# *Avoidance remains avoidance: is it desirable in socio-economic rights cases?*



Bilchitz, D. ORCID: https://orcid.org/0000-0001-6195-675X
(2013) Avoidance remains avoidance: is it desirable in socio-economic rights cases? Constitutional Court Review, 5 (1). pp. 297-308. ISSN 2073-6215 doi: 10.2989/CCR.2013.0012
Available at https://centaur.reading.ac.uk/103034/

*Constitutional Court Review* 2013
Volume 5, 297–308
https://doi.org/10.2989/CCR.2013.0012

# Avoidance Remains Avoidance: Is it Desirable in Socio-Economic Rights Cases?

*David Bilchitz*[*]

## I Introduction: Ray's Nuanced Thesis

Brian Ray has produced a remarkable and sophisticated paper analysing the recent Constitutional Court decisions on evictions. Ray focuses on the adjudication techniques employed by the Constitutional Court and situates the discussion in light of the debate around the appropriate judicial role in socio-economic rights cases.[1] His thesis is multi-layered. In essence, he argues that the Constitutional Court's approach is one that often avoids directly providing strong substantive content to constitutional provisions. Instead, the Court uses a variety of 'avoidance techniques' which are procedural in nature yet often produce pro-poor outcomes. The Court often places emphasis on 'political enforcement' which involves essentially giving effect to social rights through existing legislation and executive action. Ray suggests that this form of enforcement can be strengthened by the Court where it substantively develops and extends the legislation in a manner that strongly reflects constitutional values and considerations. Other mechanisms such as meaningful engagement involve creative exercises of the Court's power to ensure enforcement of social rights through agreement between the political branches and the affected individuals and communities. The Court's use of fact-specific, contextual forms of adjudication allows it to achieve substantively fair outcomes for the poor in particular cases and to develop constitutional principles 'softly' over time whilst avoiding rigid rules that might create a strong conflict between the Court and the legislature and executive. All these techniques seek to utilise the power of the political branches in the enforcement of social rights and give expression to a vision of 'inter-branch' comity.[2] Ray's analysis of specific case law is creative and linked to this overarching framework.[3]

[*] Professor, University of Johannesburg; Director, South African Institute for Advanced Constitutional, Public, Human Rights and International Law; Secretary-General (Acting), International Association of Constitutional Law.

[1] See, for instance, M Pieterse 'Coming to Terms with the Judicial Enforcement of Socio-Economic Rights' (2004) 20 *South African Journal on Human Rights* 383, 417; K Young *Constituting Social and Economic Rights* (2012) 133ff; and J King *Judging Social Rights* (2012).

[2] See, eg, S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013)(Discusses shared constitutional interpretation and the manner in which institutional design under the Constitution can promote inter-branch comity.)

[3] B Ray 'Evictions, Aspiration and Avoidance' (2013) 5 *Constitutional Court Review* 173.

This short response cannot engage in detail Ray's complex argument. I shall focus on one central line of argument, namely the desirability of the Court's flight from a more substantive approach to the content of social rights. Procedural techniques of adjudication can only be justified by an underlying substantive rationale. The reasons provided by Ray for the Court's adjudicatory approach, rooted in democracy and inter-branch comity, do not support the Court's failure to develop the substantive content of socio-economic rights. Attention must, therefore, be paid to the impact of the Constitutional Court's avoidance approach on lower courts, the consistency of decision-making throughout the judicial system and the concomitant effects on the poor of avoiding the provision of substantive concrete content to these rights. This reply ends by advocating a form of academic resistance to the continued unwillingness of the Court to develop the content of socio-economic rights and to provide clear entitlements for those who are worst off.

## II The (UN)Desirability of the Constitutional Court's Avoidance Technique

### *A* Descriptive and Normative

In addressing the arguments provided by Ray, one must separate the descriptive and normative components of his piece. On a descriptive level, he provides a compelling good-faith reconstruction of what the Constitutional Court is doing in its recent jurisprudence on social rights. It is no doubt a very charitable reconstruction, suggesting that the Court has intentionally adopted a coherent strategic approach to adjudication in these cases and its positioning relative to other branches of government. I am not convinced that the Constitutional Court is always explicitly seeking to adopt particular adjudication techniques that maximise the role of the legislature whilst expanding existing protections in legislation in light of the Constitution. As several authors have noted, at times, the Court seems simply to be resorting to narrow adjudicative techniques that have become the default position in a conservative legal culture.[4] Sadly, the new constitutional order, whilst having a very different normative foundation from the basic law under apartheid, has seen the courts struggling to rid themselves of a formalist approach that privileges procedure over substance.[5]

However one best *describes* the Court's approach, the focus of this brief reply will be on whether it is desirable for the Court to continue to avoid giving substance to socio-economic rights and, rather, adopting the 'avoidance' techniques Ray describes. Ray's paper, at times, appears to offer a normative defence of the Court's approach – on the aforementioned grounds of democratic

[4] See K Klare & D Davis 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 403 (Authors analyse the performance of the Constitutional Court in light of a legal culture that inhibits the development of jurisprudence which could give full effect to transformative constitutionalism); and D Davis, 'Transformation: The Constitutional Promise and Reality' (2010) 26 *South African Journal on Human Rights* 85, 97.

[5] See, for instance, *Magidiwana v President of the Republic of South Africa* [2013] ZACC 27, 2013 (11) BCLR 1251 (CC) (Constitutional Court dismissed an application asking for the state to fund the legal expenses of injured miners during the Marikana Commission of Inquiry.)

principles and inter-branch comity. In fairness, however, he also articulates concerns about this approach and worries that the Court's focus on procedure may land us up in a substantive 'dead end'. Ray suggests that one method of improving the Court's adjudication in this area is to adopt an approach of 'thick subsidiarity': this strategy effectively requires the Court to interpret existing legislation expansively in order to 'fit constitutional requirements'.[6] Essentially, this approach is an extension of what courts have always done when interpreting legislation. In our new constitutional order, it means that the courts now can employ this technique when asked to harmonise existing legislation with the demands of the Constitution.

Yet, what concerns me is the Court's lack of willingness to expand upon the standards required by the Constitution itself. This role is the fundamental reason for the Constitutional Court's existence. As I have argued elsewhere, the full embrace of this function is necessary to ensure that constitutional provisions have teeth.[7] Moreover, the foundational provision of constitutional supremacy in FC s 1*(c)* demands that the Constitution be used to provide the foundation for all other legal instruments and policy rather than the other way round.[8] If the Court further elucidates the standards required by the Constitution, then it may do so, of course, through a variety of techniques. Direct constitutional interpretation is only one possibility. The interpretation of a statute in light of the Constitution is another technique expressly mandated by FC s 39(2).[9] It would be overly prescriptive to suggest that a Court is constrained to adopt one particular adjudicatory approach in every given case. The 'avoidance' that is of concern here reflects a consistent refusal to provide meaning to constitutional provisions that are directly implicated in a host of cases.

### *B* The Grounding of Procedural Reasoning

Yet, as Ray points out in his article, the Court demonstrates great discomfort with the creation of substantive content in social rights matters. Many of the 'avoidance' techniques the Court uses are strongly procedural in nature. By requiring parties to resort to meaningful engagement, for instance, the Court can avoid direct constitutional adjudication on a particular issue.[10] Courts also prefer reasoning that involves fact-specific, ad-hoc adjudicatory

[6] Ray (note 3 above) at 180, 193.

[7] D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2001) 119 *South African Law Journal* 484; D Bilchitz *Poverty and Fundamental Rights* (2006).

[8] On the centrality of constitutional supremacy for the South African project, see J Fowkes 'Founding Provisions' in J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13. See also F Michelman 'The Rule of Law, Legality and Constitutional Supremacy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, 2006) Chapter 11.

[9] On the disadvantages of courts' consistent resort to FC s 39(2), see S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762. The urtext on 'avoidance' as a legitimate, normative approach to South African constitutional law was written 15 years ago by Iain Currie. See I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138.

[10] See, eg, *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* [2008] ZACC 1, 2008 (3) SA 208 (CC).

techniques.[11] Where direct engagement with socio-economic rights cannot be avoided, courts focus on whether a government programme has been adopted to address the right and whether that programme is 'reasonable'.[12] Part of the strategy of the Constitutional Court appears to reflect the belief that such a proceduralist approach can often be used in a manner to achieve strong substantive outcomes without necessarily having to adopt a strong (and possibly controversial) position on the substance of the right itself. Part III of this reply questions whether in fact such 'weak', 'procedural' approaches can be relied on to achieve'[13] strong substantive outcomes for the poor. This section considers the normative basis for the claim that we should focus on 'procedural' techniques rather than the substance of such rights. Why should we retreat into a proceduralist approach where we have a clear, substantively transformative document to interpret?

As a matter of abstract philosophical reasoning, we might ask a foundational question about the very value of procedure (and proceduralist reasoning described above) in law.[14] Clearly, it is often very difficult to provide a justification for why a particular procedure, in a given case, has some form of intrinsic value. Rather, procedures are most often justified instrumentally – because they enable the achievement of a particular goal or end. Of course, abiding by extant procedures is a critical component of the rule of law and its commitment to equal treatment of the governed and the governors, as well as all parties who bring a dispute to court. However, when we employ specific procedures, we must not fetishise them, but utilise them only insofar as they achieve the *legitimate* purposes for which they are designed.

The above considerations suggest careful reflection upon the value of the procedures we use. (This critical reflection drives much of Ray's analysis of the techniques employed by the Court.) Meaningful engagement orders, for instance, often force a dialogue to occur between two parties involved in an eviction. They therefore uphold important principles and values around democratic participation and the dignity and autonomy of all affected individuals. Yet, it is crucial to be clear what such orders are meant to achieve: meaningful engagement is not about people trading their rights for other benefits or allowing stronger parties to browbeat weaker ones into submission. An understanding of the substantive

[11] See, eg, *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* [2011] ZACC 36, 2012 (4) BCLR 382 (CC)('*Skurweplaas*') & *Occupiers of Portion R25 of the Farm Mooiplaats 355; JR v Golden Thread Ltd* [2011] ZACC 35, 2012 (2) SA 337 (CC)('*Golden Thread*' case).

[12] *Mazibuko v City of Johannesburg* [2009] ZACC 28, 2010 (4) SA 1 (CC) at para 67; and *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19 2001 (1) SA 46 (CC), para 44. D Brand 'The Proceduralisation of South African Socio-Economic Jurisprudence or "What are Socio-Economic Rights for?"' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003).

[13] For the sake of brevity, I use the epithets 'weak' and 'procedural' to capture the approach often adopted by the Constitutional Court that Ray describes.

[14] J Fowkes 'Managerial Adjudication, Constitutional Civil Procedure and *Maphango v Aengus Lifestyle Properties'* (2013) 5 *Constitutional Court Review* 309 – (Correctly recognises that civil procedure is both an instrumental good and an intrinsic good as by the text of the Constitution, especially FC ss 1*(c)* and 34.) See also M Dafel 'On the Flexible Procedure of Housing Eviction Applications' (2013) 5 *Constitutional Court Review* 331.

goals of a procedure allows for the construction and careful calibration of the procedure itself.

'Procedural' techniques of adjudication are only justifiable on the basis that they have a strong substantive justification rooted in the values and principles underlying the Constitution. We can thus expect judges to be reflective about the substantive normative bases for their adjudicatory techniques. Constant reminders about the co-dependent relationship between procedure and substance are vitally important: procedural reasoning often takes on a life of its own if it is detached from its substantive underpinnings. Procedure must not block just outcomes.[15]

### *C* Procedural Reasons, Democracy and Inter-Branch Comity

I cannot, within the scope of this brief reply, exhaustively examine the reasons Ray provides for why the Court's procedural approach may be attractive. I will, however, focus on two important underpinnings for this approach. The first argument is that the Court should try and use legislative provisions and executive policy as far as possible in its adjudication for reasons of democracy. These branches of government derive their legitimacy through popular elections. Courts should thus seek to give effect to the legislation and policies of the representatives of the people.

Such reasoning, however, only takes one so far in a constitutional democracy with an entrenched and justiciable bill of rights. Unlike some countries where this power has implicitly been recognised by courts, the South African Constitution explicitly provides for the power of a court to strike down any law that is inconsistent with the Constitution and to make any order that is just and equitable in this regard.[16] As such, the polity has itself granted this power to judges and the substantive interpretation of the Constitution and concomitant exercise of remedial powers cannot therefore be regarded as illegitimate.[17]

The supremacy of the Constitution also requires that legislative and executive action be evaluated against constitutional standards: the Court must give these standards discernable content. Without discernable content, the Constitution provides no meaningful constraint upon the legislature or the executive (or the rest

[15] See, for example, the use of 'subsidiarity' techniques in *Nokotyana v Ekurhuleni Metropolitan Municipality* [2009] ZACC 33, 2010 (4) BCLR 312 (CC)(Subsidiarity used to avoid addressing the substantive questions of the right to sanitation.)

[16] FC s 172(1)*(a)* and *(b)*.

[17] See, especially, *Minister of Home Affairs v Fourie* [2005] ZACC 19, 2006 (1) SA 524 (CC) at para 171. O'Regan J responds to claims that the legislature is by default the best institution to correct unconstitutional laws as follows: 'It would have been desirable if the unconstitutional situation identified in this matter had been resolved by Parliament without litigation. The corollary of this proposition, however, is not that this Court should not come to the relief of successful litigants, simply because an Act of Parliament conferring the right to marry on gays and lesbians might be thought to carry greater democratic legitimacy than an order of this Court. The power and duty to protect constitutional rights is conferred upon the courts and courts should not shrink from that duty. The legitimacy of an order made by the Court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' Ibid.

of the judiciary for that matter).[18] Thick subsidiarity, which Ray advocates, may be a method of doing so: legislation of course can be entirely congruent with the demands of the Constitution. However, the Court must not avoid making clear in such cases the respects in which the legislation reflects the standards demanded by the Constitution and which cannot therefore, for instance, be the subject of legislative amendment.[19] This consideration – a demand for constitutional justification – will help ensure that the distinction between legislation and constitutional standards is not entirely conflated.

A further substantive justification for the 'avoidance' techniques described by Ray lies in the demands of inter-branch comity and the separation of powers. By utilising legislative provisions and executive policies, courts signal their respect for the work of the other branches. By encouraging engagement, courts allow individuals and the government to work out a viable solution and enhance the citizen-government relationship. Whilst none of this is objectionable, what is problematic is to conceive of the Court's exercise of its interpretive power to provide substantive content to socio-economic rights as being in some sense in conflict with inter-branch comity and the separation of powers.

Constitutional supremacy itself requires the articulation of constitutional standards against which the exercise of legislative and executive power can be measured. The development of these standards is precisely the role of courts where they are granted the powers of judicial review. Socio-economic rights are often not explicitly recognised in older constitutional systems. Yet, where they do exist (largely now in countries in the Global South), the role of courts must be conceptualised in a manner that can give concrete effect to these constitutional provisions. When courts perform this role, they therefore actively achieve what they are required to do in terms of the division of powers within these modern constitutions. That does not mean, however, that the court must not actively engage other branches in the important task of optimally realising these rights. Those branches, however, exercise their power to realise these rights within the substantive framework set by the courts.

The Colombian Constitutional Court has been prepared to develop such constitutional standards whilst still articulating an important role for other branches in giving effect to these standards.[20] For instance, in a case dealing with internally displaced persons (IDPs) in Colombia, the court recognised that there had been a systematic violation of the rights of these persons. It specified a minimum level of realisation of these rights that had to be implemented as a matter

[18] A vociferous debate in legal philosophy exists as to the justifiability of powers of judicial review. See, for instance, J Waldron *Law and Disagreement* (1999) and R Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996).

[19] The Court has slowly been developing this line of thinking in eviction cases. For its initial attempt, see *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC)('*Port Elizabeth Municipality*').

[20] See MJ Cepeda Espinosa 'The Constitutional Protection of IDPs in Colombia' in *Judicial Protection of Internally Displaced Persons: The Colombian Experience* (2009) 1. The following description and discussion of that case is drawn from D Bilchitz 'Constitutions and Distributive Justice: Complementary or Contradictory' in D Bonilla Maldonado (ed) *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Colombia* (2013) 41.

of urgency. To this end, it ordered government entities in charge of assisting IDPs to co-ordinate their activities effectively; to quantify and make available adequate resources necessary to realise the minimum levels of these rights; to develop a programme of action to correct institutional capacity problems that hampered the realisation of IDP rights; and to report to the court on progress in this within set time-periods. Whilst seeking to address the systemic problems involved in this case, the court did not determine exactly the manner in which these duties should be carried out nor even exactly when other government agencies had to adopt specific measures. 'What it did require of them is to report on what they are doing, to establish their own goals and their timetables that they are to follow when complying with their constitutional and legal obligations and to explain to the Court – and the public – how the activities that they have chosen are going to lead to the results that they are expecting'.[21] The court thus set the *standards* other branches of government must meet without ordering the exact *means* by which these standards must be realised. By retaining jurisdiction and handing down follow-up orders, the court ensures continued government accountability for meeting these standards, supervises the implementation of its orders and encourages continued 'inter-institutional dialogue among different branches of government'.[22]

The Colombian Constitutional Court carves out its own role as both a standard-setting entity and an entity focused on monitoring the implementation of its orders relating to fundamental rights. It does so without usurping the functions of other branches of government and seeks to encourage a creative collaboration rather than rigid division between these different spheres. Such an approach can thus give strong content to socio-economic rights and still reflect inter-branch comity.[23] Importantly, the court here also begins to re-envision what an account of separation of powers requires in the context of a Constitution. Far from undermining the democratic system in Colombia, such an approach takes seriously the court's role in realising social rights and vouchsafing the Constitution's legitimacy.

## III Procedural Reasoning, Consistency and the Rule of Law

Ray's piece, as we have seen, focuses on the 'avoidance' techniques of the Court in the context of the relationship between different branches of government. I would suggest that we also need to consider their effect within the judiciary and, ultimately, upon the resolution of cases throughout the judicial system in achieving a jurisprudence on socio-economic rights that gives them concrete effect in the lives of the poor. In particular, it seems to me germane to consider the manner in which evictions are being dealt with by the lower courts and how the Constitutional Court's balancing, fact-specific approach influences lower

[21] Ibid at 26–27.

[22] Ibid at 35.

[23] See further, D Landau 'Aggressive Weak-Form Remedies' (2013) 5 *Constitutional Court Review* 244 (Engages the Colombian experience at greater length). For further analysis of the Columbian experience to be found in this volume, see S Issacharoff 'The Democratic Risk to Democratic Transitions' (2013) 5 *Constitutional Court Review* 1.

court decisions. Lower courts are where most cases are adjudicated and only very few reach the Constitutional Court on appeal.

How has the Constitutional Court's 'avoidance' approach translated into High Court practice? Unfortunately, many of the outcomes in recent High Court cases have appeared to contradict the approach of the Constitutional Court towards evictions and cannot be described as pro-poor socio-economic rights decisions.

Ray himself engages *Golden Thread*.[24] The case dealt with the unlawful occupation of land in Tshwane Municipality and an application in the North Gauteng High Court for the eviction of the occupiers. The High Court ordered an eviction without the provision of alternative accommodation. The High Court held that the shortness of the period the occupiers had been on the property, the quick action of the land-owners and the failure of the occupiers to put down strong roots in the area were dispositive of the matter. The Constitutional Court criticised the High Court for not taking account of the local authority's obligation to provide reasonable alternative accommodation to the occupiers (even where the occupation had been less than six months as part of the 'all relevant circumstances enquiry' as required by FC s 26(3)) and working with a conception of ownership rights as 'virtually unlimited'.[25]

In *Occupiers of Skurweplaas 353 v PPC Aggregate Quarries*, an eviction was granted by the North Gauteng High Court.[26] Whilst the High Court did consider alternative accommodation, the judge held in favour of the land-owner. The decision allowed the occupiers to be rendered homeless *pending* the provision of alternative accommodation by the City. Once again, the Constitutional Court ruled that this was 'neither just nor equitable'.[27]

The South Gauteng High Court has recently heard even more troubling eviction cases. In November 2012, the Constitutional Court approved a settlement in terms of which the City of Johannesburg was required to provide emergency housing to the occupiers of various properties in Marlboro and engage meaningfully with them pending their eviction. Many factual matters were in dispute. At the heart of the matter lay competing claims about the length of time during which the occupiers were on the property. The unlawful occupiers were removed twice in June and August 2012. Their possessions were destroyed during the latter eviction. The city claimed that the Metro (JMPD) police acted pursuant to their law enforcement functions to prevent trespassing and that their response was not part of an ordinary eviction. In the High Court judgment[28], Kgomo J held that the actions of the JMPD constituted law-enforcement measures and did not constitute an eviction. He also held that the resistance to the occupiers meant they could not succeed in their *mandament van spolie* – the action to restore 'peaceful and undisturbed possession'.[29] The judge made it clear that in his view,

[24] *Golden Thread* case (note 11 above).
[25] Ibid at para 17.
[26] *Skurweplaas* (note 11 above).
[27] Ibid at para 13.
[28] *Marlboro Crisis Committee v City of Johannesburg* [2012] ZAGPJHC 187 (South Gauteng High Court, Case 29978/12, 7 September 2012).
[29] Ibid at paras 73–83.

'it must be instilled in the minds and consciences of potential land-grabbers and unlawful or illegal occupiers, that landowners and contractors of space too are bearers of constitutional rights and that conduct violating those rights tramples, not only on them, but on all'.[30] The framework developed by the Constitutional Court surrounding evictions offers a distinctly different view of unlawful occupiers: furthermore, the Court has held that they are not to be treated as criminals.[31] What's worse is that the court in this matter also incorrectly used pre-constitutional common law to avoid the application of the constitutional and statutory framework governing evictions. (FC s 26 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[32] (PIE) constitute that framework's central pillars.) The balancing framework adumbrated in PIE, the need to consider the engagement between the municipality and the occupiers, and the constitutional requirement that provision of temporary alternative accommodation be supplied prior to eviction were not properly considered or applied.[33]

In *Johannesburg Housing Corporation v Unlawful Occupiers of Newtown Village,* Willis J was also concerned with an eviction application against the unlawful occupiers of a property in Newtown, Johannesburg.[34] The High Court raised an understandable concern regarding the need for 'clear, certain, and implementable guidelines' as to how the court should go about making its order.[35] The High Court then raised a number of questions about how any state authority – including a court – ought to interpret the term 'just and equitable' as used in PIE. Willis J shows his preference for a very strong understanding of property rights. He reads the Constitutional Court's judgment in *Blue Moonlight* as precedent supporting his views.[36] (The *Blue Moonlight* Court though clearly recognises that such rights can, at least temporarily, be limited: Willis J's gloss seems substantially more.) The judge then quotes the National Development Plan and effectively argues that the only way to secure socio-economic rights for individuals in the long term is through strong protection for private property and economic growth: 'If we want more people to have access to housing, it must be made easier to own property and not more difficult.'[37] Willis J here provides some insight into his own legal-philosophical world-view. Whatever the merits of his view might be, he articulates an approach to socio-economic rights that appears strikingly at odds with the normative thrust of Constitutional Court decisions: an oeuvre that requires that the property rights of land-owners and the housing rights of occupiers be balanced in a nuanced fashion.

30 Ibid at para 100.

31 *Port Elizabeth Municipality* (note 19 above) at para 12.

32 Act 19 of 1998.

33 For a detailed engagement with the flaws in this judgment, see D Bilchitz and D Mackintosh 'P.I.E. in the Sky: Where's the Constitutional Framework in High Court Eviction Proceedings?' (2014) *South African Law Journal* 521ff.

34 [2012] ZAGPJHC 230, 2013 (1) SA 583 (GSJ).

35 Ibid at para 28.

36 Ibid at para 75.

37 Ibid at para 103.

Why this disjunction between the Constitutional Court's housing and eviction jurisprudence and several High Court judgments?

I do not wish to create the impression that High Court judges are all ignoring or bypassing the constitutional framework on evictions. Instead, we might turn our attention to the responsibility borne by the Constitutional Court to make its normative framework for evictions transparent, and in so doing, rather easy for lower courts to follow. As Ray points out, the Court has, in eviction applications, created a strong fact-specific and contextual jurisprudence. In general, it has been unwilling to provide general principles as to how to render decisions. That lack of clarity has had untoward substantive results: judges in the High Courts have significant discretion as to whether to grant an eviction order or not. Those judges who do not share the Constitutional Court's sensitivity to vulnerable groups and who prefer to work within a more traditional common-law conception of property rights render judgments that tend to over-emphasise the rights of land-owners. This set of dispositions results in eviction orders that create unnecessary misery and hardship. The Constitutional Court's failure to develop clear guidelines and a more substantive normative framework creates a lacuna in the law which is filled by judges whose views are not in conformity with the new constitutional order's pro-poor commitment in eviction disputes.[38]

Whilst Willis' judgment is, in many respects, clearly at odds with the new constitutional ethos, the question arises as to whether he is not at least correct in asking for clearer guidelines for rendering 'just and equitable' decisions. The Constitutional Court is beginning to respond to these concerns. It has held that alternative accommodation must be considered even in cases of short occupation, and that it is not acceptable to allow for temporary homelessness pending the provision of alternative accommodation. Those of us pressing for a more substantive view of adjudication have not been asking for that much more than this: for the court clearly to articulate standards which can be relied on in a manner that can help address the plight of the poor. This request for clearer guidelines is also a requirement of the rule of law in the context of evictions.[39] The employment in all cases of fact-specific, contextual reasoning may thus have the unintended consequence of strongly reducing the usefulness of these rights for unlawful occupiers or the homeless.

## IV Conclusion: The Role of Academics in the Face of 'Avoidance'

We have seen thus far the need for the Court to offer a clear understanding of the substantive justification for its approach to the adjudication of socio-economic rights. I have also argued that some of the reasons provided by Ray do not support a flight from giving substantive content to socio-economic rights, though such content may be developed in several ways.

[38] See *Port Elizabeth Municipality* (note 19 above). See M Dafel 'On the Flexible Procedure of Housing Eviction Applications' (2013) 5 *Constitutional Court Review* 331.

[39] For a similar point, see T Roux 'The Langa Court: Its Leitmotifs and Legacy' (2015) *Acta Juridica* (forthcoming).

The Constitutional Court appears, at least for the time being, to be set on a course that increasingly utilises these procedural 'avoidance' techniques despite their apparent drawbacks. One interesting question, with which I would like to conclude, is to consider how academics should respond to this approach of the Constitutional Court.

One option is to do what Ray does in his lead essay: identify the techniques, accept the approach of the Court and identify ways in which its current approach can be exploited to produce further pro-poor results. Ray justifies this strategy as follows:

> The signs of avoidance in these more recent cases show that it is unlikely the Court will begin to develop the reasonableness test in strong substantive ways. But the pro-poor results and doctrinal advances in this set of cases also point towards approaches that allow the Court to mitigate the institutional and practical concerns that pervade its socio-economic rights decisions and still exercise greater institutional authority for interpreting and enforcing these rights.[40]

This approach has its benefits: it works with the modes of thought current in the Constitutional Court and tries to show ways in which they can lead to better results. While Ray does point to several weaknesses in the Court's approach, his strategy might have the unintended consequence of strengthening and legitimating its 'avoidance' techniques.

An alternative strategy for academics is to adopt a stance of resistance. Resistance jurisprudence highlights the manner in which the Court fails fully to grasp the nettle of the new constitutional order.[41] It would mean continuing to point out the Court's failure to provide minimum core content to socio-economic rights. It would involve challenging the Court's refusal to articulate a general principle that evictions cannot take place without the provision of a minimum standard of alternative accommodation. It would mean standing up for the basic principle that courts are bound by the Constitution, have a duty to make meaning, and should do so in an open and unapologetic manner that affords citizens the most basic of socio-economic goods. The benefits of such a strong push by academics would be to give other members of civil society well-developed grounds for pressing all organs of state to deliver in concrete and specific terms on our Constitution.[42]

Ray's approach in the lead essay and resistance jurisprudence are not mutually exclusive. Academics could seek, as Ray does, to exploit the possibilities of the existing approach whilst highlighting its inadequacies. However, continued and sustained pressure from the academic community and civil society to 'harden' the socio-economic rights into firm principles and commitments should, over time, lead to a changed judicial mind-set as well as a different legislative and executive attitude toward meeting their constitutional obligations. We have already moved far, far down the road from Etienne Mureinik's still stirring victory in the cause

[40] Ray (note 3 above) 175.

[41] Even an ardent proponent of interpretive charity, finds 'resistance jurisprudence' appropriate when the Court appears to fall back on well-entrenched common-law rules that ought to be disentrenched by new constitutional norms. See F Michelman 'Expropriation, Eviction and the Gravity of the Common Law' (2013) 24 *Stellenbosch Law Review* 245.

[42] T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013) 392–397.

of making pro-poor socio-economic rights justiciable.[43] The challenge now is to consolidate and build on these gains in a manner that ensures that someday our Constitution's aspirations are fully realised.

[43] See E Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464; E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.