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The rule of law under a written and unwritten constitution

Remedies

In the December 2010 issue of *Advocate* a number of papers on judicial and professional independence and comparative law were published. In this issue we publish several papers dealing with remedies:

- The judicial role in cases involving resource allocation by Geoff Budlender SC, Cape Bar
- Challenging government decisions: codified and uncodified judicial review by Hugh Corder, Professor of Public Law, UCT
- Fashioning constitutional remedies in SA: some reflections by Justice Kate O'Regan, former judge of the Constitutional Court of SA

The judicial role in cases involving resource allocation

By Geoff Budlender SC, Cape Bar

All legally enforceable rights cost money.[1] There are always the costs of adjudication and execution. The creation of a statutory right can require substantial judicial resources for the adjudication of the disputes which arise. But in some cases, there are also further costs involved in giving effect to the right.

Those costs are more widespread than is sometimes appreciated. An example is the right to a fair criminal trial. That involves not only large infrastructural costs, but also, in many jurisdictions, the right to state-funded legal representation in appropriate cases. In South Africa that right was not recognised in the pre-constitutional era,[2] but it is now entrenched in section 35(3)(g) of our Constitution. The state has had to revamp and substantially increase the funding of the Legal Aid Board. The right thus has a very substantial cost. In some jurisdictions, this principle also applies to at least some civil litigation.[3] South Africa is inching towards that position.[4]

A further obvious example is the right to vote. It requires the government to set up and fund mechanisms and facilities to enable people to exercise their right to vote.[5]

A principled starting-point

It is important to identify a principled starting-point for consideration of the judicial role in cases involving resource allocation. Three very different apex courts show the way.

The Supreme Court of Canada has identified the following principles in dealing with assertions that a right may not be enforced because an adequate budget has not been provided:

'… First, a measure whose sole purpose is financial, and which infringes Charter rights, can never be justified under s 1 (*Singh* and *Schachter*). Second, financial considerations are relevant to tailoring the standard of review under minimal impairment (*Irwin Toy*, *McKinney* and *Egan*). Third, financial considerations are relevant to the exercise of the court's remedial discretion, when s 52 is engaged (*Schachter*).'[6]

The Canadian approach has been summarised by Professor Weinrib. She refers to:

'… the understanding that a government cannot succeed in evading a Charter commitment by failing to fund a particular department or program sufficiently to meet constitutional standards. It is inherent in the nature of constitutional rights that they must receive a higher priority in the distribution of available government funds than policies or programs that do not enjoy that status.'[7]

In the USA, the following was said on behalf of the Supreme Court:

'… it is obvious that vindication of conceded constitutional rights cannot be made dependent on any theory that it is less expensive to deny them than to afford them'.[8]

The Supreme Court of India has, typically, expressed this principle in more trenchant and colourful terms:

'The plea of the municipality that notwithstanding the public nuisance financial inability validly exonerates it from statutory liability has no juridical basis. The Criminal Procedure Code operates against statutory bodies and others regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the State

regardless of budgetary provision. Likewise, s. 123 of the Act has no saving clause when the municipal council is penniless. Otherwise, a profligate statutory body or pachydermic governmental agency may legally defy duties under the law by urging in self-defence a self-created bankruptcy or perverted expenditure budget. That cannot be."[9]

Under our Constitution, a failure to give effect to a right may in theory be justified under the limitation provision in section 36. A right in the Bill of Rights may be limited to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. It is therefore conceptually possible for a lack of resources to be raised as a justified limitation. The government bears the burden of producing evidence which justifies the limitation. A prerequisite for a valid limitation is that it is authorised by a law of general application. I cannot recall a case in which the court has found that there has been a breach of a right, but that the breach is justified by resource constraints.

However, to say all of this is not to escape the difficulties which arise around the questions of 'how much?' or 'who first?' These are sometimes, although not always, questions about the content of the right.

These questions have engaged South African courts since the commencement of our 1996 Constitution. It started with *Soobramoney*.[10] There, the Constitutional Court faced the agonising case of a desperately ill man who required the use of a state-funded dialysis machine, and would die if he did not receive this - but who did not qualify for dialysis in terms of the policy which the provincial government had adopted in order to allocate its limited resources on a fair and rational basis. The court found that he did not have a right to a state-provided dialysis machine, and he did indeed die.

Cases which involve resources often lead to an almost reflex contention by government that policy and polycentric questions are involved, and accordingly the court should adopt a position of deference (or in truth, a position of abstinence). This solution is sometimes very tempting to judges.

The purpose of this paper is to suggest that this is a far from inevitable result in cases with resource allocation consequences, nor should it be. When the reflex response is abstinence, the promises of the Constitution are mocked and made empty. Under those circumstances, it should not be surprising if ordinary people take the view that the Constitution is of no value to them, and that it is not worth defending.

Different sorts of cases involving resource allocation

It is possible to identify a typology of different sorts of cases involving resource allocation, to illustrate the range of judicial responses which are possible and appropriate.

The first category of cases is those where the right is such that it does not ordinarily admit of the reply 'but we cannot afford that'. This situation arises where, for example the right is unqualified, such as the right to vote, and the right to a fair criminal trial.

It is true that even in these situations, there may be some fuzzy edges around the question of 'how much?' – for example, the state is not obliged to set up a polling station at every street corner. However, those qualifications are limited, and the right is directly exigible. A claim of a lack of resources is not a general defence.

A second category is where the right is contained in a statutory scheme, which defines the extent of the benefit. Social grants are the simplest example of this.[11]

A third category is where the right to equality is engaged. This is the trajectory which much European social rights litigation has taken.[12] In European Human Rights Convention law, the social and economic rights are limited and fairly weak. In many cases, it will be open to the legislature and the executive to decide what should be provided, and in what quantity and quality. However, what they cannot do is make provision which is unequal. If they decide to provide a benefit of a particular kind and value to one group, then presumptively the same benefit must be provided to all. In these cases, the foundation of the claim is an assertion of the right to equality. Provision to some presumptively requires provision to all. If the answer from the state is that it cannot afford to provide to all at the higher level, then the answer is that the level must be reduced to the point where all can have equal access to the benefit. The political burden then falls where it properly belongs, namely with political decision-makers, who must either justify to some of their voters (usually the more powerful group) a reduction in their benefits, or find the resources to provide the same benefits to all. This is therefore a mechanism through which the powerlessness of the vulnerable and marginalised groups is neutralised, by in effect making the powerful their defenders. Under the International Covenant on Economic, Social and Cultural Rights, and in South Africa explicitly in respect of some of the socio-economic rights, there must ordinarily be special justification for a measure which is retrogressive.[13]

A fourth class is cases where the government has already made an undertaking to do something specific, and particularly where it has already budgeted for this. This class is illustrated by the *Sharma* case,[14] where the Supreme Court of India was asked to order the government to build a road. Plainly, an order of that kind goes far beyond what a court would ordinarily contemplate. It involves decisions by the legislature and the executive as to budgets and spending priorities. In that case, however, the government had announced that it would indeed build the road. What this meant, the court reasoned, was that it had already exercised its discretion and made its decision on the merits. The budget had been allocated The question of deference to the executive as to what should be provided, and where, therefore did not arise:

'There is also no dispute that the state government was willing and has indeed sanctioned money for the construction of the road. Constitutional and legal imperative on the part of the state to provide roads for the residents of hilly state is not in issue. So in this petition we need not examine how far is the obligation to provide roads.'[15]

If the government has given an undertaking to do something, and particularly if it has provided a budget for it, the claim that it is not affordable becomes rather weak. In some systems, this will on occasion be a matter of a substantive legitimate expectation.[16] In our system, where it has not yet been decided whether that doctrine is part of our law,[17] the legal foundation is a *prima facie* breach of a right, coupled with a decision by government that this should be remedied.

The fifth sort of case is where the question is whether the government has taken 'reasonable' measures. This is the test in our Constitution for most of the positive obligations placed on government to fulfil the named social and economic rights. It raises difficult issues and inevitably, and appropriately, leads to some measure of deference. However, it does not require that courts stultify the right, or abandon their critical faculties. In many different contexts, our law requires the courts to decide whether particular conduct was 'reasonable.' They do so without flinching, and without any great difficulty. There is no reason why they cannot undertake this task where constitutional rights and obligations are involved.

In *Grootboom* and *Treatment Action Campaign*, the Constitutional Court identified some of the tests which should be applied to determine whether the measures taken by government were reasonable. Legislative measures by themselves were not likely to

constitute constitutional compliance. The legislative measures had to be supported by appropriate, well-directed policies and programmes implemented by the Executive. The policies and programmes had to be reasonable both in their conception and their implementation. An otherwise reasonable programme that was not implemented reasonably would not constitute compliance with the State's obligations. A programme had to be balanced and flexible and make appropriate provision for attention to crisis situations and to short, medium and long term needs. A programme that excluded a significant segment of society could not be said to be reasonable. To be reasonable, measures could not leave out of account the degree and extent of the denial of the right they endeavoured to realise. Those whose needs were the most urgent and whose ability to enjoy all rights therefore was most in peril should not be ignored by the measures aimed at achieving realisation of the right. It might not be sufficient to show that the measures were capable of achieving a statistical advance in the realisation of the right. If the measures, though statistically successful, failed to respond to the needs of those most desperate, they might not pass the test.[18] If Government adopted a policy with unreasonable limitations or exclusions, the court might order that these be removed.[19] Transparency was an element of reasonableness: for a public programme to meet the constitutional requirement of reasonableness, its contents had to be known appropriately.[20]

The emblematic example is *Treatment Action Campaign.* It dealt with the failure of the government to implement a national programme to provide anti-retroviral medicines to HIV-positive pregnant women and their babies, in order to prevent the transmission of HIV at birth. The evidence showed that the direct financial cost of implementing a nation-wide programme was relatively limited, as the medicines were initially available for free. However, the provision of a national programme required significant human resources. The court made a detailed order requiring government to implement a national programme in order to give effect to its constitutional obligations. It justified this on the basis that the government had already decided to provide the treatment in question, but on a very limited basis. As there was no reasonable justification for this limited provision, the court felt able to order the government to extend the programme on a comprehensive national basis. It seems to me, however, that the sub-text to the court's conclusion that the government's measures were not reasonable, was the fact that this literally involved questions of life and death. Under such circumstances, the court felt emboldened to intervene, notwithstanding the fact that there were material resource implications – and the fact that this was a matter of high political dispute.

The sixth category is the most difficult of all. It arises where there is prima facie a widespread and systemic failure to give effect to a right - for example, the right to basic education - and the provision of additional resources is a substantial part of the solution. Here, the court faces genuine questions of 'how much?' – what is the standard of reasonableness – and 'who first?' – if resources are indeed limited, whose needs should receive priority? These are cases in which it can genuinely be said that the decision is polycentric, and may involve removing funds from one activity in order to provide them for another.

In such cases, courts have a legitimate anxiety about both their competence and their legitimacy in making these decisions. The typology shows, however, that not all cases involving resources give rise to this problem. In South Africa, only a small minority of cases has raised this issue.

One never hears it said that the court may not adjudicate a conventional contractual or delictual claim, and make an award to the plaintiff, because the cost is excessive. The distinction between conventional private law cases, and the public law cases which give rise to concern, is that in a public law case the award of a remedy to a particular individual may imply a right to an equivalent award on the part of many others. The distinction between private and public law litigation was famously explained in an article by Professor Chayes in 1976.[21] He contrasted the received tradition of private law litigation, which is based on bi-polar, retrospective, and party-controlled litigation, with an emerging public law style of litigation which is forward-looking and involves multiple parties, not all of whom may be before the court. This distinction was elaborated upon by O'Regan J as follows:

'As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events.Such litigation will generally not directly affect people who are not parties to the litigation.In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief.In litigation of a public character, however, that nexus is rarely so intimate.The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous.'[22]

What this means is that different sorts of remedies need to be developed in public law. For a start, systemic breaches require systemic remedies. The essential nature of these systemic remedies has been described as follows:

'These innovative structural remedies represent a departure from the normal finality, and 'command-and-control' features of judicial remedies. Initially a court gives an order which defines the broad goals to be achieved to cure the constitutional violation. The order further requires the respondents, through a process of deliberative engagement and negotiation with the applicants, to devise a plan detailing the concrete measures and steps to be taken in order to meet those goals. The approval of the plan and its implementation are subject to ongoing judicial supervision. However, the court leaves as much latitude as possible for the formulation, implementation and monitoring of the plan to be resolved through deliberative negotiation between the claimants, relevant organs of State and, possibly, other stakeholders.'[23]

The Constitutional Court has demonstrated that this approach can be used very effectively in dealing with applications for eviction orders which would leave large numbers of people homeless. Our experience has been that an order for 'engagement' and, where necessary, report back to the court, can be surprisingly effective in achieving resolution of disputes which had seemed utterly intractable.[24]

The challenge is therefore to develop appropriate remedies where large-scale resources are potentially involved. The court needs to ensure both that the rights of the complainants are effectively addressed, and that it does not overstep its competence or its legitimacy by making decisions which are more properly for the legislature and the executive. The 'once and for all' final remedy which is typical of private law litigation is not likely to be appropriate in such cases.

Endnotes

[1] Stephen Holmes and Cass R Sunstein *The Cost of Rights: Why Liberty Depends on Taxes* (Norton, 1999).

[2] *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (AD)

[3] *Airey v Ireland* 1981 (3) EHRR 592.

[4] *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC);*Shilubana and others v Nwamitwa* 2007 (2) SA 620 (CC) par [21].

[5] See for example *August v Electoral Commission* 1999 (3) SA 1 (CC).

[6] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR para [284].

[7] Lorraine Weinrib 'The Supreme Court of Canada and s 1 of the Charter' (1988) 10 *Supreme Court Law Review* 469 at 486.

[8] *Watson v City of Memphis* 373 US 528 (1063) at 537.

[9] *Municipal Council, Ratlam v. Shri Vardichand and Others* 1980 (4) SCC 62 at para 12.

[10] *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) SA 765 (CC).

[11] *Khosa and others v Minister of Social Development and others; Mahlaule and others v Minister of Social Development and others* 2004 (6) SA 505 (CC)

[12] See the discussion in Sandra Fredman *Human Rights Transformed:Positive Rights and Positive Duties* (Oxford, 2008) 181-189

[13] Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, and General Comment 3 of the UN Committee on ESCR, which are discussed in *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) at [45].

[14] *State of Himalchal Pradesh v Umed Ram Sharma* (1986) SCC 68.

[15] Para [13].

[16] *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213.

[17] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* 2010 (3) SA 454 (CC) para [306] and the cases cited at footnote 25.

[18] *Grootboom*, paras [42] – [44].

[19] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) 721 (CC) as explained in *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para [67].

[20] *Treatment Action Campaign* para [123].

[21] Abram Chayes 'The Role of the Judge in Public Law Litigation' *Harvard Law Review* Vol 89 (1976) pages 1281 – 1316.This account is borrowed from Kent Roach 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights' in Malcolm Langford (ed) *Social Rights Jurisprudence:Emerging Trends in International and Comparative Law* (Cambridge, 2008) 47.

[22] *Ferreira v Levin N.O. and Others; Vryenhoek and Others v Powell N.O. and Others* 1996 (1) SA 984 (CC) para [229].

[23] Sandra Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta, 2010) 435.

[24] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

Challenging government decisions:

codified and uncodified judicial review in South Africa

By Hugh Corder, Professor of Public Law, University of Cape Town

'There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'

Chaskalson P in *Pharmaceutical Manufacturers Association : In re Ex parte the President of the Republic of South Africa*.[1]

This portion of perhaps the leading administrative-law judgment of the Constitutional Court (CC) encapsulates much of what needs to be recorded on this occasion. Yet it masks not only the frustration which gave rise to a degree of judicial pique, but also the diversification of pathways to judicial review (albeit under the broad umbrella of the Constitution) over the intervening decade. In what follows, I shall attempt a brief overview of these and other aspects of the law relating to judicial review of the exercise of public power[2] in South Africa, and point out some areas of concern.

The common law era

The origins of judicial review of administrative action in South African law predate the establishment of the nation state itself one hundred years ago. The superior courts of all four colonies which united to form South Africa had practised some form of judicial review, with the courts of the Boer republics in fact exercising a form of judicial review of legislative action as well. But it is to the courts of the Cape Colony that most lawyers look for the original insistence, as part of their 'inherent jurisdiction', of the authority of the judges to regulate the exercise of public power.[3] This occurred first in judgments delivered soon after the establishment of a Supreme Court at the Cape in terms of the Charter of Justice of 1828,[4] but the tone was set in the post-Anglo-Boer War Transvaal by Innes CJ in *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council*, in which he outlined three types of review power of the courts.[5] The most oft-quoted restatement of the grounds of review is to be found in the words of Corbett CJ [6] as follows:

'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice'. .. Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.'

This type of formulation ought to sound comfortably familiar to most administrative lawyers in the British Commonwealth, but notice that review even for *Wednesbury* unreasonableness is not listed. Indeed the unreasonableness has to be 'gross' and even then it is merely symptomatic of a failure to apply the mind. Notice too that the rules of natural justice are still referred to as the basis for procedural fairness, without mention of the general duty to act fairly or the doctrine of legitimate expectation. The last-mentioned concept was not far off in South African common law, as the same court adopted legitimate expectation as the basis for a hearing in *Administrator Transvaal*