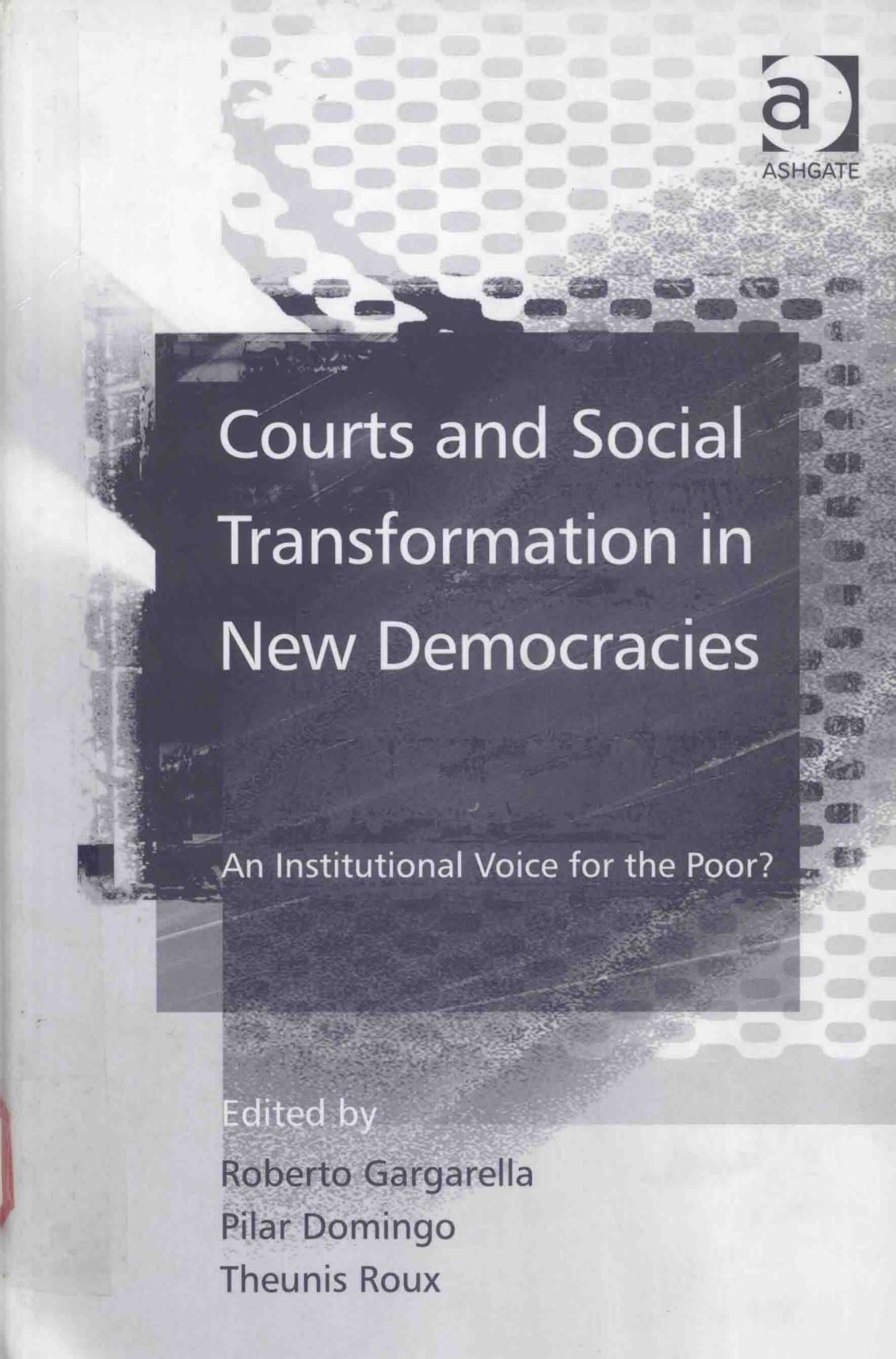
ASHGATE
Courts and Social Transformation in New Democracies
An Institutional Voice for the Poor?
Edited by
Roberto Gargarella
Pilar Domingo
Theunis Roux

Courts and Social Transformation in New Democracies

An Institutional Voice for the Poor?

Edited by
ROBERTO GARGARELLA
Torcuato di Tella University and UBA Argentina, and the Christian Michelson Institute, Norway
PILAR DOMINGO
University of Salamanca, Spain
THEUNIS ROUX
South African Institute for Advanced Constitutional, Public, Human Rights and International Law, South Africa

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COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES

To address the dramatic inequalities in wealth and power new democracies suffer from, we often bet on entrepreneurs and markets, or trust in presidents and bureaucracies. As this volume argues forcefully, we might be well advised to turn to judges and courts. Judicial institutions, this innovative and provocative volume contends, may act as effective agents of social transformation that help establish the social bases of democratic citizenship. Rich in theoretical reflection, empirical analysis, and policy implications, the book represents a highly commendable contribution to the comparative study of democratization, judicial politics, and democratic citizenship. Both scholars and practitioners will benefit greatly from this multi-faceted study.

Dr Andreas Schedler, University of Vienna, Austria

A very interesting volume, which brings together the latest scholarship on the constitutional protection of welfare rights. A must-read for legal and political theorists interested in this issue, as well as anti-poverty activists and lawyers.

Dr Cecile Fabre, London School of Economics, UK

A just society seeks to safeguard the fundamental interests of individuals even against the majority will. This is often done through basic legal rights adjudicated and enforced through the courts. Many have claimed that this method is unsuitable for protecting basic social and economic interests – in food, safe water, essential drugs, and non-discrimination, for example. The present authors dispute this claim through detailed analyses of recent experience in countries where this method has taken root. Studying this experience is important for anyone concerned with protecting the fundamental interests of the least advantaged.

Thomas Pogge, Professorial Research Fellow, Centre for Applied Philosophy and Public Ethics, Australia, The Australian National University, Australia, Charles Sturt University, Australia, and University of Melbourne, Australia

Much has been written about the growing "judicialisation" of politics around the world. But can social rights be effectively promoted through the courts of fragile new democracies? This important volume focuses on trends in a wide range of key countries where social rights litigation has indeed recently developed some real momentum. It explores the factors behind these developments, tracing their origins and institutional trajectories, and also considers the broader political dynamics involved, recognising the limitations as well as the potential of this approach to social incorporation of the poor.

Laurence Whitehead, Fellow at Nuffield College, University of Oxford, UK

List of Contributors

Christian Courtis teaches law at the University of Buenos Aires Law School, and at the Law Department of ITAM (Instituto Tecnológico Autónomo de México). He was a Visiting Scholar and Professor at University of Toulouse-Le Mirail (France), Valencia, Castilla-La Mancha, Pablo de Olavide and Carlos III (Spain), California-Berkeley (USA), Diego Portales (Chile), and Nacional Autónoma de Honduras. His published work includes *Los Derechos Sociales como Derechos Exigibles* (Madrid: 2002), *Derechos Sociales: Instrucciones de Uso* (Mexico: Fon Tamara, 2003), *Protección Internacional de los Derechos Humanos: Nuevos Desafios* (Mexico: Porrea, 2005) and publishes extensively on human rights, constitutional law, disability law and jurisprudence.

Javier A. Couso is Associate Professor of Law and Sociology at the Universidad Diego Portales, in Santiago, Chile. He holds a J.D. (Catholic University of Chile) and a Ph.D. in Jurisprudence and Social Policy (University of California at Berkeley). His current research, and recent publications; focus on the politics of law and courts in Latin America.

Pilar Domingo is Researcher at the Instituto de Estudios de Iberoamérica at the University of Salamanca in Spain. She has held teaching and research positions in the Politics Division at CIDE (Centro de Investigación y Docencia Económica) in Mexico, and the Politics Department at Queen Mary, University of London. Her research and recent publications focus on rule-of-law construction, judicial reform and human rights in weak democratic states, with particular focus on Latin America.

Jackie Dugard is Senior Researcher and Head of the Basic Services & Housing Project at the Centre for Applied Legal Studies (CALS), University of the Witwatersrand, Johannesburg. Her fields of specialisation embrace local government accountability and delivery, housing and water rights, and access to justice by the poor. Prior to joining CALS she worked in the Political Affairs Division at the Commonwealth Secretariat in London. Her current projects include research into access to South Africa's Constitutional Court, social housing options for the poor and public interest litigation on the right of access to sufficient water.

Roberto Gargarella has a S.J.D. from the University of Chicago, a doctorate in law from the University of Buenos Aires, and undertook post-doctoral studies at Balliol College in Oxford. He is currently Professor of Law and Constitutional Theory at the University of Torcuato Di Tella, Buenos Aires, and holds a research position at the Chr. Michelsen Institute in Bergen. He has been awarded a John Simon Guggenheim grant (2000) and the Harry Frank Guggenheim grant (2002–2003). He has published on issues of legal and political philosophy, as well as on US and Latin American constitutionalism and legal theory.

Siri Gloppen heads the 'Courts in Transition' research programme at the Chr. Michelsen Institute in Bergen and is Associate Professor at the Department of Comparative Politics, University of Bergen, Norway. Currently (2005–2006 academic year) she is Visiting Fellow at Harvard Law School, Human Rights Programme. Her research focus is on the political role of African courts. Recent publications include: 'Social Rights Litigation as Transformation: South African Perspectives', (in Jones and Stokke (eds) *Democratising Development* (Leiden: Martinius Nijhoff, 2005); and, with Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary* (London: Frank Cass, 2004).

José Reinaldo de Lima Lopes is Professor of Law at the University of São Paulo, where he previously received his Doctor's degree in Law (1991), and his degree of Livre-Docente (habilitation) (2003). He also teaches law at the Law School of the Fundação Getúlio Vargas in São Paulo. His recent research interests include working in areas of the history of legal ideas and doctrines, legal philosophy, legal sociology and social rights.

Theunis Roux has a Ph.D. in law from the University of Cambridge. He is the Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law and an Honorary Reader in Law at the University of the Witwatersrand, Johannesburg. His main areas of research are constitutional property law and land reform and, more recently, the politics of constitutional law in South Africa. Recent publications include: 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court', in Siri Glippen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary* (London: Frank Cass, 2004); and 'Pro-poor Court, Anti-poor Outcomes: Explaining the Performance of the South African Land Claims Court', *South African Journal on Human Rights*, 20 (2004): 511–43.

András Sajó is University Professor at Central European University Budapest and New York University Law School, Global Faculty. Professor Sajó was the founding dean of Legal Studies at the Central European University. He has been deeply involved in legal drafting throughout Eastern Europe. In addition, he has participated or advised in drafting the Ukrainian, Georgian and South African constitutions.

José Octávio Serra Van-Dúnem holds a Ph.D. in Sociology from the Instituto Universitário de Pesquisas do Rio de Janeiro (IUPERJ). He is Associate Professor and Researcher at the Law Faculty of the University of Agostinho Neto and the Catholic University in Angola. He is Senior Researcher of the Angola Institute of Economic and Social Research (AIP). His research interests are in the fields of political sociology, legal sociology and philosophy, and human rights.

Elin Skaar, holds a Ph.D. in Political Science from the University of California, Los Angeles. She is a Senior Researcher at the Chr. Michelsen Institute, Bergen, Norway, where she is part of the research programme on 'Courts in Transition' and former head of the Human Rights Programme. She has worked with the UNDP in Namibia on poverty reduction issues. She has worked extensively on human rights, reconciliation, and judicial reform in Latin America. Recent books include: with Siri Gloppen and Roberto Gargarella (eds), *Democracy and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Frank Cass, 2004); and, with Siri Gloppen and Astri Suhrke (eds), *Roads to Reconciliation* (Lanham, Maryland: Lexington Books, 2005).

R. Sudarshan is the policy advisor for legal reforms and justice at the UNDP Regional Centre in Bangkok. In that capacity, he is involved in developing programmes to improve access to justice for the poor and disadvantaged groups in several Asian countries, using a variety of strategies, informed by a human rights-based approach. He was also the Justice Advisor for three years at the UNDP Oslo Governance Centre, where he contributed to the evolution of UNDP policies in the area of justice and human rights. He has over 20 years of experience working on governance issues in India and Indonesia, as the assistant representative in the Ford Foundation, New Delhi, and in UNDP offices in India and Jakarta. He has edited a number of books connecting law to poverty concerns. His current research interests include constitution-making processes for democratisation in the Asia region.

Rodrigo Uprimny Yepes is a Colombian lawyer with a doctorate in economics. He was deputy justice at the Colombian Constitutional Court from 1994 to 2004. He currently directs the Centre of Studies on Law, Justice and Society in Colombia and is Law Professor at the National University of Colombia. His current research focuses on human rights, constitutional law, transitional justice and sociology of law. Recent works include: co-authored with César Rodríguez and Mauricio García, 'Justice and Society in Colombia: A Sociological Analysis of Colombian Courts', in Lawrence Friedman and Rogelio Pérez-Perdomo (eds), *Legal Culture in the Age of Globalization* (Stanford: Stanford University Press, 2003); and 'The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia', in Siri Glippen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary* (London, Frank Cass, 2004).

Foreword

The history of this book begins in May 1954 when the Supreme Court of the United States announced its decision in *Brown v. Board of Education*. That decision not only declared unconstitutional racial segregation in public schools, but in so doing brought into being a new understanding of the purpose of law. Many view the maintenance of order as the primary function of government, with the constitution serving merely to establish the structures of government that will rule society. The *Brown* decision, however, saw within the US Constitution an even grander purpose – the articulation of the ideals of the nation.

The Supreme Court's decision in *Brown* was based on the provision of the Fourteenth Amendment guaranteeing the equal protection of the laws. The Court read this provision as a broad national commitment to racial equality and used this standard to measure the system of racial segregation that stood before it. Over the next two decades, the Court extended its judgment to a broad array of social practices, most state fostered, that were responsible for the racial caste structure that had scarred America from the very beginning. In so doing, the Court did not see itself as merely policing a set of limits on the state, but – as the authors of this book envision – also as giving concrete meaning to the ideals of the Constitution and crafting the rights needed to implement that meaning. The Court's approach to the Fourteenth and other Civil War Amendments was later adopted in its construction of the Bill of Rights and was reflected in the decisions of the 1960s regarding freedom of speech, religious liberty, privacy, due process, and the operation of the criminal justice system.

Brown not only revised our understanding of constitutionalism but also confounded our expectations of the judiciary, which had long been thought to be nothing more than an instrument of the ruling elite and, as such, thoroughly unsympathetic to the claims that lie at the heart of this book. Of course, the Court did not operate in a vacuum. The Justices were subject to the pressures for change that were afoot in America and in the world in general. Still, the fact remained that *Brown* was rendered by a group of nine white lawyers who were accountable to no one other than Justitia. Even more remarkably, the Supreme Court placed itself and the lower federal courts at the helm of the reconstructive endeavour it decreed.

Throughout the 1960s, the executive and legislative branches also played a vital role in the project of social transformation that has become known as the Second Reconstruction. At crucial junctures, the President used the military forces at his disposal to enforce federal court orders requiring school desegregation. Through the Attorney General, the President also launched lawsuits to protect civil rights

and proposed bold new legislation to extend the reach of *Brown*. Congress, for its part, passed a number of statutes between 1957 and 1968 that created new enforcement mechanisms. It also added to the list of rights enunciated by the judiciary. The hallmark of the civil rights era in the United States was a co-ordination and not a separation of powers; each of the three branches exercised its distinctive powers in pursuit of the same end – equality.

The social transformation decreed by *Brown* also depended on a robust civil society. Organisations were needed, for example, to initiate lawsuits, to present facts and legal arguments, and to ensure that judicial decrees were obeyed. The United States had long been blessed with organisations that could perform these functions such as the National Association for the Advancement of Colored People, and *Brown* itself was spearheaded by the legal wing of that organisation. Citizens were mobilised as well, and in countless demonstrations and protests insisted upon all that the Constitution promised. The judiciary was greatly influenced by such social action, and many achievements of that period were dependent upon it, as they were dependent upon the initiatives of the legislative and executive branches. Nevertheless, it was the judiciary that directed the Second Reconstruction. The Court issued the initial edict, protected civil rights activists, transformed social action into claims of justice, encouraged and facilitated the participation of the legislative and executive branches, and without exception sustained whatever action those branches had taken to further equality.

This book is not just concerned with the social and economic rights of a racial minority but speaks more generally to all disadvantaged groups, especially those whose disadvantage is defined in purely economic terms – the poor. Those whose rights were vindicated in *Brown* were blacks, but in 1954 virtually all blacks were poor. Given this tie between race and class, it was not at all surprising that in the mid 1960s, during the halcyon days of the struggle for civil rights, the President of the United States announced a 'War on Poverty'. To some extent this war could be seen as a supplement to the civil rights movement linked to *Brown* since a disproportionate number of blacks were poor. But the President must have had a grander ambition in mind because a larger proportion of the poor were white. Economic status – poverty – was to be treated as an independent and sufficient basis for corrective action.

As part of the 'War on Poverty', Congress enacted numerous measures to provide special assistance to the poor. The Economic Opportunity Act provided for job training, adult education, and loans to small businesses. Medicaid was established to provide health-care assistance to the poor. Two education acts were passed that gave federal money to the states based on the number of their children from low-income families. The Legal Services Corporation was created to provide for the legal needs of the poor. During this same period, the Supreme Court insisted upon several reforms of the welfare system then in place. For example, it denied the states the power to condition the receipt of welfare on lengthy residence requirements. In 1970, it required the states to provide evidentiary hearings before independent decision makers prior to the termination of welfare benefits. By the

mid 1970s, however, the 'War on Poverty' was abandoned, not just in the political domain, but in the courts as well. In 1973, the Supreme Court decided that poverty was not to be treated the same as race and that the transformation of American society envisioned by *Brown* was not to extend to removing the structural impediments faced by the poor.

This decision of the Supreme Court was announced at a moment in United States history marked by the resurgence of a belief in orthodox capitalism and a growing faith in the market as the primary ordering mechanism of society. At such a time, reform measures such as those embodied in the Economic Opportunity Act, or a litigation program aimed at eradicating poverty or alleviating its hardships must have seemed anomalous. Capitalism envisions wide disparities in incentives and thus easily accommodates extensive economic stratification. It also privileges bilateral exchanges between individuals, rendering suspect any government intervention beyond enforcing contracts and protecting property rights. More than a resurgent capitalism must have been involved, however, for the Court not only turned its back on the poor but at the same time also expressed second thoughts about *Brown*. In fact, the Court tried to bring the Second Reconstruction to a close. As a purely formal matter, *Brown* remained on the books, but it was limited by the Court in countless ways and deprived of its generative power. The Court now repudiated the vision of constitutionalism upon which that decision rested.

From the vantage point of the United States in the mid-1970s, this book could not have been. Yet over the next twenty-five years, the essential background of this book, changes occurred in the world that created new possibilities, and a remarkable thing happened – *Brown* went global. Countries throughout the world began to view *Brown* as an inspiration not as an aberration. The protection of rights came to be seen as the highest function of a constitution. It was also understood that only an independent judiciary, fully committed to public reason, could safely be entrusted with giving practical reality to the ideals of the constitution.

America's insistence upon the primacy of the market has not abated over the last twenty-five years. To the contrary, it has been transformed into a model for economic development throughout the world. Where this model – now known as neo-liberalism – has been adopted, often with a push by the World Bank and the International Monetary Fund, strong exercises of the judicial power to protect the poor remain untenable. Yet it would be a mistake to see the closing decades of the twentieth century as nothing more than a triumph of neo-liberalism. During this same period, we have also witnessed the transition from dictatorship to democracy in Latin America, the collapse of the Soviet Empire in eastern and central Europe, the dissolution of the Soviet Union, and the transformation of South Africa into a multiracial democratic society. These developments have made this book possible. They led to the adoption of constitutions that emphasised rights over structure, that saw these rights as the embodiment of the highest aspirations of the nation, and that empowered the judiciary to turn these aspirations into a living reality. These developments changed the course of world history, and enabled us, once again, to

imagine courts as an engine of social transformation and as an institutional voice for the disadvantaged.

Owen Fiss
Sterling Professor of Law
Yale University

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The Editors

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Introduction

Pilar Domingo

Recent developments in social rights litigation signal new trends in contemporary understandings of democratic citizenship. As the frontiers of *what* constitutes minimum entitlements for the realisation of basic human dignity are shifting, so are our perceptions of *how* best to protect and promote socially inclusive notions of rights-based citizenship. We are witness to the unfolding of an era of human rights which involves pushing forward novel versions of the 'rights revolution', new patterns in legal mobilisation and growing recourse to the courts by different social groups in pursuit of emancipatory forms of social transformation. And courts in some cases are taking up the challenge.

It is these phenomena that this book seeks to analyse. In particular, our study examines the changing role of courts as a channel for social redress for disadvantaged sectors of society. Can judges lead, or at least contribute in meaningful ways to, processes of social and economic transformation and the reduction of inequalities in society?

Rights-based development and judicial politics generally have become prominent issues on the public agenda of young or fragile democracies, and are increasingly the subject of scholarly analysis. As yet, though, few studies engage in observing the *social transformation* potential of courts, and less so from an inter-disciplinary perspective.[1] This volume addresses some of the gaps in the literature, drawing on expertise in the fields of law, legal and political theory, and political science.

The book offers novel insights both at the descriptive and normative levels. At the descriptive level, it watches 'courts in action' in order to assess the real impact of progressive judicial activism and legal mobilisation on processes of social transformation. The case studies presented in the book shed light on the conditions that enable legal mobilisation strategies, and the factors that encourage or obstruct pro-poor judicial activism in the courts. On the one hand, the different cases allow us to get a better understanding of what the anatomy of social rights litigation is. In other words, they allow us to recognise what the different factors (social, institutional, juridical, cultural and political) that came into play in the process of social rights litigation are. On the other hand, these cases illustrate what strategies, legal procedures, and judicial decisions have been more favourable for this litigation to become successful.

Thus, the book illustrates the powerful movement in search of new remedial mechanisms that is emerging in Latin America, in some cases through the creative participation of courts; the self-restrained social-rights revolution that has been taking place in South Africa; the way in which sub-altern discourses are increasingly being framed in terms of rights, even in largely underdeveloped legal communities; the sudden and unexpected explosion of social-rights litigation that took place in India; and the peculiar role assumed by judges in Eastern Europe, where the invocation of social rights came to prevent, rather than support or encourage, economic reform measures.

At the same time, the book shows how these practical developments belong to a historic trend (Couso). More importantly, the book seeks to demonstrate that these developments can be normatively justified, even in the face of the many criticisms that have been directed at 'judicial activism' regarding social rights. In part, many of the cases presented here allow us to test the theoretical issues about the 'different' character of social and economic rights, in contrast to the civil and political liberties of traditional liberal-democratic thought. More significantly, many of the contributors advance arguments in support of the view that this type of judicial activism promotes, rather than offends, democratic values. This line of argument is particularly important, given that the 'democratic objection' may reasonably be considered to be the main objection against both the decision of activists to engage in social rights litigation, and the initiatives adopted by judges in trying to give effect to these rights.

Social transformation, throughout the volume, is taken to mean 'the altering of structured inequalities and power relations in society that reduce the weight of morally irrelevant circumstances, such as socio-economic status/class, gender, race, religion or social orientation' (developed by Gargarella, and cited in Gloppen's chapter). While the emphasis is on new or fragile democratic settings, the theoretical and empirical findings are of relevance to more general debates on the political and social role of courts, and on the normative underpinnings of modern democracies regarding issues of social justice.

Theoretical Issues

Gargarella's chapter explores the theoretical question as to whether judges should decide on social and economic rights issues as a matter of democratic probity. In an endeavour to set the bounds for what judges may or may not do, he challenges two concepts of democracy which have been explicitly or implicitly used by judges in order not to enforce social and economic rights. On the one hand, Gargarella reviews *elitist* versions of democracy, in which judges act as gatekeepers against passionate majoritarian impulses. In this case, the Constitution is seen as the real and only embodiment of 'We the people,' and it is read as valuing the right of 'freedom of contract' over 'the power of the State to legislate' (*Lochner v. New York* 198 U.S. 45 (1905)). As a result of this, the (democratic) role of judges here is