13 Adjudicating social and economic rights

Can democratic experimentalism help?

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Introduction

Social and economic rights (SER) adjudication is an ever more common feature of rights-protecting democracies. Yet democratic concerns continue to be expressed: the threat of a judicialized politics, a politicized judiciary, co-opted claimants, distorted markets, and other (real and imagined) challenges. These concerns are raised within jurisdictions that have not yet entrenched SER and those in which SER are explicitly justiciable. Scholars seeking to address, or at least quiet, such concerns often explore the real-world examples of SER justiciability in South Africa, India, Colombia, Brazil, Argentina and other jurisdictions discussed in this book. Another approach is to examine new ways of theorizing the models of democratic representation and separation of powers implicit in these criticisms and to test these new models against comparative experience. This chapter examines the promise of the approach of "democratic experimentalism".

"Democratic experimentalism" has been advanced as a new paradigm of institutional thinking about democracy and law. Scholars of democratic experimentalism envision different roles for legal actors, including courts. Under this paradigm, courts depart from their traditional model of adjudicative finality, and seek to stimulate deliberative processes that involve parties and other interested groups in the design and implementation of legal rights. Certain features of contemporary SER jurisprudence indicate the promise of a deliberative model, although whether the deliberations contemplated are in line with democratic experimentalist proposals is less certain.

This chapter explores whether the democratic experimentalist approach succeeds in delivering a realizable, democratic model for SER adjudication. We begin by cataloguing the typical critiques of SER adjudication and then describe how democratic experimentalism, read sympathetically, responds to each. Next we apply these responses to the *Mazibuko* right-to-water case in South Africa[2] and imagine an alternative approach to that case. Our thought experiment is meant to bring the pros and cons of democratic experimentalist thinking into sharp relief. While it is important as a program for securing more democratic participation in SER adjudication, we examine how

democratic experimentalism might nevertheless entail significant costs for under-resourced, unorganized and politically weak claimants. This raises the question whether any new procedural or remedial formats for SER adjudication can help to realize such rights without a fundamental rethinking of the material preconditions of democracy itself.

Adjudicating social and economic rights: democratic concerns

Despite some success in SER adjudication in South Africa and elsewhere within the last two decades(Young 2012; O'Connell 2012; Gauri and Brinks 2008), several concerns persist. These are usually presented in institutional terms. Rights to food, water, healthcare, housing and education are notoriously open-ended, even when circumscribed by the targeted language of qualified, conditional legal guarantees.[3] SER adjudication is also procedurally difficult, at least according to an uncomplicated model of the separation of powers. When treated as formally enforceable rules, SER appear to replace democratic debate with rigid commands; when provision is made for more flexibility, SER adjudication may lead to unpredictable and potentially arbitrary judicial interventions. Under the separation-of-powers model of three mutually accountable branches of government, SER therefore raise the challenge of judicial usurpation and abdication: courts may either enforce such rights and thereby usurp the elected branches, or refuse to enforce, thereby abdicating their role (Michelman 2008: 683). Civil society organizations and social movements may also be disempowered by the encounter with courts concerning the definition and implementation of SER (Brand 2005: 17–36).

Many concerns about SER adjudication map onto concerns about public law litigation generally (Chayes 1976: 1281). Lawsuits challenging SER law and policy are likely to be complex and amorphous. Water delivery, for example, involves myriad city, state and nationwide governmental institutions and traverses water, but also health, environmental and finance bureaucracies. It engages public and private organizations involved in infrastructure, maintenance, quality assessment, delivery, and conservation, and consumers of water include firms and households with varied requirements. The pressures of fact-finding, the marshalling of evidence and its careful evaluation may burden the procedural rules and resources of courts. The remedial exercise, conceived not as compensation for past wrongs but as prospective changes to public law and policy, transforms the court into the role of legislator/policy-maker, for which it is apparently not equipped (Chayes 1976: 1315). Because these disputes are polycentric in nature and effect, the interests of a multitude and ultimately indeterminate number of unrepresented absentees may be greatly affected without their input or consideration.[4] Remedies will not reach all parties; yet precedents will bind them whether the claims are brought by an individual or by a class.

Even with generous standing rules, complainants with water, food, housing, education or healthcare needs are likely to struggle to access the resources, time and expertise necessary to litigate. Public interest organizations' ability to reach out to and represent these constituencies is perennially stretched. The more complex remedies requiring negotiation and engagement call for additional resources and organization. These constraints may result in a "middle-class bias" in SER adjudication, reflected in lopsided development of precedent and unbalanced access to relief (Ferraz 2011: 1643; White 2000: 1667; Landau 2012; Alviar, this volume).

Moreover, successful litigation may provoke long-term political and cultural backlash and motivate counter-movements that pursue their own rights-based agendas (Post and Siegel 2007: 392), as occurred in response to the reproductive rights or anti-discrimination strategies in the US (Siegel 2006). Once courts are utilized as forums of social struggle, counter-movements may induce long-term changes to rights interpretation by shifting the political orientation of judicial appointments.

These problems coalesce into an overarching concern: that SER adjudication is anti-democratic and inconsistent with traditional institutions of constitutional democracy. Does giving courts power to resolve fundamental disputes about social goods and services threaten the vibrancy and the stability of democracy? Leaving to one side the ideal of democracy that such a view entertains,[5] it is clear that concerns about SER adjudication are primarily institutional; they reflect disquiet about funnelling democratic activity into courts and limiting democratic activity elsewhere. Several democracy-based approaches respond by attempting to imagine more accountable and yet dialogical roles for courts. "Democratic experimentalism" is one such approach.

The democratic experimentalist response

Democratic experimentalism is a collection of pragmatist-inspired proposals for fostering more deliberative, democratic institutions. Although not conceived as a program for SER adjudication *per se*, its suggestions for bringing institutions and stakeholders together to negotiate and coordinate solutions in areas as diverse as community policing, environmental standard-setting, and drug treatment orders (Fung 2004: 132; Dorf 2003: 875; Karkkainen 2002: 223) appear suited to the concerns catalogued above. Experimentalism suggests an entirely new architecture for governing – reflected in the alternative terminology of "new governance" (De Búrca and Scott 2006: 31) –but we focus on particular applications to adjudication. In applying the tools of democratic experimentalism to adjudication in general and SER in particular, we are necessarily engaged in an act of interpretation and extension of democratic experimentalist ideas. We begin with an account of the program before embarking upon a critique.

The open-endedness of SER adjudication is neither surprising nor unwelcome to democratic experimentalists; it merely presents another opportunity

for interested parties to deliberate over provisional solutions. For experimentalists, SER adjudication invites democratic engagement, deliberation, and learning about what claimants and others care most about in terms of the provision for social goods. The assumption is that when people are uncertain how their goals will be served or their institutions affected, they may entertain a more open, collaborative form of decision-making and be more willing to reform or even reject the status quo (Sabel and Simon 2004: 1074–5).

For example, under experimentalist adjudication, a conflict over interpretations of the right to housing might require state officials, claimants, and other stakeholders to negotiate over provisional benchmarks or standards for security of rental tenure, rental prices, emergency housing facilities or available shelter places. Similarly, the adequacy of the right to water might involve a contestation over water quotas, quality, access to taps and water payment assistance. By including new forms of knowledge – local, situated, as well as expert –experimentalists hope that negotiations will expose participants to alternative ways of perceiving and responding to social problems, draw established participants out of their "comfort zone" (Dorf and Sabel 1998: 418) and unearth new solutions to such intractable problems as housing shortages and water scarcity.

A court engaging in experimentalist adjudication would oversee these negotiations and work to ensure the fairness of the deliberative procedures and the representativeness of the parties (Sturm and Scott 2006: 565). Within this conception, the role of courts is neither simply to safeguard representative politics nor to reorganize institutions on the basis of substantive constitutional rights, as traditional constitutional theory would have it, "but to require that problem-solvers themselves make policy with express reference to both constitutional and relevant policy reasons" (Cohen and Sabel 1997: 335). Sabel and Simon (2004: 1016) argue that a democratic experimentalist court could also lend its institutional power to "destabilize" entrenched positions, especially those of state officials or bureaucracies previously immune from electoral accountability or the exposure of litigation. This conception sees SER as "destabilization rights" rather than formal entitlements: that is, they serve to "protect the citizen's interest in breaking open the large-scale organizations or the extended areas of social practice that remain closed to the destabilizing effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage" (Unger 1987: 530, endorsed by Sabel and Simon 2004: 1055–6).

The democratic experimentalist approach de-centers courts and takes greater notice of institutional innovations occurring elsewhere (Lobel 2004: 382). Decentralized, collaborative decision-making is the democratic experimentalist's preferred modality of resolving rights conflicts and meeting the obligations imposed by constitutional rights; courts are considered too remote from the dynamics of such problems to generate satisfactory resolutions through standard adjudicative techniques. Yet litigation is nonetheless

important because courts can promote the goals of accountability and transparency, and push beyond the traditional model of separation of powers by using novel remedial powers to initiate complex reforms (Sabel and Simon 2004: 1080). Polycentricity is transformed from a challenge to an aid to problem-solving because proliferating connections between stakeholders generates opportunities for learning and innovation. Judicial intervention can also make structural reforms in and across policy areas and institutions a plausible prospect. The court's main contribution is "to indicate publicly that the status quo is illegitimate and cannot continue" (ibid. 1056). The parties, through their induced negotiation, do the rest.

Democratic experimentalism adds new approaches to the existing responses to the problem of unrepresented absentees, such as class actions and *amici curiae* (Chayes 1976: 1300–1). Having the court oversee negotiations between the parties in reaching its decision or in designing a remedy is an additional and growing feature of public law litigation in a number of jurisdictions (Chayes 1976: 1312; Parmar and Wahi 2011: 172–4; Angel-Cabo and Lovera, this volume; Gargarella, this volume). Democratic experimentalists would also include additional stakeholders in that negotiation, beyond the parties themselves (Sabel and Simon 2004: 1098). Within this model, remedies are formulated in provisional terms and designed to be renegotiated over time. The critical element of the remedy, then, is the participatory process that it establishes. New affected interests may be identified in the course of implementation, and these additional constituencies are given an opportunity to challenge the provisional standards or pathways that had been set through using "rolling" remedies or timelines for reporting back and "benchmarking" improvements (ibid. 1069).

This iterative approach to remedies also applies to rights. Not tethered by "rights essentialism" (Levinson 1999: 858) and the need to formulate the fixed content of rights, courts make liability determinations in fluid interdependence with the initiation of the remedy. This insight reflects the general pragmatist orientation of democratic experimentalism, which does not draw a sharp distinction between ends and means but instead emphasizes their "reciprocal determination" (Dorf and Sabel 1998: 284–5; Simon 2004: 127). However, the position is not wholly fluid. When confronted by a potentially serious threat to fundamental rights calling for urgent intervention, experimentalists propose that courts lay down "prophylactic rules" as a preventive or protective measure while inviting actors close to the situation to develop improvements on these general rules through deliberative experimentation (Dorf and Sabel 1998: 453). Such rules have presumptive force "until experience provides a better alternative" (ibid. 457).

For its proponents, this approach is consistent with both public and private law (Sabel and Simon 2004: 1062). It is also compatible with market-based solutions insofar as experimentalism rejects the "command and control" features of the state's (court, legislative or executive) articulation of rights and instead celebrates reciprocal involvement of private actors (Young

2012: 265; Lobel 2004: 369). To this extent the experimentalist program parallels the Hayekian emphasis on market flexibility and choice as opposed to central planning (Cohen 2010: 369). Yet in contrast to neoliberal deregulation, democratic experimentalists envisage an alternative model that purports to deepen democracy and accountability in non-governmental and governmental sites while responding to the need for flexible responses and market participation (Cohen and Sabel 1997: 315–16).

Similarly, democratic experimentalism addresses the challenges that SER adjudication presents for democracy by introducing a more radical, deliberative version of democracy. Democracy is reimagined as polyarchy – the rule of multiple, highly participatory minorities.[6] Experimentalists therefore favour direct democracy, emphasizing the benefits of decision-making at the lowest possible level rather than through proxies established by representative democracy. Under this approach, different localities are coordinated by procedures of information sharing, peer review, and benchmarking of best practices. This opening and sharing of information is said to counteract the dangers of localism by making former prejudices transparent and exposing them to challenge. New solutions designed by particular groups are benchmarked for wider use, and incentives are created to encourage other groups to reap the same rewards.

In summary, an experimentalist approach may bring flexibility, accountability, and a direct form of democracy to the practice of adjudication, features that appear critical to meeting the challenges of SER adjudication. These innovations are meant to play a role in both the liability and the remedial phases of adjudication. How they might operate in practice is explored below.

Democratic experimentalism: a thought experiment

South Africa's developing SER jurisprudence exhibits features that reflect a dialogic, deliberative approach to adjudication. The Constitutional Court has developed an open-ended, flexible model of "reasonableness review" that purports to provide scope for the other arms of government to design social legislation and programs, while reserving for the court the powers of review against specified criteria. Such criteria include, for example, a failure by the government to provide for those in urgent need, lack of reasonable flexibility in a program, and unfair exclusion of groups from social programs (Liebenberg 2010: chapter 4). Based on these criteria, the Court in *Government of the Republic of South Africa v. Grootboom*[7] provided an open-ended declaration of unconstitutionality in order to prompt reform of the national housing policy to cater to emergency housing situations. In *Minister of Health v. Treatment Action Campaign*[8] the Constitutional Court mandated access to the anti-retroviral drug Nevirapine while expressly reserving the right for government to adapt its policy if equally appropriate or better methods became available for the prevention of mother-to-child transmission of HIV.[9]

Most significantly for interventions aimed at stimulating deliberative responses, the Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg*[10] designated "meaningful engagement" – between parties, stakeholders and government – as a weighty factor in determining whether a court should order the eviction of people from their homes and how to mitigate the disruptive consequences of lawful evictions (see Liebenberg 2012: 1; Chenwi, this volume).[11] This development perhaps reflects the greatest congruence between South African jurisprudence and the directly democratic, small-scale and deliberative solutions prescribed by democratic experimentalism (Ray 2009: 799). However, meaningful engagement has largely been deployed in eviction cases and contemplates involvement of the primary parties, namely the occupiers, landowner and/or local authority. It has not yet been extended to the broad range of stakeholders contemplated in the experimentalist approach, although the Constitutional Court has signaled the important role of civil society organizations in facilitating the engagement process.[12] Despite its potential to evolve into a collaborative, directly deliberative decision-making process between citizens, government and private parties (Muller 2012: 300), meaningful engagement still vests considerable decision-making authority in state institutions.[13] Finally, meaningful engagement has thus far served primarily as a dispute-resolution mechanism, not a vehicle for enabling inclusive deliberations regarding the far-reaching structural reforms needed to realize various SER.

In this section, we apply the democratic experimentalist conception of courts as deliberative partners in SER realization to one of the Constitutional Court's most controversial SER judgments, *Mazibuko v. City of Johannesburg.* While this judgment has attracted some support from commentators sympathetic to the administrative burdens on local government within the context of water scarcity (Kotzé 2010: 157–60), many commentators have suggested that the Court was overly deferential to the elected branches of government and neglected to engage with the substantive obligations imposed on local authorities by the right of access to sufficient water in section 27 of the Constitution (see Liebenberg 2010: 466–80; Williams 2010: 141; Quinot 2010: 124–36; Wilson and Dugard 2012: 231–6). We explore in the *Mazibuko* context how a democratic experimentalist approach seeks to transform the traditional dichotomy between a "deferential" and "usurping" court (discussed by Michelman 2008).

Mazibuko emerged from changes to Johannesburg's water policy limiting the supply of free basic water (FBW) to 6 kilolitres per household (based on the national prescribed minimum basic water supply[14]) and requiring the installation of pre-payment water meters as a precondition for water supply in residents' houses (as opposed to a credit system for in-house service or outdoor delivery through yard standpipes). Five households from Phiri, Soweto, challenged the new policies as contrary to the constitutional right to access sufficient water.[15] These claimants, all from very low-income households and many with critical care or health based needs for water consumption,[16] argued

that the supply of FBW was insufficient to meet daily water requirements, and that the combined effect of the limited FBW amount and the pre-payment water meter system was that the claimants were frequently left without access to water mid-month. They argued further that the policy was unreasonable because it did not cater to different household sizes,[17] shared water connections, different consumption needs, and fixed water-borne sanitation requirements. A second challenge claimed that automatic termination of a household's water supply beyond the FBW minimum unless additional credits were purchased and loaded on the pre-payment meter deprived the applicants of procedural fairness.

The city's response highlighted problems of sustainable water management. This is a particular challenge in a city where half of all households are very poor, one-fifth live in informal settlements and one-tenth of residents have no access to water within 200 metres of their homes. The city produced evidence that 75 per cent of water delivered to Soweto was unaccounted for and defended the policy changes as aspects of its attempt to save water and increase accountability of its use.

Both the High Court and the Supreme Court of Appeal agreed with the claimants that the 6 kilolitre minimum was unreasonable and set a higher standard (although the courts differed on the standard).[18] The Constitutional Court rejected this approach, holding that "the City is not under a constitutional obligation to provide any *particular* amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realize the achievement of the right."[19] The Court gave three primary reasons for declining to fix a quantitative standard: setting a fixed standard could be counterproductive given that needs vary over time and context;[20] government is institutionally better placed than courts to set standards for SER delivery; and it is preferable as a matter of democratic accountability that the legislature and executive set such standards "for it is their programs and promises that are subject to democratic popular choice".[21] The Court noted but did not evaluate the parties' conflicting expert evidence parties on what constituted daily "sufficient water". The Constitutional Court also compared the situation of Phiri residents with the apparently more dire situation of those in informal settlements who lack access to a tap providing clean water within 200 metres of their home.[22]

These reasons reflect the concerns about SER adjudication expressed above insofar as they assume that the elected branches of government are better suited to articulate and deliver such rights, and that polycentric disputes may leave unrepresented absentees greatly affected without their input or consideration. Would a democratic experimentalist approach, introduced at both the liability and remedy phases, have assisted in the adjudication of the right to water? Or was *Mazibuko* already an application of the democratic experimentalist approach?

Many aspects of the Court's decision reflect basic tenets of democratic experimentalism. Its refusal to set a quantifiable minimum reflects pragmatist

anti-essentialism. In celebrating the flexibility of the city's metered, user-pays system for water service delivery above the basic minimum, the Court sanctions the administrative deftness of a market solution. Over the course of the litigation, the city itself improved upon its policy, and the Court admitted subsequent evidence of ongoing enhancements including a program providing an additional 4 kilolitres of water per month for households that register as indigents.[23] The Court held that the admission of new evidence was justified given the constitutional obligation "to continue to revise its policy, consistently with the obligation to ensure progressive realization of rights".[24] In praising this evolution in the city's position, the judgment presented a theory of democracy that united the accountability of the ballot box with the ongoing accountability, information disclosure, and responsiveness produced directly by litigation.[25]

Nonetheless, *Mazibuko* also departs from some features of democratic experimentalism. The city's flexible, evolving approach to water management, praised by the Court, did not result from a direct negotiation between the parties or between them and other stakeholders,[26] but from what the Court saw as the city's own bureaucratic resourcefulness. Provision of additional water under the city's indigency program was not a tailored policy designed in collaboration with and approved by the claimants, who argued that it was demeaning and under-inclusive.[27] The Court did not give detailed consideration to the hardship experienced by households that lost water supply after exhaustion of the free basic minimum. As noted previously, many households within Phiri find it difficult to purchase the credits for continual supply beyond the FBW amount.[28] Despite some soaring rhetoric ("water is life"[29]), the Court gave greater credence to problems of water scarcity, distribution, and expense, as attested to by the city, than to the impact of limited and expensive water on the lived realities of the Phiri community. By contrast, the High Court had engaged with the effects of insufficient water on a poor community plagued by a high AIDS prevalence and paid close attention to the implications of the city's program for the applicants' human dignity.[30]

Yet it is possible to reimagine the outcome in *Mazibuko* through an alternative approach closer to democratic experimentalism. Rather than adjudicating between the claimants' and defendants' opposed lines of reasoning, the Court would emphasize negotiated elaboration of a new standard of liability and new remedial interventions. It would address the conflicts and difficulties associated with water delivery to low-income communities by seeking to stimulate new participatory processes for learning, democracy, and experiment. Perhaps a court-supervised negotiation between the parties of the kind suggested by Sabel and Simon (2004) might have brought additional insights to the problem of managing water sustainably and equitably, central goals acknowledged by the Constitutional Court.[31] The Court might have invited additional stakeholders, such as residents of informal settlements, commercial water users, sanitation experts, health groups, the South African Human

Rights Commission, the Commission for Gender Equality and others, to deliberate over how best to realize the constitutional right of access to sufficient water in a sustainable and equitable manner.

Although one cannot predict exactly what would have transpired, a thought experiment suggests many possible outcomes. By comparing other jurisdictions in an experimentalist fashion (De Búrca *et al.* 2013), the Court might have acknowledged the need for a different minimum standard of water provision based on a clearer articulation of the required purposes and uses of water (Winkler 2012: 126–34; Moyo 2013: 80–1, 276–87). By requiring the parties to engage in "root cause analysis" (which seeks to identify the original cause rather than more immediate basis of a problem (Sabel 2005: 115–16)), the Court might have helped them to broaden their perspectives, thereby potentially generating novel solutions.[32] This might have dissolved some powerful, if false, binaries, such as the assumed opposition between water consumers and environmental conservation goals (cf. Kotze 2010). While not able to say in the abstract which solutions would be practical or enjoy support, one can imagine alternatives that include exploring different methods of water distribution and subsidization between various categories of water users;[33] delivering sanitation through alternative, non-water-borne methods such as the provision of newly designed toilets, perhaps acquired through a collaboration with private philanthropies; supporting additional infrastructure for shared water connections; adding procedural-fairness protections to the pre-payment meter system; replacing the indigency program with a less stigmatizing community insurance policy for water use; designing special water programs to support female-headed households and those caring for people living with AIDS; or generating efforts to increase the livelihood opportunities and incomes of the relevant communities. While such solutions are not unique to the experimentalist position, the emphasis on court-supervised deliberation, the inclusion of many stakeholders, and the incentives for learning and root cause analysis open paths toward such innovations.

The limitless potential of the thought experiment indicates that a robust exercise in democratic experimentalism eluded the Court's judgment. An experimentalist response to the *Mazibuko* facts might have stimulated a more inclusive participatory process to design a water services policy consistent with the normative purposes of the right to water, while enabling the Court to sidestep the separation-of-powers and institutional competence concerns cited in the judgment.[34] *Mazibuko* did little to solve the underlying causes of the water delivery conflict in Phiri. Moreover, by substantially reducing the prospects of success in cases involving challenges to the adequacy of government program to give effect to SER, *Mazibuko* arguably had a chilling effect on SER litigation, particularly that involving the enforcement of the positive duties imposed by these rights.

A participatory, experimentalist solution to the Phiri water conflicts could have given voice to poor communities affected by the city's policies,

constructively channeled the institutional energy of the social movements supporting these communities, and avoided the negative jurisprudential impact of the judgment. Such an approach would not have required the Court to set quantitative standards for water provisioning in an a-contextual, rigid and potentially counter-productive manner.[35] Yet while compelling alternatives responsive to the democratic and separation-of-powers concerns described above are possible, their practical likelihood is less convincing. Why is this so? We suggest that the limitlessness of theoretical alternatives in *Mazibuko* overlooks a problematic aspect of democratic experimentalism, especially in the SER context. Successful application of democratic experimentalism as a pathway to rights fulfillment requires some parity of deliberative strength among the parties, either as peers or because courts or other institutions or processes counteract deliberative inequality. This dilemma may limit the usefulness of democratic experimentalism in SER adjudication.

Democratic experimentalism: a critique

Democratic experimentalism offers innovative responses to the concerns about SER adjudication identified above. To remove the democratic objections to judicial review, one weakens the normative finality of judicial decisions; just as one counteracts the regulatory inefficiencies of command-and-control by reducing the finality of decisions by governmental institutions, and avoids the top-down delivery of social goods and services by dispersing centralized decision-making.

The danger in this approach is that localized, bottom-up, deliberative processes will not be sufficiently strengthened while the "equalizing" power of courts is weakened. This danger is particularly critical in the context of SER adjudication as claimants will, by definition, lack the resources for effective participation. Often they come to court to access very basic requirements of survival. Here we argue that current accounts of democratic experimentalism do not adequately address the power imbalances between the parties, an omission that deeply compromises the potential of experimentalist adjudication. We pursue three aspects of this criticism: that experimentalism places too much faith in procedural over substantive interpretations of SER while undervaluing the importance of confrontational politics; that it fails to appreciate or address deliberative inequalities; and that it overestimates the power of local problem-solving to achieve the redistributive aspirations of SER.

Normative weakness

Recall that a key feature of experimentalism is the porousness of the boundary it sees between rights enactment and interpretation on the one hand, and rights enforcement on the other. The meaning of rights is said to evolve through deliberative engagement, processes of benchmarking, rolling

standard-setting, and adjustment subject to judicial scrutiny of whether the processes conform to experimentalist methodology in broad outlines and are sufficiently directed by constitutional considerations. This exposes the theory to the critique that its engagement with the normative content of rights is too procedural at the cost of substance and too trusting of certain deliberative procedures to deliver appropriately on the scope and enforcement of SER. We call this the "normative weakness" objection. The two parts to this objection relate to the way in which a strong substantive definition of rights yields to a procedural articulation of SER, while at the same time diminishing certain procedural sources of normative power, such as strong courts and oppositional politics.

Rights are integral to most accounts of democratic experimentalism, but their content is not fixed. They are shaped and evolve through pragmatic engagement between communities, groups and formal institutions in response to particular conflicts and struggles. Over time, rights have become a primary means through which the non-foundational, but functionally important values of equality and freedom receive institutional and symbolic protection in democratic societies (Dorf and Sabel 1998: 444–8). Yet the meaning of rights is provisional and open to revision and redefinition through democratic deliberation and experimentation in response to varying local contexts and temporal circumstances (ibid. 445–52).

Within the practice of adjudication, this conceptualization of rights implies deference to processes of democratic decision-making that conform to experimentalist criteria and a corresponding avoidance of deep, comprehensive and final definitions of rights. Rarely, and only at the end of an extensive democratic experiment, would a court intervene to substitute a decision that it thinks should be made for one made by those directly affected and involved (Cohen and Sabel 1997: 337). By then the court is said to have the benefit of an extensive record of the deliberative process and the reasoning that informed the participatory decisions.

While this suggests a much weaker role for courts, in the sense that substantive rights are not judicially developed and enforced independently from the parties' continual involvement (Tushnet 2008: 248), there are exceptions. The device of "prophylactic rules" is available to protect urgent interests until experimentation produces a better solution. Moreover, courts can gradually "turn up the heat" of substantive review as democratic experimentation unfolds and emerging standards gain discursive cogency and acceptance (Michelman, this volume). The aim of "benchmarking" particular rights pronouncements against determinations reached elsewhere can exert this kind of normative pressure. Nonetheless reliance is primarily placed on the outcome of ongoing deliberative engagements to develop the normative content of rights. These processes do not contemplate that courts themselves apply normative standards and values, independently from the parties' own expression. But such standards and values are the outcomes of hard-won domestic and/or international struggles to carve out the normative

content of SER. The worry is that such gains may be negotiated away by subjecting them to ongoing processes of democratic experimentation in which outcomes may reflect the power disparities between the parties rather than the evolving normative standards associated with SER.

Even benchmarking processes – which democratic experimentalists favour as an ever-increasing standard of review when standards reached earlier, or elsewhere, are internalized as minimal commitments (Dorf and Sabel 1998: 339) – may succeed when applying SER determinations developed in courts or jurisdictions that do *not* practise democratic experimentalism because the stronger, substantive SER approaches may be grounded in a very different mode of adjudication or other politics. This relates to the second feature of the normative weakness objection: experimentalism downplays the contentious cultural and political processes through which rights often acquire meaning.[36] Processes that privilege an atmosphere of negotiated resolutions and that, beyond a certain point, discourage parties from holding robust, partisan or counter-hegemonic views tend to deny or suppress basic cultural and distributional conflicts.

From a perspective in which rights accrue normative strength by connecting abstract values to specific meanings through social struggles, democratic experimentalism seems to ignore the potential contributions of spontaneous, not fully deliberative and possibly confrontational political action and expression. Young has described this as a "symbolic deficit" of experimentalism, contrasting the "grand, world-shifting discourse" of other, jurisgenerative accounts of rights with the "pragmatist, problem-solving and incremental reform" orientation of experimentalism (Young 2012: 284). Similarly, scholars such as De Sousa Santos and Rodríguez-Garavito criticize the tendency of democratic experimentalism to exclude contentious collective action, which may be a political requisite for the attainment of social and legal transformations (De Sousa Santos and Rodríguez-Garavito 2005: 8, 16).

Current democratic experimentalism theories tell us little of how the normative strength that attaches to rights after social struggle – often after exceptional moments of crisis – is generated and sustained in experimentalist processes (Herschkoff and Kingsbury 2003: 321). Many accounts of the historical processes undergirding the emergence of human rights emphasize the political energy generated in crisis as critical to the formulation and ongoing resilience of rights (e.g., Dudziak 2011: 236, Forbath 2001: 1828–9). Clearly, periods of incremental or repressed advocacy and struggle are also important, as South Africa's own long fight against apartheid demonstrates. But rights commitments are heightened, rearticulated, and become embedded in new settlements after an energetic moment of crisis. The Second World War provides a good example in the context of SER (Young 2009: 181–91). When the crisis ceases, something is needed to protect unrepresented and marginalized groups in public reform processes, whether strong narratives of rights, strong memories of struggle, strong courts, strong central

governments, strong social movements or other sources of power. Democratic experimentalism does not contest this historical account.

Our worry is that prophylactic rules, benchmarking, and painstaking deliberative engagements within the strictures imposed by democratic experimentalism may not be enough to safeguard rights claimants, particularly those who do not enjoy broad popular support in disputes which are polarizing and accompanied by structural power-conflicts. This problem may be common to all prescriptions for weaker courts (e.g., Tushnet 2008), but it does represent a major concern that the democratic experimentalist response to the concerns raised by SER adjudication fails to appreciate a vital aspect of how the normative strength of rights is built.

In *Mazibuko*, the Phiri claimants and their social movement supporters turned to courts when mobilization and social protest failed to redress their concerns. One reason their mobilization strategy failed was that the claimants lacked the broad cross-class and cultural support needed to initiate the deep-seated and long-term institutional reforms needed to secure access to water (Dugard 2008b: 595–6). The government spearheaded reform efforts concerning water (Klug 2013) without much prior, focused organizing by social movements. We speculate that this backdrop diminished the organizing strength of the Phiri claimants and made it more difficult for them to build the kind of cross-class alliances forged by the Treatment Action Campaign in their popularized campaigns on the right to health care (Young and Lemaitre 2013: 203–6). Now, three years after the Constitutional Court decision, the Anti-Privatization Forum, one of the major social movements involved in the litigation, no longer exists, which heightens the vulnerability of the Phiri community. Dugard and Langford identify certain material and symbolic gains that flowed from the litigation. Material gains included the increase in the FBW allocation for indigent and special needs households, the installation of a "trickler" device on the pre-payment meters to avoid the automatic termination of access to water following the exhaustion of the FBW allocation, and an undertaking from the city not to prosecute anyone for bypassing the pre-payment meters (Dugard and Langford 2011: 58–9). The symbolic gains included the establishment of a new coalition, the Coalition Against Water Privatization (CAWP), and dissemination of publicity and information concerning water rights, water services related planning, budgeting and other problems (ibid.). Nonetheless, these indirect gains remain problematic and insecure as they are not grounded in a clear articulation of the city's constitutional responsibilities in terms of section 27. Registration for the increased package is vastly under-representative of qualifying households, and access to sufficient water for the majority of impoverished households living in Phiri remains a major concern.[37] This outcome suggests that the deep disadvantage experienced by impoverished and politically marginalized groups involved in the Phiri litigation called for the enhanced protection of a strong normative statement by the Court of the values, objectives and obligations generated by section 27.

Instead, the Constitutional Court's judgment engaged very little with the constitutional values and purposes of the right of access to sufficient water. Almost no reference was made to relevant international or comparative law pertaining to the right to water (described, e.g., by Winkler 2012). The critical question is whether deliberation in a democratic experimentalist mode would have facilitated a more in-depth normative engagement with section 27 and a stronger account of the normative purposes underlying the right.

Deliberative inequalities

To the normative weakness objection must be added the concern, acknowledged by its proponents, that many central tenets of democratic experimentalism contain built-in structural biases that systematically advantage the strong and disadvantage the weak.[38] In addition to neutralizing the levelling effects of either strong courts and/or contentious politics, such features include the decentralization of authority and the privileging of deliberative reasoning as a mode of solving social problems.[39] The predictable inequality between the parties in SER adjudication affects both the bargaining strength and the more general ability of deliberative processes to create agency on the part of the poor.

As early proponents of democratic experimentalism acknowledged, two forms of inequality may operate to disadvantage weaker parties in deliberative processes: a "bargaining disadvantage" of inequality and a "disenfranchisement effect" (Dorf and Sabel 1998: 409). The former argues that resource mal-distributions undermine the ability of "the have-nots" to successfully assert and defend their interests in contentious negotiations, while the "haves" are able to "recoup losses they might unaccountably suffer in one round of bargaining in the next" (ibid. 1998: 408–9). Poor claimants are also disadvantaged in bargaining processes because they are less able to predict their own bargaining strengths and are more likely to be exploited in settlement procedures (Fiss 1984: 1076). A "disenfranchisement effect" occurs in that the very experience of oppression and grinding poverty removes from the impoverished the ability to participate successfully in deliberative processes, and to take advantage of the opportunities presented.

Democratic experimentalist proponents Dorf and Sabel do not contest that resource inequalities create bargaining disadvantages. However, they reject the idea that the only possible outcome is mechanical reproduction of inequality. They argue that the historical record and the reality of practical politics is far more complex and that the disadvantaged have real opportunities to extract gains through alliances with divided factions of the elite, particularly under conditions of uncertainty and volatility that inequality helps to perpetuate (Dorf and Sabel 1998: 409–10). They also theorize that dialogue and engagement have a transformative power on persons' self-understandings and prior commitments (ibid. 467).

The second, "disenfranchisement" effect of inequality is a greater obstacle. But as Dorf and Sabel suggest, if inequality inevitably creates disenfranchisement, then it would systematically undermine all radically redistributive reform initiatives, as oppressed groups would be divided and incapable of generating the solidarity needed to formulate radical proposals for change. Historical instances of oppression reveal the opposite – that oppressed groups are eminently capable of organizing, exercising agency, rebelling and negotiating to bring about social change (ibid. 410–1). Nonetheless, that historical record is also replete with confrontational, oppositional politics of a kind disfavoured by the democratic experimentalist approach.

Indeed, one might fear that experimentalism may risk serious co-optation effects that lead disadvantaged participants to adapt to an unjust social order in the interests of arriving at pragmatic solutions and invite them to exchange a politics of defiance and "limit breaking" for a politics of "small deals" (ibid. 413). Just as noted above in relation to the normative weakness objection, this exchange undercuts the symbolic and mobilizing potency of the politics of resistance, which arguably has greater potential to redress deliberative inequalities than attempting to reconcile vastly divergent interests through painstaking incremental negotiations. In the *Mazibuko* context, social movements such as the Anti-Privatization Forum might have lost what limited bargaining power they had, had they abstained from contentious political mobilization and protest in order to operate within the strictures of a democratic experimentalist negotiation.

Deliberative inequalities structure outcomes in more subtle ways as well. The personality new governance envisions – "pragmatic, democratic, collaborative negotiators" – shapes and constrains the way disadvantaged groups are able to advance their interests (Cohen 2008: 539). The skills required for successful deliberation "are purposefully designed to shape individual interests in ways which are strategically adaptive to existing social and power relations" (ibid. 540). Experimentalism steers participants to seek collaborative solutions that accommodate market efficiency concerns (typically to be the credo of the more economically powerful) and concerns about inequality and lack of access to resources (the concerns of the economically marginalized). The logic is that win-win solutions are possible and that economic efficiency and democratic legitimacy are mutually reinforcing (Cohen 2008 citing Lobel 2004: 344; Rose 2006). This optimism about win-win solutions must be tempered by a greater realism that negotiation processes frequently produce winners and losers (Cohen 2008: 546) and may end by reproducing rather than altering the status quo (De Sousa Santos and Rodríguez-Garavito 2005: 6–9; Scheuerman 2004: 125–6).

The risk is exacerbated in conditions of social and economic inequality as disempowered groups can end up compromising on positions that would be in their distributional interests in exchange for the recognition benefits of participating in processes perceived as procedurally fair and dignity-enhancing (Cohen 2008: 542; De Búrca *et al.* 2013: 59). In short, the vision of

the "selves" underlying democratic experimentalism – open and willing to be transformed through dialogic engagement with the other, and to convert their ends into strategic interests so as to achieve pragmatic solutions –is, as Cohen argues, already heavily inflected by practices of power (Cohen 2008: 530).

The limits of local problem-solving

To these criticisms of normative weakness and deliberative inequalities we add a third: the bias toward local decision-making in democratic experimentalism might further detracts from the redistributive aspirations of SER. Not dispersed forms of local problem-solving, but a national-scale redistribution of resources, services and opportunities may be needed before experimentalist methods can meaningfully be contemplated. A preference for the local can create a built-in head wind against centrally coordinated projects aimed at advancing egalitarian distribution of resources. For example, the inadequacy of resources and political support for anti-poverty proposals in both the United States and South Africa has been cited as a failure of localism: "decentralization places responsibility on government actors that lack the fiscal capacity to respond effectively" (Super 2008: 547; see also, in the South African context, Siddle and Koelble 2012: 184–5). Critics claim that democratic experimentalism assumes away problems that necessitate national regulation. These include the way in which externalities from one state or locality, such as pollution or migration, affect another (Super 2008: 557).

The democratic experimentalist solution to the conundrum of centralization – to benchmark and scale up from successful experiments – creates its own challenges. These include the difficulty of measuring success, as well as the institutional will and capacity among various spheres of government, private actors, and social movements to engage in a benchmarking exercise, agree on best practices, and make consequential adjustments in policy and practice. This criticism raises complex issues beyond the scope of this chapter. For example, while there is evidence of successful SER benchmarking between provinces in South Africa (Klug 2005), there is equally evidence that decentralization can lead to differences in quantity and quality of services provided in different areas within a state, depending on the capacity and resources of the relevant local unit. This may lead to a deepening of inequalities between richer and poorer areas.[40]

From a different perspective, the preference for localism may discount the important advantage for SER claimants of utilizing international human rights standards. These emerged through national and international struggles and provide valuable normative markers for evaluating both the processes and outcomes of deliberative engagement. For example, international standards of adequacy, access (physical and economic), acceptability, and adaptability have emerged as guides in assessing the fulfilment of SER, without commitment to a precise political program or policy blueprint. These broad standards leave much scope for their practical implications to

be contested and worked out through various forms of institutional and extra-institutional politics. Unlike the localized, participatory processes favoured by democratic experimentalism, their pedigree is often an expert-led, "top-down" crafting without the responsiveness of local processes (despite suggestions of more participatory processes in more recent international treaty-making and standard setting and in regional institutions: see De Búrca *et al.* 2013: 26–38; Gerstenberg 2012: 904). Yet these deficiencies in local responsiveness and deliberation do not inevitably obstruct the potential of international standards to guide SER adjudication.

Conclusion

As a species of deliberative response to concerns about SER adjudication, democratic experimentalism has clear institutional virtues. It promotes bottom-up, collaborative decision-making by those directly affected by social problems and injustice instead of the imposition of top-down solutions by the remote and inflexible central institutions of representative democracy. It enhances accountability and learning through the requirements of deliberative reason. And it attempts to create new institutional spaces for citizens to design innovative solutions to collective problems, solutions currently beyond the imagination of the orthodox institutions of liberal constitutional democracies.

Yet, we have sought to demonstrate that many design features of democratic experimentalism suggest a misplaced optimism in the equalizing power of deliberation and the likelihood of achieving common ground in the situations of intense distributional conflict that characterize many SER disputes. The very values that animate democratic experimentalism generate tools for criticizing its use in an array of social contexts. The turn to procedural forms of SER definition and enforcement can undercut the normative strength that social and economic rights potentially offer those marginalized by poverty and inequality. Democratic experimentalism relies on strong forms of political organization while removing the grounds of oppositional, contentious politics on which social movements often depend. Of particular concern is the way in which experimentalist processes discount power asymmetries and place the risks of a local, deliberative process of decision-making on the weaker party.

These limitations do not to our minds imply a wholesale rejection of democratic experimentalism, but rather demand closer study of the conditions under which it may empower participants and advance substantive SER goals. Democratic experimentalism should not be viewed as a complete prescription for social change, but as one set of institutional arrangements that may be more or less suited to generating progressive changes in various contexts. It can form part of an eclectic range of tactics for social movements, marginalized communities and other forms of social organization, and for courts in the design of review and remedies. We have highlighted

some weaknesses in order to enable a more clear-eyed assessment of when it is likely to be productive for courts, governments and disadvantaged groups to participate in experimentalist processes.

This conclusion is significant not only in answering the question with which we started – can democratic experimentalism help to address the challenges of SER adjudication? – but also to our thinking about the role of social and economic rights in democracy in general. Many of the problems that beset democratic experimentalism are common to other deliberative models of rights enforcement, where equalizing inequality is both a precondition for getting started and an end goal. The problems that we have identified in the course of our *Mazibuko* thought experiment – such as bargaining disadvantages, disenfranchisement effects, adaptive preferences, the elusiveness of the win-win, externalities, co-optation by offer of half-a-loaf, and the inevitability of distributive conflict – apply to other deliberative models of democratic engagement and challenge us to interrogate our conception of democracy more deeply.

Notes

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2 2010 (4) SA 1 (CC) (hereinafter "*Mazibuko*").

3 See, e.g., the qualifiers of "reasonable measures", "progressive realization", and "within available resources" in sections 26(2) and 27(2) of the South African Constitution.

4 Chayes 1976: 1304, citing Fuller on polycentricity – although Chayes attributed this only to public law, polycentricity also applies to private law. See Sabel and Simon 2004: 1058.

5 See Gargarella, Klare, Michelman, and O'Cinneade, this volume.

6 Cohen and Sabel (1997: 318) adapt Robert Dahl's descriptive term for modern practices of democracy (Dahl 1989: 220–2), to describe "a form of polyarchy distinguished by the presence of a substantial degree of directly-deliberative problem-solving."

7 2001 (1) SA 46 (CC) (hereinafter "*Grootboom*").

8 (*No 2)* 2002 (5) SA 721 (CC) (hereinafter "*TAC*").

9 Ibid. para 135, Order 4.

10 2008 (3) SA 208 (CC) (hereinafter "*Olivia Road*").

11 The obligation of "meaningful engagement" was derived by the Court from a range of constitutional provisions, including section 26(2) (ibid. paras 16–18).

12 Ibid. para 20.

13 See *Residents of the Joe Slovo Community v. Thubelisha Homes* 2009 (9) BCLR 847 (CC): paras 112–13 (Yacoob J); paras 244–7 (Ngcobo J); paras 301–4 (O'Regan J); paras 378–85 (Sachs J).

14 The 6 kilolitres per household was calculated on the national minimum of 25 litres per person per day for a household comprising eight persons.

15 Section 27 accords everyone the right to have access to, among other social rights, a right of access to sufficient water. The state is required to "take reasonable

legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

16 Household incomes among the Phiri applicants were approximately R1,100 per month, with many relying on government grants. A number of households were headed by women, and there was a high prevalence of people who were living with AIDS or HIV positive (Founding affidavit of Teboho Mosikili in Constitutional Court, paras 16–17, available at www.constitutionalcourt.org.za/Archmages/13516.PDF; see also the High Court judgment, *Mazibuko v. City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W) (hereinafter "*Mazibuko* HC"), paras 159, 172–3).

17 Mrs Mazibuko's household at the time of the case's filing comprised three separate households with a total of 20 residents.

18 The High Court held that 50 litres per person per day was required by section 27 of the Constitution, and ruled the installation of the pre-payment water meter system to be unlawful. The Supreme Court of Appeal held that 42 litres per person per day would constitute 'sufficient' water for the purposes of s.27(1)(b) of the Constitution, and confirmed the finding of the High Court that the installation of the pre-payment meters was constitutionally invalid. The latter invalidity order was suspended for a period of two years to give the city an opportunity to legalize the use of the prepayment meters (*City of Johannesburg v. Mazibuko* 2009 (3) SA 592 (SCA) (hereinafter "*Mazibuko* SCA")).

19 *Mazibuko* CC, op cit. para 85.

20 Ibid. para 60.

21 Ibid. paras 61–2.

22 Ibid. para 7.

23 Ibid. paras 90–102.

24 Ibid. para 40.

25 Ibid. paras 71, 92–3, 163.

26 The claimants were mainly residents of Phiri who were supported in their struggles for adequate water services by the Coalition Against Water Privatization.The Anti-Privatization Forum was a prominent member of the Coalition. Their legal representatives were initially the Freedom of Expression Institute and thereafter the Centre for Applied Legal Studies. For a history of this litigation, see Dugard 2008b: 593.

27 *Mazibuko* CC, op.cit. paras 44, 98.

28 For a critique of the Court's reasoning in relation to the lawfulness of the installation and operation of the pre-payment water meters, see Quinot 2010: 132–5.

29 *Mazibuko* CC, op.cit. para 1.

30 *Mazibuko* HC, op. cit. paras 92, 124, 170–3, 179.

31 *Mazibuko* CC, op. cit. para 3.

32 Although for the sake of convenience and simplicity we have referred to the Constitutional Court as the supervisory judicial body in our *Mazibuko* thought experiment, an 11-member plenary constitutional court may not be the ideal body to superintend experimentalist deliberations. This role could, however, be delegated to the High Court with jurisdiction. There is already precedent for this practice in the context of supervisory orders in eviction cases: see, e.g., *Occupiers of Saratoga Avenue v. City of Johannesburg Metropolitan Municipality and Another* 2012 (9) BCLR 951 (CC); *Schubart Park Residents' Association v. City of Tshwane Metropolitan Municipality* 2012 (1) BCLR 68 (CC), paras 51 and 53.

33 It was argued that Phiri, one of the poorest suburbs in Soweto, was being unfairly targeted for punitive water conservation and cost-recovery measures, with less pressure on luxury and industrial/agricultural users (the largest consumers of water in South Africa). See Dugard 2008b: 604, fn. 60.

34 See, e.g., *Mazibuko* CC, op.cit. para 61.
35 See the concerns expressed by the Court in this regard: *Mazibuko CC*, para 60. For criticisms of the minimum core, see Young 2008.
36 Captured powerfully by Robert Cover's account of jurisgenerative politics (1983: 12).
37 Ufrieda Ho, "Where the taps still run dry",*Saturday Star*, 29 June 2013, 21: www.seri-sa.org/images/Phiri_SaturdayStar_29Jun13.pdf (accessed 5 December 2013). The city's Siyasizana program (otherwise known as the "Expanded Social Package") provides certain households with up to 50 litres per person per day, depending on their "rating", not unlike the indigency exception discussed by the court, *Mazibuko* CC, op.cit. paras 44; 90–102 (discussed above at notes 23 and 27). For details, see www.joburg-archive.co.za/2009/pdfs/expanded_social_package_policy.pdf (accessed 6 December 2013). In 2010, the city publicly acknowledged that only 10 per cent of formally qualifying households had registered, reflecting a general problem with indigency registers: see Naidoo 2012: 9.
38 See Dorf and Sabel's discussion and responses to the "criticisms and big worries" in relation to experimentalism (1998: 404–18).
39 On the exclusionary tendencies of traditional accounts of deliberative reasoning as a mode of political communication, see Young 2000: 26–51.
40 The South African Constitutional Court has signalled the importance of the distributional equity in access to social rights in the cases of *Mashavha v. President of the RSA and Others* 2005(2) SA 476 (CC);*Khosa v. Minister of Social Development; Mahlaule v. Minister of Social Development* 2004 (6) SA 505 (CC).