *CFE II*, 801 N.E.2d at 338.
134. Liebenburg, *supra* note 1, at 487.
135. *CFE II*, 801 N.E.2d at 328.

IV. CONCLUSION

In *Socio-Economic Rights: Adjudication Under a Transformative Constitution*, Sandra Liebenberg provides a thorough analysis of South Africa's socioeconomic rights jurisprudence and explores how this jurisprudence might be developed to respond more effectively to the entrenched conditions of poverty and inequality that pervade South African society. The New York cases considered in this essay, like a number of the South African judgments discussed in Liebenberg's book, illustrate the global applicability of the challenges Liebenberg addresses and offer real world examples of the adjudicative approaches she proposes.

First, Liebenberg believes that courts should develop the content of constitutional socioeconomic rights and analyze the reasonableness of government policy in light of that content. The New York Court of Appeals provides one example of how courts might give effect to the type of "reconceived reasonableness" approach she envisions. In *CFE II*, the court gave content to its constitutional education provision and held that in today's context the government must provide people with a meaningful high school education in order to, among other things, participate effectively on juries and more broadly in democratic processes. The standard articulated by the court, in line with Liebenberg's views, was flexible and developed in accordance with modern needs, and it took into account the inter-related nature of all rights. Although the trend in South African jurisprudence has been to avoid substantive engagement with socioeconomic rights, some South African courts have developed the content of these rights, particularly in cases involving the right to housing in the context of evictions.

Second, Liebenberg offers a number of suggestions for courts regarding the development of remedies, including that they consider issuing structural orders in appropriate cases. This remedy would call upon the executive or legislature to make potentially wide-scale policy changes, but would also engage the government in the process. Instead of simply finding a constitutional violation and then leaving it up to other parts of the government to determine an appropriate remedy, the appropriate approach may require continual engagement among the different branches of government and the broader public as Liebenberg suggests. Some lower South African courts have begun to embrace structural remedies; for example, the High Court in *N v. Government of Republic of South Africa* ordered the government to develop a plan to provide for the treatment of HIV-positive prisoners and to report back to the Court, leading to a process of engagement between the parties and the Court. In *CFE II*, the New York Court of Appeals engaged the government to develop a plan that complied with its decision. It continued to retain jurisdiction and wanted an opportunity to evaluate for itself whether the plan was in compliance with the Constitution as interpreted by the Court. However, in *CFE III*, when it came time to evaluate the government plan, the Court did not conduct its own analysis but rather choose to defer to the plan developed by the executive.

Third, Liebenberg acknowledges that socioeconomic rights cases must confront the doctrine of separation of powers but rejects a narrow interpretation of separation of powers. The process by which socioeconomic litigation is undertaken and decisions made both inside and outside of courts can promote democratic values rather than undermine them. For example in *Occupiers of 51 Olivia Road v. City of Johannesburg*, the South African Constitutional Court issued an order for "meaningful engagement"

between poor apartment residents and the municipal government, which led to a process of dialogic exchange between the residents, their lawyer, the government, and the Court, resulting in a comprehensive and protective settlement agreement.[136] In the New York case, litigation strategies were shaped by a wide-scale public dialogue. Additionally, the trial court in New York conducted a seven-month trial and heard from parents, students, experts, government officials, and other witnesses during its adjudicative process. In this venue, it obtained and could evaluate the claims of all stakeholders from an independent perspective. Finally, in evaluating whether New York City school funding satisfied the constitutional standard, it considered what the other branches of government viewed to be an adequate level of education.

South Africa's Constitution is known throughout the world for its transformative vision and robust human rights protections, and its Constitutional Court has developed an extensive jurisprudence on socioeconomic rights. On the other hand, the socio-economic rights jurisprudence of US state courts is little known by the international community. While we do not hold up the right-to-education cases from state courts in New York as a perfect model for how courts should adjudicate socioeconomic rights cases, we present them here because they are rarely understood from the perspective of socioeconomic rights litigation. The methodology used by these New York courts in interpreting socioeconomic rights, creating meaningful remedies, and addressing separation of powers concerns can provide insight to practitioners in other countries who are engaged in socioeconomic rights litigation. Together with the South African cases discussed in *Socio-Economic Rights* and Liebenberg's thoughtful proposals for the development of South Africa's socioeconomic rights jurisprudence, these cases contribute to an ongoing global dialogue about how courts should approach the adjudication of socioeconomic rights so as to respond more effectively to systemic deprivation, inequality, and marginalization.

** Elizabeth Brundige is an Adjunct Professor at Cornell Law School and Associate Director of Cornell Law School's Avon Global Center for Women & Justice. Professor Brundige was a law clerk for Justice Sandile Ngcobo of the Constitutional Court of South Africa in 2006 and has worked on socioeconomic rights initiatives in South Africa and other countries.*

*** Sital Kalantry is an Associate Clinical Professor of Law at Cornell Law School, and Director of the Cornell International Human Rights Clinic. Professor Kalantry has written on the use of empirical data in the enforcement of economic and social rights and works on socioeconomic rights litigation around the world.*

Elizabeth Brundige*
Adjunct Professor and
Associate Director Avon Global
Center for Women & Justice
Cornell Law School

Sital Kalantry**
Associate Clinical Professor of Law and
Director of the Cornell
International Human Rights Clinic
Cornell Law School

136. Liebenberg, *supra* note 1, at 293–303.