BOOK REVIEWS


and

Kirsty McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009)

Christopher Mbazira and Kirsty McLean’s books, both adapted from doctoral theses and published by Pretoria University Law Press, are welcome additions to the growing scholarship on socio-economic rights litigation in South Africa. Both books are very readable, while being well-researched and academically rigorous, and are likely to appeal to law students and practitioners alike.

Starting with Christopher Mbazira’s book, this proceeds in six chapters to set out an argument that the South African Constitutional Court’s socio-economic rights jurisprudence reflects an overall aim to advance distributive justice rather than corrective justice. The book’s main contributions lie in its extremely well-referenced overviews of the concepts of corrective and distributive justice, as well as its consideration of the use of the structural interdict as a judicial remedy.

In chapter 1, Mbazira introduces the concepts of corrective and distributive justice, usefully summarising the theoretical positions before presenting his argument that the ‘decisions of the Constitutional Court are based on the ethos of distributive justice’.1 Chapters 2 and 3 deviate from the discussion about corrective and distributive justice, to deal with socio-economic rights per se. In chapter 2, Mbazira examines the nature of socio-economic rights, summarising some of the well-known arguments against and for the inclusion of socio-economic rights in bills of rights, including the debates around counter-majoritarianism, separation of powers, polycentricity and budgetary allocations. Chapter 3 appraises the Court’s socio-economic rights record, outlining the Court’s rejection of the minimum core content approach – as per *Government of the Republic of South Africa v Groothboom*2 and *Minister of Health v Treatment Action Campaign*3 – and assessing the Court’s reasonableness standard of review. As others have done, Mbazira criticises the Court’s failure to define the content of socio-economic rights. He concludes that the normative content of socio-economic rights could be derived from a strengthened reasonableness test. This assertion appears somewhat optimistic in light of the fact that there has neither been much further development of

2 2001 1 SA 46 (CC).
3 2002 5 SA 721 (CC).
the reasonableness test after *Grootboom* and *TAC*, nor any progress in terms of developing the test to provide content to the rights, but this does remain an important possible option for the Court.

Returning to the discussion of corrective and distributive justice in chapters 4 and 5, Mbazira expands on the theoretical arguments (chapter 4) and empirical evidence (chapter 5) relating to these philosophies of justice and also foregrounds an analysis of the relationship between rights and remedies, which is taken forward through an assessment of the structural interdict remedy in chapter 6.

The book provides a thorough examination of the jurisprudential arguments around the justiciability of socio-economic rights, as well as of the tenets of corrective and distributive justice. And it offers a thought-provoking analysis of the role of remedies within the South African model. If there is a weakness, it is the somewhat shaky empirical premise of the central argument: that the Constitutional Court’s socio-economic rights record reflects the ethos of distributive justice. The relevant chapter (chapter 5) that grapples with the question: ‘South Africa: Distributive or Corrective Justice?’ gives only two examples of socio-economic rights decisions by the Constitutional Court to substantiate the claim for the distributive model: *Grootboom* and *Khosa*. Indeed, the chapter relies overwhelmingly on civil and political rights cases to backup the arguments about the nature of the Court’s adjudicative model. However, in fairness to Mbazira, at the time of publication the Constitutional Court had not decided many socio-economic rights cases – only six by most definitions. It is all the more frustrating that *Litigating Socio-Economic Rights in South Africa* was published before the Court handed down a string of four decisions on socio-economic rights (in October/November 2009) that might have provided additional support for the thesis. Nevertheless, the book stands as a worthwhile assessment of the adjudication of socio-economic rights in South Africa from a novel, distributive justice angle.

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Kirsty McLean’s book, too, explores socio-economic rights in the context of jurisprudential debates around issues such as counter-majoritarianism and separation of powers. But, whereas Mbazira concentrates on the character of the Constitutional Court’s remedies, McLean focuses on the operation of

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4 There was some further consideration of the reasonableness test in *Khosa v Minister of Social Development*; *Mahlauhe v Minister of Social Development* 2004 6 SA 505 (CC) and in *Occupiers of 15 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC), but neither decision expanded the test to give meaning to the normative content of socio-economic rights.

5 Note 2 above.

6 Note 4 above.

7 Mbazira’s book does not specify which cases are considered as socio-economic rights cases.

8 *Mazithuko v City of Johannesburg* 2010 (4) SA 1 (CC); *Joseph v the City of Johannesburg* 2010 (4) SA 55 (CC); *Abahlali base Mjondolo v Premier of KwaZulu Natal Province* 2010 (2) BCLR 99 (CC); and *Nokotyana v Ekurhuleni Municipality* 2010 (4) BCLR 312 (CC). Mbazira’s book was also too early to include an earlier judgment from 2009, *Residents of Joe Slovo Community, Western Cape v Thobelisha Homes* 2010 (3) SA 454 (CC).
the concept of deference in the judicial review of socio-economic rights. The book provides a valuable examination of comparative perspectives on deference from the Canadian and United Kingdom jurisdictions (chapter 1), before turning to a more theoretical consideration of the concept of constitutional deference (chapter 2). McLean then moves on to deal with the debates around the justiciability of socio-economic rights (chapter 3) the adjudication of socio-economic rights (chapter 4), and the interpretation and enforcement of socio-economic rights (chapter 5). Although at times repetitive, the overview of socio-economic rights in chapters 3 to 5 is comprehensive and will be beneficial to readers hoping for a definitive summary of the debates and experience of the judicial enforcement of socio-economic rights in South Africa.

McLean’s analysis of the Constitutional Court’s socio-economic record is very good, particularly her examination of how the Court has grappled (or not) with the relationship between parts 1 and 2 of the internally-limited socio-economic rights – housing (s 26 of the Constitution of the Republic of South Africa, 1996) and food, water, healthcare and social security (s 27 of the Constitution). I enjoyed McLean’s fresh take on Khosa, especially her critique of the Court’s rather ‘awkward conflation of socio-economic rights and equality jurisprudence’. And also her argument that, whereas the Court should have shown the highest degree of deference in Khosa – the only decision at that point to have involved a review of legislation (because ‘as a general principle, courts should more readily defer to the decisions of parliament than the executive’\(^\text{10}\)) – the Court in fact displayed the least deference in this case out of the socio-economic rights cases covered in the book.

McLean writes in an easy-to-read and engaging style, and moves effectively through the arguments. She clearly substantiates her central thesis that the Constitutional Court has adopted a principled approach in civil and political rights cases but has not done so regarding socio-economic rights cases, where it has been overly deferential, especially in relation to the executive. As with Mbazira’s book, I regret that *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* was published too early to consider the batch of subsequent socio-economic rights decisions by the Constitutional Court from October/November 2009. But this does not detract from the certain value of the book, which stands as a measured and yet critical appraisal of the Court’s socio-economic rights record.

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10 Ibid 168.