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The Socioeconomic Right to Housing in South Africa

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Abstract

Despite longstanding international recognition of socioeconomic rights, state-level action to provide for these rights remains uncommon and underdeveloped. Among states that claim to provide socioeconomic rights, only some enshrine constitutional guarantees for their provision, and even fewer enforce these constitutional promises. Influential scholarship has praised South Africa's post-Apartheid Constitution for enumerating protected socioeconomic rights and the country's courts for developing a method to adjudicate socioeconomic rights claims. This method is called the administrative law approach to socioeconomic rights. This paper investigates whether the administrative law approach effectively enforces socioeconomic rights. The paper draws upon insights from incremental and systems theories of public policy to highlight flaws in the approach. The paper presents housing rights in South Africa as a case study to demonstrate that the use of the administrative law approach has not upheld a robust positive right to housing and has therefore failed to enforce the country's constitutional promises. Then, the paper proposes structural interdicts and temporal priority-setting as means through which the current judicial approach to socioeconomic rights in South Africa can be improved.

Cass R. Sunstein's influential essay, "Social and Economic Rights? Lessons from South Africa," leads readers to conclude that what he calls the administrative law approach to socioeconomic rights is a breakthrough in the global effort to secure people's positive housing rights. Sunstein frames *Government of the Republic of South Africa and Others v. Irene Grootboom and Others*, the ruling that first implemented this approach, as a step toward the difficult goal of making socioeconomic rights real and enforceable without bankrupting countries that constitutionally guarantee them. Unfortunately, Sunstein fails to mention that Ms. Irene Grootboom, the lead respondent in the landmark case, died without ever having received permanent housing from the state.

This research paper aims to use the case study of South Africa to answer the question: Is the administrative law approach effective in enforcing positive socioeconomic rights? More specifically, this research paper focuses on the socioeconomic right to housing for three main reasons. First, housing is the right in question in *Grootboom*. Second, according to Williams, "the South African Constitutional Court's housing rights jurisprudence is more developed than that regarding any other social and economic right contained in the South African Constitution."[1] Third, the right to housing is a socioeconomic right that is not commonly guaranteed by liberal democracies, unlike, for example, the right to education.

Based on the incremental and systems theories of public policy, which stress the importance of policymakers' ability to formulate programs that respond to the needs, demands, and feedback of citizens, I hypothesize that the administrative law approach is not an effective enforcement mechanism for the socioeconomic right to housing. The administrative law approach fails to induce government agencies to respond to citizen inputs by creating program

[1] Lucy A. Williams, "The Right to Housing in South Africa: An Evolving Jurisprudence," *Columbia Human Rights Law Review* 45, no. 3: 819 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2440718.

and policy outputs. The administrative law approach also fails to use a program's results – resulting changes in citizens' needs, demands, and feedback – in the assessment of the program's adequacy.

This research paper uses the status of positive housing rights in South Africa as a case study to support its hypothesis. It draws upon primary sources, including landmark international agreements on human rights and socioeconomic rights, the Constitution of South Africa, and the Constitutional Court of South Africa's judgment in the *Grootboom* case. It also draws upon secondary sources analyzing the *Grootboom* judgment and evaluating the status of housing rights in South Africa. Ultimately, after consideration of this case study, the paper supports the hypothesis that the administrative law approach does not effectively provide a positive right to housing in South Africa. The paper then turns to two proposals with the potential to improve South Africa's housing rights: structural interdicts and temporal priority-setting.

This paper will first provide context about socioeconomic rights, their international recognition, and their level of protection. Then, the paper will present a brief literature review to introduce various branches of scholarship on the issue, highlighting a need for more research critically evaluating state-level socioeconomic rights provisions. Then, the paper will describe the incremental and systems theories of public policy, which drive the paper's hypothesis that the administrative law approach does not effectively enforce socioeconomic rights. The paper's analysis will discuss the facts of the case in *Grootboom*, the Constitutional Court's judgment, and the administrative law approach before turning to the failures of the resulting housing program and highlighting opportunities for improvement. Finally, the paper concludes by noting research limitations and discussing future research questions.

Context

Socioeconomic rights include the rights to housing, sustenance, education, and health care, among other goods and services. Socioeconomic rights are often described as positive rights as opposed to negative rights. Positive rights are entitlements to access goods or services. As a result, state guarantees of positive rights entail state obligations to undertake actions that provide these rights. In contrast, negative rights are protections against actions taken by the state or actions taken by other individuals. Negative rights typically obligate the state to abstain from an action or to prevent individuals from taking actions that would violate others' negative rights. The positive-negative rights distinction is often invoked by those who wish to minimize public spending: because positive rights are associated with obligations for state action, they are associated with public spending and large government bureaucracies, and they are targeted by fiscal austerity proponents.

However, the traditional positive-negative rights distinction and its public spending implications are not unchallenged in academia. In *The Cost of Rights: Why Liberty Depends on Taxes*, Stephen Holmes and Cass R. Sunstein argue that all rights – even those traditionally lauded as negative rights – are positive rights and that the guarantee of all rights results in government expenditure.[2] Whereas negative rights are often framed as rights to be left alone, Holmes and Sunstein argue that all rights are claims to affirmative government action or response. Rights against government interference in one's private life cannot be enforced without a robust, reliable judicial system capable of hearing and adjudicating claims of so-called negative rights violations. Rights against other individuals' interference in one's private life cannot be prevented or punished by the government without a system of law enforcement. Holmes and Sunstein argue that all rights depend on the administration of justice, which, as of 1992, cost

[2] Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.M. Norton & Company, 1999), 13-31.

United States taxpayers over $94 billion. Holmes and Sunstein point out that other basic rights that are not traditionally considered positive rights require vast government spending and public infrastructure. The right to own property and participate in a market without state or individual interference requires positive state action to make the market system function, including the prevention of violent seizure of others' possessions and the creation of sufficient political stability to make interstate trade networks credible.

In international scholarship and diplomacy, socioeconomic rights are closely associated with the International Covenant on Economic, Social, and Cultural Rights (ICESCR), a multilateral treaty adopted by the United Nations General Assembly in 1966.[3] The ICESCR enumerates many socioeconomic rights, including food, clothing, housing, physical and mental health, and education. Furthermore, the ICESCR states that each state party to the treaty shall take steps to achieve the progressive realization of these rights.[4] This provision recognizes the infeasibility of immediately securing all the rights enumerated in the ICESCR for all residents of each state party but urges that each state party ensure that the enumerated rights become more secure for their inhabitants over time.

It is also important to note that socioeconomic rights are prominent in the earlier and better-known Universal Declaration of Human Rights (UDHR), a landmark document in international human rights proclaimed in 1948. The UDHR states that everyone "is entitled to realization… of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality."[5] Furthermore, the UDHR specifies that all people have the

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[3] "International Covenant on Economic, Social and Cultural Rights," Office of the High Commissioner for Human Rights, https://www.ohchr.org/sites/default/files/cescr.pdf.
[4] Office of the High Commissioner for Human Rights, "International Covenant on Economic, Social and Cultural Rights."
[5] "Universal Declaration of Human Rights," Office of the High Commissioner for Human Rights, https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf.

right to a standard of living adequate for their health and well-being, enumerating food, clothing, housing, medical care, and education as integral parts of this right.

The United Nations Office of the High Commissioner for Human Rights (OHCHR) has also emphasized that neither the ICESCR nor the UDHR constituted the first international recognition of socioeconomic rights. The perception that ICESCR or UDHR invented the notion of socioeconomic rights is often deployed as an argument against undertaking measures to secure them by those who believe socioeconomic rights are secondary in importance to civil or political rights. To dispel this myth, the OHCHR points to the International Labour Organization (ILO) and World Health Organization (WHO), which recognized socioeconomic rights in 1944 and 1946, respectively.[6] The OHCHR also points to state-level recognition of socioeconomic rights that preceded the 1948 UDHR. Examples include late nineteenth century protections for economic rights in some European countries, early twentieth century protections for rights like health and social security in many Latin American constitutions, and 1930s measures taken in the United States under U.S. President Franklin D. Roosevelt's "four essential human freedoms."[7]

Despite international recognition of socioeconomic rights and other positive rights, there is a distinction between the protection of civil and political rights and the protection of socioeconomic rights in many states, regardless of their status as state parties to the ICESCR and UDHR. Whereas civil and political rights have long been recognized as essential to any liberal democracy, socioeconomic rights have historically been excluded from explicit constitutional protection. The debate regarding the role of positive rights in constitutional design is ongoing.

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[6] "Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights," Office of the High Commissioner for Human Rights, https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet33en.pdf.

[7] Office of the High Commissioner for Human Rights, "Fact Sheet No. 33."

Constitutions in liberal democracies framed since the twentieth century are more likely to enshrine formal protections for the rights to housing and other socioeconomic rights than older constitutions.[8] However, these constitutions vary widely on which socioeconomic rights they protect, the degree of protection they grant these rights, and the enforcement of constitutional protections.

Literature Review

Socioeconomic rights are the topic of prolific debate among scholars of philosophy, government, international relations, and law. These discussions take both positive and normative forms, with some scholars studying questions such as which socioeconomic rights have gained recognition and protection, to what degree they are protected, where they are protected, and for whom they are guaranteed, and other scholars studying questions such as whether socioeconomic rights merit strict protection and what form these protections should take. This scholarship also spans international and state levels of analysis, with some scholars studying international strategies for the advancement of these rights, and other scholars studying individual states' abilities to enforce these rights.

International-level scholarship on the provision of socioeconomic rights discusses the implications of the ICESCR. The Committee on Economic, Social, and Cultural Rights (the Committee) interprets the ICESCR, periodically issuing guidance for state parties. The Committee's interpretation emphasizes the importance of the minimum core obligations approach, which states that all state parties must immediately secure the minimum core of each socioeconomic right enumerated in the ICESCR, and the progressive realization process, which

[8] Cass R. Sunstein, "Social and Economic Rights? Lessons from South Africa," John M. Olin Program in Law and Economics Working Paper, no. 124 (2001): 1, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1454&context=law_and_economics.

states that all state parties must increase the provision of socioeconomic rights over time through legislation and other means. Scholars such as David Bilchitz hold the ICESCR's minimum core obligations approach and progressive realization process in high regard, producing literature criticizing ICESCR state parties for not complying with these requirements.[9] This literature highlights faults in other approaches used in place of the ICESCR's recommendations, ultimately claiming that implementation of the minimum core obligations approach and the progressive realization process are essential to the realization of socioeconomic rights. This literature also responds to ICESCR state parties' claims that "minimum core" level of a socioeconomic right is too difficult for a court to adjudicate by pointing to the Committee as the best arbitrator for these decisions. Other scholars such as Kirsteen Shields accept that the ICESCR and its requirements are somewhat ambiguous despite the Committee's guidance.[10] These scholars recognize that, while the ICESCR has legal force as a treaty, the legal authority of the Committee's guidance on how to interpret the ICESCR's requirements is debatable. This literature also highlights that the minimum core approach can be implemented in various ways: Alston and Scott advance a "two minimum cores" approach, which sets a universal minimum core and additional state-specific minimum cores based on capability; Young advances an approach that sets minimum core obligations based on the needs associated with different socioeconomic rights; and Tasioulas advances an approach for minimum core obligations based on immediacy.[11]

Notably, scholars who support the ICESCR's minimum core obligations approach and progressive realization typically believe that state-level legislation is the best way for state

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[9] David Bilchitz, "Giving Socio-economic Rights Teeth: The Minimum Core and its Importance," *The South African Law Journal* 119, no. 3 (2002): 484-501, https://heinonline.org/HOL/P?h=hein.journals/soaf119&i=522.
[10] Kirsteen Shields, "The Minimum Core Obligations of Economic, Social, and Cultural Rights: The Rights to Health and Education," World Bank, https://openknowledge.worldbank.org/server/api/core/bitstreams/39654842-d461-5f0b-a20e-4b3ca4908228/content.
[11] Shields, "The Minimum Core Obligations of Economic, Social, and Cultural Rights: The Rights to Health and Education."

parties to adhere to the ICESCR's requirements. This characteristic differentiates ICESCR scholars from those who call for constitutional approaches to securing socioeconomic rights.

Turning to state-level analysis, scholars such as Courtney Jung, Ran Hirschl, and Evan Rosevear analyze the degree to which socioeconomic rights are enshrined in state constitutions.[12] This literature brings to light the vast diversity of constitutional approaches to socioeconomic rights between different states, highlighting that not all socioeconomic rights are equally common in constitutions or granted equal status when enumerated. This literature also seeks patterns in the constitutional enshrinement of socioeconomic rights, including trends based on states' common region or political history. Scholarship in this field is almost entirely positive in its analysis.

Another category of state-level scholarship analyzes judicially activist legal innovations that derive constitutional guarantees to socioeconomic rights from existing constitutional guarantees. This scholarship analyzes courts' interpretations of the right to health or the right to human dignity. This scholarship also analyzes constitutions that recognize socioeconomic rights but designate them as non-fundamental rights, grant socioeconomic rights fewer constitutional protections than fundamental rights, and allow citizens limited or nonexistent legal remedies when their socioeconomic rights are not upheld. Scholars such as Patrick Delaney,[13] Norman Dorsen, and András Sajó study how judicial activism has been deployed by courts and litigators

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[12] Courtney Hung, Ran Hirschl, and Evan Rosevear, "Economic and Social Rights in National Constitutions," *The American Journal of Comparative Law* 62, no. 4 (December 2014): 1043-1094, https://doi.org/10.5131/AJCL.2014.0030.

[13] Patrick Delaney, "Legislating for Equality in Colombia: Constitutional Jurisprudence, Tutelas, and Social Reform," *The Equal Rights Review* 1 (2008): 50-59, https://www.equalrightstrust.org/sites/www.equalrightstrust.org/files/ertdocs/Legislating%20colombia.pdf.

to lessen the distinction between socioeconomic rights and other rights through the lens of comparative constitutionalism.[14]

Perhaps due to the influence of the ICESCR, the Committee, and international human rights advocates, international-level scholarship on the advancement of socioeconomic rights is highly developed, and scholars studying the issue have produced literature that spans positive and normative analysis. However, state-level analysis of socioeconomic rights is less prolific. State policies and practices related to the provision of socioeconomic rights are emergent and, in many cases, underdeveloped. As a result, many scholars conducting state-level analysis of socioeconomic rights produce descriptive literature aimed at explaining states' socioeconomic rights programs or legal innovations. Few scholars engage in critical assessment or normative evaluation of existing socioeconomic rights programs at the state level. This paper aims to fill that gap by responding to one widely influential positive analysis of a state-level socioeconomic rights approach.

Theory and Hypothesis

Credited to Charles Lindblom, the incremental theory of public policy states that policymakers examine a limited number of policy alternatives and implement change in a series of small steps.[15] This theory acknowledges limits such as time, money, and policymakers' imperfect abilities to understand complex problems and design rational policy solutions. Incremental implementation allows administrators to adjust policy based on an evaluation of the policy's impact on the situation. Credited to David Easton, the systems theory imagines the "political system" as the system comprising a society's government institutions and processes,

[14] Norman Dorsen, Michael Rosenfeld, András Sajó, Susanne Baer, and Susanna Mancini, *Comparative Constitutionalism, Third Edition* (United States of America: West Academic Publishing, 2016).
[15] Adam A. Anyebe, "An Overview of Approaches to the Study of Public Policy," *International Journal of Political Science* 4, no. 1 (January 2018): 14-15, http://dx.doi.org/10.20431/2454-9452.0401002.

excluding that society's social system, the economic system, and the physical setting.[16] In this theory, the political system receives inputs from society – election results or demands to meet their needs – and produces outputs – laws, rules, or judicial decisions.

Taking into account both the incremental and systems theories, one can imagine policymaking as a constant process through which policymakers create output by implementing incremental policy changes, evaluate their impacts through society's input, and respond by creating more output and implementing further policy changes. Based on the limitations faced by policymakers highlighted by incremental theory, this process is the policymakers' best attempt at making sound policy choices.

These theoretical understandings of public policy ultimately drive my hypothesis in this paper. The administrative law approach does not effectively enforce the socioeconomic right to housing because socioeconomic rights can only be secured through public policy if government agencies evaluate their programs' results and adjust them over time. In this paper, I analyze the administrative law approach to socioeconomic rights and its impacts in South Africa. Ultimately, I argue that the political system in South Africa fails to secure the socioeconomic right to housing because the administrative law approach does not result in government agencies responding to inputs.

Analysis

On October 4, 2000, the Constitutional Court of South Africa ruled on *Government of the Republic of South Africa and Others v. Irene Grootboom and Others*. Irene Grootboom was part of a group of 510 children and 390 adults who lived in an informal settlement on the outskirts of Cape Town called Wallacedene, where they faced appalling living conditions. They fled

[16] Anyebe, "An Overview of Approaches to the Study of Public Policy," 13.

Wallacedene and established illegal shelters nearby on a plot of land that was designated by the state for low-cost housing but had not yet been developed. They were forcibly evicted from this shelter, and they lost all their possessions. They could not return to Wallacedene as their places had been filled by others facing housing insecurity. Many of the respondents had applied for subsidized low-cost housing in the past but had been on waiting lists for years, calling into question the government's ability to provide housing for its citizens.[17]

The unhoused respondents in *Grootboom* applied to the Cape of Good Hope High Court for an order directing the appellants to provide them with basic temporary shelter and/or basic nutrition, shelter, health care, and social services to the children of the group. The respondents based these demands on two constitutional provisions, South Africa's obligations under sections 26 and 28(1)(c) of the Constitution of the State of South Africa. Section 26 states that "everyone has the right to have access to adequate housing," that the state must "achieve the progressive realization of this right" through legislative and other measures, and that no one may be evicted without a court order.[18] Section 28(1)(c) states that every child has the right "to basic nutrition, shelter, basic health care services and social services."[19]

Regarding the respondents' section 26 claims, the Cape of Good Hope High Court rejected the argument that the constitutional provision creates a "minimum core entitlement to shelter" that obligates the state to provide temporary shelter pending the implementation of a comprehensive housing program.[20] However, the High Court was more sympathetic to the respondents' section 28 claims, concluding that section 28(1)(c) imposes an obligation on the

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[17] Dennis Davis, "Socio-economic rights in South Africa: The record of the Constitutional Court after ten years," *ESR Review: Economic and Social Rights in South Africa* 5, no. 5 (December 2004): 4, https://journals.co.za/doi/epdf/10.10520/AJA1684260X_137.
[18] "South Africa 1996," Constitute Project, https://www.constituteproject.org/constitution/South_Africa_2012.
[19] Constitute Project, "South Africa 1996."
[20] "Government of the Republic of South Africa and Others v. Irene Grootboom and Others," The Southern African Legal Information Institute (SAFLII), http://www.saflii.org/za/cases/ZACC/2000/19.pdf.

state to provide shelter for children if their parents are unable to do so. The High Court also concluded that "an order which enforces a child's right to shelter should take account of the need of the child to be accompanied by his or her parent."[21] Therefore, the High Court found that the children in the group of respondents – and their parents, by extension – were entitled to shelter under section 28(1)(c). The court ordered the government to provide them with tents, portable latrines, and a water supply to constitute a minimal shelter.[22]

This initial decision was appealed to the Constitutional Court of South Africa. The Human Rights Commission and the Community Law Centre of the University of the Western Cape submitted *amicus* briefs in the appeal.[23] These *amici* argued that the initial ruling had construed the state's obligations to be insufficient and narrow, claiming that all the respondents – including adult respondents with no dependents – were entitled to shelter due to the minimum core obligations associated with the section 26 right to adequate housing.[24] These issues, raised in the appeal by the *amici*, were supported by the respondents' counsel.

Justice Yacoob wrote the unanimous decision of the Constitutional Court of South Africa. In the opinion, Yacoob noted that the Constitution obliges the state to act positively to provide socioeconomic rights enshrined in the Bill of Rights.[25] In interpreting section 26 of the Constitution, Yacoob denied *amici* claims that the Committee's guidance on the minimum core level of housing should guide the interpretation of section 26 despite South Africa's status as an ICESCR member state.[26] He interpreted the obligation flowing from section 26 as follows: the state must have a "reasonable" program that clearly allocates housing responsibilities to the

[21] SAFLII, "Government of the Republic of South Africa and Others v. Irene Grootboom and Others."
[22] SAFLII, "Government of the Republic of South Africa and Others v. Irene Grootboom and Others."
[23] SAFLII, "Government of the Republic of South Africa and Others v. Irene Grootboom and Others."
[24] SAFLII, "Government of the Republic of South Africa and Others v. Irene Grootboom and Others."
[25] SAFLII, "Government of the Republic of South Africa and Others v. Irene Grootboom and Others."
[26] SAFLII, "Government of the Republic of South Africa and Others v. Irene Grootboom and Others."

different spheres of government and ensure that "appropriate" resources are available to support this effort.[27] In setting the standard of reasonableness, he noted that a court reviewing any such program "will not enquire whether other more desirable or favorable measures could have been adopted, or whether public money could have been better spent."[28] Rather, he clarified, a court would only consider whether the adopted measures were reasonable, and a wide range of policy alternatives would meet the standard of reasonableness. Having established reasonableness as the test through which housing programs are properly assessed, Yacoob considered whether adopted housing programs were reasonable within the context of section 26, and he concluded that the state's housing program was unreasonable because it lacked short-term housing solutions for people in desperate need. Turning to section 28(1)(c), Yacoob found that the provision does not create an unqualified positive right to state-provided housing for children and their parents.[29] Yacoob declared that the High Court's order providing the respondents who were children and their parents with immediate housing was erroneous.

The Constitutional Court's decision in *Grootboom* established the precedent that neither section 26 nor section 28 entitles South Africans to claim housing immediately upon demand. The Constitutional Court ordered the state to "devise, fund, implement, and supervise measures to provide relief to those in desperate need" with the aim of creating a housing program reasonable in the context of constitutional requirements.[30]

This case, though groundbreaking in its own right, was launched to international notoriety by an essay by Cass R. Sunstein. In "Social and Economic Rights? Lessons from South Africa," Sunstein praises the *Grootboom* ruling as a notable advance in the realization of

[27] SAFLII, "Government of the Republic of South Africa and Others v. Irene Grootboom and Others."
[28] SAFLII, "Government of the Republic of South Africa and Others v. Irene Grootboom and Others."
[29] SAFLII, "Government of the Republic of South Africa and Others v. Irene Grootboom and Others."
[30] SAFLII, "Government of the Republic of South Africa and Others v. Irene Grootboom and Others."

socioeconomic rights. Sunstein believes the provision of socioeconomic rights is critical for inherent and instrumental reasons – while socioeconomic rights are valuable in and of themselves, people in desperate conditions cannot exercise their status as citizens, so socioeconomic rights enable civic and political rights.[31] However, Sunstein states that the provision of constitutionally enshrined socioeconomic rights, including a constitutionally guaranteed right to housing, poses a dilemma: the need to identify a middle ground between the view that socioeconomic rights are unqualified, and the view that socioeconomic rights are not justiciable at all.[32] Protecting unqualified socioeconomic rights – allowing every citizen of a state with a constitutional guarantee to a socioeconomic right to demand immediate state provision of that good or service – would be a costly undertaking. In a state such as South Africa, where poverty is widespread, and public funds are limited, constitutional commitments to provide unqualified socioeconomic rights would inevitably become unfulfilled promises. However, deeming socioeconomic rights nonjusticiable – believing that determining the state's obligation in reference to a specific socioeconomic right in a specific situation is impractical or imposes undue burdens on the courts – would make constitutional guarantees to socioeconomic rights meaningless. Under such a system, citizens whose socioeconomic rights are transgressed would have no legal recourse. Thus, a constitutional guarantee of a socioeconomic right like housing must be able to be adjudicated by the courts in such a way that the expense of providing it does not exceed the limit of public funds.

In the context of this dilemma, Sunstein offers *Grootboom* as a model for the judicial protection of constitutionally guaranteed socioeconomic rights like housing. Sunstein terms the approach implemented in South Africa as a result of *Grootboom* the "administrative law model

[31] Sunstein, "Social and Economic Rights? Lessons from South Africa," 2-3.
[32] Sunstein, "Social and Economic Rights? Lessons from South Africa," 12.

of socioeconomic rights."[33] Administrative law requires a government agency to face the burden of explanation. An agency must explain why it adopted the program it chose and why it chose not to adopt a different sort of program. If the court does not find that the agency allocated resources in an unreasonable way, the court will allow the agency to proceed.

Sunstein claims that this model is sufficiently powerful to strike down arbitrary government agency decisions; in *Grootboom*, Yacoob used this standard to find that the state had arbitrarily neglected to provide relief to those in desperate need and ordered the enactment of a program to address the issue.[34] Sunstein also praises this model for not interfering with the advantage of granting government agencies some discretion in deciding which policies to implement.[35] Agencies need not definitively prove their programs are the most effective policy tool available; they must only be able to explain the reasoning behind their choices.

However, Sunstein fails to consider that the administrative law model to socioeconomic rights has no capability to respond to ineffective government programs which were designed on reasonable bases. A core tenet of incremental theory is that rationalism in policymaking is an impossible goal. Incremental theory accepts that it is not feasible, given imperfect information, time constraints, and public funding limits, for policymakers to devise and implement programs that rationally respond to the relative values of citizens and stakeholders. Incremental theory urges policymakers to endeavor to design policies they believe will approximate the ideal of a rational policy. However, some programs, albeit designed by well-informed and highly educated policy experts, fail to achieve their stated goals.

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[33] Sunstein, "Social and Economic Rights? Lessons from South Africa," 13.
[34] Sunstein, "Social and Economic Rights? Lessons from South Africa," 13.
[35] Sunstein, "Social and Economic Rights? Lessons from South Africa," 12.

Sunstein's administrative law approach to socioeconomic rights would uphold dysfunctional and ineffective programs. Hypothetically, a defunct housing program designed by experts who can prove that they reviewed available data and considered various policy alternatives, who can cite a reason why they enacted their chosen program instead of another, would pass the standard of reasonableness advocated by Sunstein. The program's demonstrated failure to achieve its stated goal could not be cited by the court as a cause to order additional action by a government agency. This hypothetical housing program's failure to meet its goal would not change the fact that its framers designed it with reasonable confidence in its effectiveness. The danger of this aspect of the administrative law approach is best understood through the lens of systems theory. Systems theory insists that policymakers produce output – laws and programs – on the basis of input – demands, needs, and votes of constituents. The administrative law approach does not allow the court to consider inputs like the unmet needs of unhoused people in its evaluation of government agencies' outputs.

The concrete impacts of the housing policy designed to respond to *Grootboom* support this theoretical analysis. Following Yacoob's order in *Grootboom*, the government implemented a new housing program designed to provide temporary accommodation to South Africans facing desperate conditions, "Chapter 12 National Housing Programme: Housing Assistance in Emergency Housing Circumstances."[36] The program grants assistance to those in desperate need by providing grants to municipalities. These grants are intended to enable municipalities to respond rapidly to emergent housing needs through the provision of land, relocation services, and temporary shelters. The program can also fund the provision of water, sanitation, and lighting services for a maximum of three years. Eligible beneficiaries include people who lost

[36] "A Resource Guide to Housing in South Africa 1994-2010," Socio-Economic Rights Institute of South Africa (SERI), http://www.urbanlandmark.org.za/downloads/SERI_Housing_Resource_Guide_Feb11.pdf.

their homes due to a natural or man-made disaster, people who were evicted or threatened with eviction, people whose shelters were destroyed, and people who live in conditions that pose immediate threats to their life, health, or safety.[37] While the national government provides the grants, the municipal governments determine whether assistance is required and how to administer assistance when it is required.[38]

Housing rights activists highlight many flaws in the new housing program. As of 2009, only six out of the nine provinces had used funds for emergencies in their municipalities.[39] Furthermore, the vast majority of funds used aided the victims of natural disasters and benefitted individuals who once had housing but lost it due to floods in rural areas.[40] This implementation seems contrary to the program's motivation; the program is not typically used to ameliorate the housing crisis faced by urban populations living in dangerous informal settlements, populations like the respondents in *Grootboom*. A housing report submitted to court proceedings by the City of Johannesburg stated that the city had made three requests for emergency housing grants to aid the victims of eviction and that none of the requests were approved, suggesting once again that people like the *Grootboom* respondents did not benefit from the program.[41] To make matters worse, the program also lacks definitive guidance to clarify what constitutes an emergency that necessitates housing assistance.[42]

Policy Implications

According to Williams, the majority of the Constitutional Court of South Africa's jurisprudence on housing rights since *Grootboom* has related to citizens' negative right to be free

[37] SERI, "A Resource Guide to Housing in South Africa 1994-2010."
[38] SERI, "A Resource Guide to Housing in South Africa 1994-2010."
[39] SERI, "A Resource Guide to Housing in South Africa 1994-2010."
[40] SERI, "A Resource Guide to Housing in South Africa 1994-2010."
[41] SERI, "A Resource Guide to Housing in South Africa 1994-2010."
[42] SERI, "A Resource Guide to Housing in South Africa 1994-2010."

from unjustified eviction rather than to citizens' positive right to adequate housing. However, I argue that the Constitutional Court should revisit the state's positive obligations regarding housing in light of the insights of incremental and systems theories of public policy as well as observations made regarding *Grootboom*'s concrete outcomes.[43] Here, I will briefly propose two improvements to the administrative law approach to socioeconomic rights heralded by Sunstein: the structural interdict, and temporal priority-setting. Structural interdicts would increase government agencies' responsiveness to successful litigants. Temporal priority-setting would ensure that court orders are acted upon in a timely manner, enabling government agencies to observe the impacts of their policies sooner and make appropriate adjustments.

According to Davis, a structural interdict "is an injunctive remedy that requires the party to whom it is directed to report back to the court, within a specific period, the measures that have been taken to comply with the court's orders."[44] In other words, a structural interdict is a tool that enables courts to enforce their rulings. Structural interdicts are used frequently in the enforcement of socioeconomic rights in Kenya.[45] According to Nthenya, structural interdicts in Kenya benefit successful litigants who would otherwise be subject to the whims of slow-moving government agencies.[46] Structural interdicts allow these successful litigants to participate in the execution of court orders to ensure that the resulting government action responds to the needs of these litigants.

Structural interdicts could improve the enforcement of the socioeconomic right to housing in South Africa by increasing the degree to which policymakers' outputs meaningfully

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[43] Williams, "The Right to Housing in South Africa," 844.
[44] Davis, "Socio-economic rights in South Africa," 5.
[45] James Kariuki Nthenya, "The Place of Structural Interdicts in the Enforcement of Social Economic Rights in Kenya, https://dx.doi.org/10.2139/ssrn.4131623.
[46] Nthenya, "The Place of Structural Interdicts in the Enforcement of Social Economic Rights in Kenya."

respond to inputs like citizens' needs. Under the administrative law model, successful litigants in South Africa have not experienced increased access to socioeconomic rights due to new programs. However, under a structural interdict, successful litigants could participate in a collaborative process between the policymakers designing new programs, the courts monitoring the enforcement of court orders, and the people voicing the needs that inspired the programs' creation.

Staunch separation of powers proponents take issue with structural interdicts as they significantly increase the power of the court. However, I would argue that strict enforcement of court orders regarding the provision of socioeconomic rights is essential under the systems theory. The implementation of structural interdicts to allow the Constitutional Court of South Africa to monitor government agencies' development of new programs to comply with constitutional guarantees for socioeconomic rights would also bolster court legitimacy. When successful litigants receive court orders requiring the state to devise a program to increase their rights, and these litigants do not benefit from new programs in a timely manner, other citizens lose faith in the court's ability to protect their rights. Citizens may lose political efficacy – the belief that they can understand and influence the government and its outcomes – and participate in politics less frequently as a result. This reduction in the frequency of citizen inputs would in turn limit policymakers' ability to create responsive outputs, disrupting the effectiveness of the entire political system.

My second proposal to improve South Africa's judicial approach to socioeconomic rights is to engage in temporal priority-setting. Whereas Sunstein describes the administrative law approach laid out in *Grootboom* as empowering government agencies to engage in "sensible

priority-setting," Roux contends that the approach lacks temporal priority-setting.[47] In *Grootboom*, Yacoob's order demanded no specific time frame in which the state had to create the new housing program. Housing advocates observed that there had been "little visible change in housing policy to cater for people who find themselves in desperate and crises situations" three years after the decision.[48] This criticism accurately reflects the pace of government agency action regarding the new program. According to Huchzermeyer, "only in June 2002, almost two years after the Constitutional Court ruling, the National Department of Housing put out a tender for policy proposals for emergency housing."[49] Huchzermeyer adds that "the municipality for Wallacedene [took] almost as long to unveil a development plan for the Wallacedene settlement."[50]

Roux contends that, in the case of *Grootboom*, the program for individuals in desperate need should have been given mandatory temporal priority.[51] To generalize this suggestion, Roux contends that the administrative law approach would be more effective at securing socioeconomic rights if it provided that any program a government agency is ordered to create should be implemented as soon as possible and not delayed by the development of other programs. From the standpoint of systems theory, this change in temporal priority-setting could improve government agencies' output. Although the administrative law approach does not include mandatory assessment of programs in question, prudent government agencies may still choose to monitor the landscape of needs and the specific impacts of their decisions on those

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[47] Theunis Roux, "Understanding Grootboom – A Response to Cass R. Sunstein," *Constitutional Forum* (July 2011): 46, http://dx.doi.org/10.21991/C9S953.
[48] Dennis Davis, "Socio-economic rights in South Africa," 5.
[49] Marie Huchzermeyer, "Housing rights in South Africa: Invasions, evictions, the media, and the courts in the cases of Grootboom, Alexandra, and Bredell," *Urban Forum* 14 (January 2003): 88, https://doi.org/10.1007/s12132-003-0004-y.
[50] Huchzermeyer, "Housing rights in South Africa: Invasions, evictions, the media, and the courts in the cases of Grootboom, Alexandra, and Bredell," 88-89.
[51] Roux, "Understanding Grootboom," 46.

needs. Temporal priority-setting would hasten the process through which government agencies implement their initial programs. This would, in turn, enable government agencies to observe the real-world impacts of their programs through the changing needs of the people sooner. This would enable them to make the crucial policy adjustments urged by both incremental and systems theories sooner.

Timeliness could also help ameliorate the court's legitimacy dilemma. As I have already discussed, citizens who observe that successful litigants' conditions do not improve due to slow-moving bureaucratic processes may lose faith in the court's or the government's ability to protect their rights. As a result, they may decrease their political participation, making the input-aware decision-making advocated by systems theory impossible. Timely implementation of new programs ordered by the court could make it more likely for conditions to improve in a period of time that does benefit successful litigants and prevent the degradation of political efficacy.

Conclusion

Ultimately, analysis of the status of housing rights in South Africa confirms the hypothesis that the administrative law approach does not effectively enforce positive socioeconomic rights because it does not create a political system that responds to inputs to make policy improvements over time. This research paper contributes to the scholarly discussion surrounding constitutionally guaranteed socioeconomic rights by emphasizing that socioeconomic rights programs must be assessed by their impacts rather than by their design. It also contributes to scholarship by highlighting the judicial monitoring in Kenyan enforcement of socioeconomic rights as a positive addition to existing judicial approaches to socioeconomic rights. For example, countries like South Africa and Colombia already have established

jurisprudence regarding the assessment of socioeconomic rights, but both countries struggle with the underenforcement of judicial orders, an issue that structural interdicts could ameliorate.

It is important to acknowledge the various limitations of this research paper. While this paper considered the impacts of South Africa's emergency housing policy, it lacked a data-driven analysis of the program's impact on unhoused populations. Should such data become available, future studies should verify my understanding that the emergency housing program did not help people like the *Grootboom* respondents, urban residents of dangerous informal settlements. Furthermore, while this paper grappled with the right to housing in South Africa, future research should investigate how the Constitutional Court of South Africa applied the administrative law approach and the reasonableness standard to other socioeconomic rights. This research should ascertain whether the administrative law is more successful at enforcing other socioeconomic rights enshrined in the Constitution of South Africa.

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