Strasbourg, 22 February 2006

CCS 2005/08

CDL-JU(2006)005
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with
Constitutional Court of the Republic of Armenia
International Association for Constitutional Law
Conference of Constitutional Control Organs of Countries of Young Democracy
Centre for Constitutional Law of the Republic of Armenia

CONFERENCE TO COMMEMORATE THE 10TH ANNIVERSARY OF THE ESTABLISHMENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

"THE LEGAL PRINCIPLES AND POLITICAL REALITY IN EXERCISE OF CONSTITUTIONAL CONTROL"

Yerevan, Armenia, 29 September – 2 October 2005

REPORT

Disputes over social and economic rights: Law, Politics, Money
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1. Introduction

The role of a Constitutional Court is difficult and highly sensitive. The core function of such a court, from which it derives its reason for existence, is to preserve constitutionalism, including the rule of law. A Constitutional Court is a deliberate check and balance in a constitutional system. It offers protection to individuals, many of whom may be highly vulnerable, against the unlawful exercise of public (and sometimes private) power. It assists to maintain the integrity of the system as a whole, in ways that range from helping both the state and its people to understand the meaning and effect of the Constitution to imposing on the organs of government a form of accountability for their actions, which also has the advantage of transparency. In some circumstances, decisions of a Constitutional Court will preclude the government or the legislature from doing what it wishes to do. Depending on the circumstances, this may take courage and a clear perception on the part of the Court of the scope and legitimacy of its role.

But a Constitutional Court does not operate in a vacuum. It is part of the system of government, in a symbiotic relationship with the other institutions of the state, sharing responsibility for the well-being of the people. In carrying out its function, a Constitutional Court naturally and properly takes into account the potential impact of a decision on the polity as a whole and on the integrity of the system of constitutional control, including the standing of the court and compliance with its decisions. In acknowledging this reality, however, I do not want to be misunderstood. This is an approach to adjudication that requires wisdom rather than expediency and strategic vision rather than judicial self-interest.

Striking this balance, generally and in particular cases, is important for any court with a constitutional jurisdiction. It is particularly important following the establishment of a new Constitution, with a new Court, and perhaps even more so in states that are in transition. In these circumstances, a Court is establishing itself as a key institution of government, in the eyes of the other institutions and of the public at large. Its image, its reputation and the effectiveness of its role may depend on the actions taken at this time. At the same time, it is laying the foundations on which its jurisprudence will build, and determining its approach to the interpretation of the Constitution. Again, much of the doctrine established at this time may well prove enduring, or at least highly influential.

Courts generally have a range of techniques at their disposal to assist them to strike this balance in a way that gives primacy to constitutional principle without intruding beyond their sphere into the proper and accepted domain of the other institutions. These mechanisms typically are available at different stages of the process of adjudication. Most obviously, they may affect:

- Acceptance of a matter: where, for example, the Court considers that it lacks jurisdiction, or that a matter is not suitable for judicial determination
- Deliberation on a matter: a Court sometimes may, for example, decide a case on relatively settled point, avoiding a larger and more contentious issue
- The nature of the final order: a Court may have the capacity to choose between remedies that are more or less intrusive or may be able to postpone a remedy to enable a defendant institution to take remedial action itself.

The detail of such techniques varies, depending on the legal system, the constitutional framework and the powers and constitution of the Court. The choice of particular techniques almost always will depend on the circumstances of particular cases.

One genre of constitutional questions that notoriously raises sensitive issues is the protection of social or economic rights. The sensitivities are at least two-fold. First, disputes over such rights often have substantial budgetary implications, which normally are regarded as the responsibility of the elected branches of government, denied to the courts on the grounds of both legitimacy and capacity. Secondly, social and economic policies typically are the tools used by the elected branches to pursue their vision for the state and to shore up their electoral support. Interference by a court in these circumstances may well meet a hostile reaction. Partly for these reasons, common law states have tended to eschew constitutional protection for social and economic rights, at least in justiciable form. In consequence, when States such as India wanted to give social and economic rights constitutional status, they recognised them as non-justiciable directives of state policy, and withheld the sanction of judicial enforcement.

The new post-apartheid constitutional settlement in South Africa departed from this pattern. The importance of social and economic rights in the transformation of the new South Africa caused their inclusion in the Constitution in a form that, potentially, was justiciable. It thus fell to the new Constitutional Court to interpret and apply the rights in a way that gave them effect, within the limits of the judicial function. South Africa therefore provides a useful case study of how one particular court, newly established pursuant to a new Constitution, sought to strike the balance between what the title to this colloquium describes as legal principle and political reality. In what follows, I examine the South African experience, both to illustrate how the Constitutional Court of South Africa went about its task and to determine whether more general conclusions can be drawn from it.

2. South Africa as a case study

a. Constitutional framework

South Africa has a mixed legal system. Its public law, however, is recognisably in the style of the common law. Consistently with the normal pattern of common law constitutionalism, the Constitution is established as fundamental law, to be enforced through courts, through a process of concrete constitutional review, generally at the instance of individuals or groups. In a departure from the design of the court system in most common law states, however, responsibility for constitutional adjudication under the final Constitution of South Africa of 1996[1] was conferred on a specialist Constitutional Court, in large part to avoid entrusting the interpretation of the new Constitution to judges associated with the former regime. The constitutional jurisdiction of this Court is not exclusive, but it is final. Generous rules of standing determine access to the courts in constitutional cases[2] and the courts have broad discretion in relation to the remedies that they may grant.[3]

A Bill of Rights in Chapter 2 of the Final Constitution offers protection for a wide range of rights including rights in relation to housing[4] and to health care, food, water and social security.[5] These rights are expressed to be available to "everyone". They are drafted in a distinctive style, drawing loosely on the International Covenant on Economic, Social and Cultural Rights (ICESCR). Sections 26(1) and 27(1) respectively create the "right" in question: to "access to adequate housing", for example, in the

[1] An earlier, interim Constitution is not relevant for present purposes.
[2] Section 38
[3] Section 38, "…the court may grant appropriate relief…"; section 172 "a court …may make any order that is just and equitable".
[4] Section 26
[5] Section 27

case of section 26(1). Sections 26(2) and 27(2) acknowledge the particular difficulties created by rights of this kind by imposing on the state an obligation to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right". Sections 26(3) and 27(3) provide certain, relevant, negative rights. Section 27(2) for example, provides that "no one may be refused emergency medical treatment".[6] Like the other rights in the Bill of Rights these are subject to the general limitations clause, pursuant to which rights may be limited "only in terms of a law of general application to the extent that the limitation is reasonable and justiciable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors…"[7]

On their face, these provisions raise a host of questions. One, very basic, question is whether they are justiciable at all. This issue was settled early, in the *Certification* case, in which, in response to a challenge to the inclusion of non-justiciable rights in the Constitution the Court observed that the rights were "at least to some extent, justiciable".[8] What this meant, given the wording of the sections, remained to be decided. Given the broad similarity of these sections with the wording of the ICESCR, one possibility was to adopt the Convention notion of "core" content for each right that, as a minimum, the State must provide.[9] On the other hand, given the magnitude of the task of restructuring that the new government faced, judicial enforcement of the concept of a core of economic and social rights might well prove impracticable.

There have been four major decisions of the Constitutional Court in which individual complaints about social and economic rights have been resolved and through which the jurisprudence has progressively developed: *Soobramoney v Minister of Health*[10] , *KwaZulu-Natal Government of the Republic of South Africa v Grootboom,*[11] *Minister of Health v Treatment Action Campaign*[12]and *Khosa v Minister of Social Development*[13] . These are examined in the next part. In relation to each case, I am concerned (1) to isolate the particular sensitivities in the issue before the Court (2) to identify the techniques used by the Court to resolve the case, bearing these sensitivities in mind and (3) to assess the significance of the outcome in terms both of the resolution of the immediate problem and of broader strategic considerations.

b. Four cases

Soobramoney came before the Court in 1997, shortly after the final Constitution came into effect. The applicant had chronic renal failure as well as diabetes, heart disease and cerebro-vascular disease. He had been refused dialysis treatment by the Addington state hospital. It was clear that in the absence of such treatment he would shortly die. In considering the applicant's case, the hospital had followed its own internal guidelines, developed in recognition of the fact that it could not provide dialysis to everyone who sought it and excluding from eligibility, *inter alia*, people with "significant vascular or

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[6] See generally, Sandra Liebenberg "South Africa's evolving jurisprudence on Socio-Economic Rights", Socio-Economic Rights Project CLC, UWC, 2002, p.5
[7] Section 36
[8] *Ex parte Chairperson of the Constitutional Assembly; in re Certification of the Constitution of the Republic of South Africa* 1996(4) SA 744, para 78
[9] See *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 29
[10] 1998 (1) SA 765 (CC)
[11] 2001(1) SA 46 (CC)
[12] CCT 8/02
[13]

cardiac disease." The Court accepted the hospital's claim that it had insufficient funds to provide dialysis service for all. It accepted also that "this is a nation-wide problem and resources are stretched in renal clinics throughout the land".[14] Soobramoney applied to the Court for relief under section 27(3) of the Constitution, which provided that "no one may be refused emergency medical treatment". His application was unsuccessful.

Had the application been resolved as a denial of emergency medical treatment, pursuant to section 27(3), it would have had severe budgetary implications. In effect, the decision could have meant that every person with chronic renal failure was constitutionally entitled to dialysis at state expense, with significant consequences for the funding of other programs. In the event, the Court handled the case primarily in terms of section 27(2). It disposed of the argument based on section 27(3), using contextual and purposive approaches to interpretation, to conclude that Mr Soobramoney's circumstances did not represent an emergency but an "ongoing state of affairs…which is incurable".[15] The argument was not particularly convincing; the notion that the sections must be understood in their textual and broader context nevertheless has remained, as an important step in the reasoning of the Court in all such cases.

The applicant failed under the other parts of section 27 as well. By reading the entire section in context, the Court held that section 27(2) conditioned the ostensibly individual rights in section 27(1). And there was no breach of section 27(2) itself. The Court accepted that guidelines were necessary and that, on the evidence, there was nothing to suggest that these guidelines were unreasonable or had not been "applied fairly and rationally".[16] It concluded on this point that "A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters".[17]

From the standpoint of the applicant, the decision was a tragedy: a consequence that the Court acknowledged. In a context in which the meaning of the provisions in issue was ambiguous, the Court clearly was influenced by wider considerations, about its own role *vis-a-vis* that of other branches. On the other hand, it did not entirely abandon its individual rights focus, poor comfort though this may have been to the applicant. Thus it went to some lengths to identify circumstances in which the right not to be refused emergency treatment would be likely to be attracted.[18] And it sought to justify its decision by reference to similar circumstances elsewhere and an understanding of the meaning of rights in a broader community setting.[19] Its judgment also had the advantage of introducing into the public record the government's own policies and justifications for them, with some advantage for accountability and transparency.

The second case, *Grootboom*, concerned the eviction of 900 people, including 510 children, from informal housing that they had illegally established for themselves on someone else's land, after waiting for years for action on their application for low-cost housing. They sought to enforce the right

[14] At [24]
[15] At [21]
[16] At [25]
[17] At [29]
[18] At [18],[20]
[19] At [31]; see also Sachs J at [52],[54]: "Chaskalson P's judgment, as I understand it, does not merely 'toll the bell of lack of resources'. In all the open and democratic societies based upon dignity, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care".

to housing under section 26 of the Constitution or, alternatively, the right of children to "shelter" under section 28. The governments, for their part, gave evidence before the Court about the challenge of providing adequate housing in the circumstances that prevailed in South Africa after the fall of apartheid and the legislative and other policy initiatives that were underway. The applicants argued nevertheless for an interpretation of section 26 that identified a minimum core that, in their case, had not been provided. The High Court, at first instance, accepted that the government was in breach of the provision protecting children's rights and ordered remedial action, to be supervised by the Court itself. On appeal, the Constitutional Court accepted the claim largely by reference to section 26 instead[20] and its order took the significantly more restrained form of a declaration.

The judgment in *Grootboom* was central to the establishment of the doctrine that now prevails. The Court rejected the argument for a minimum core, for a mixture of textual and institutional reasons.[21] Instead, it developed an approach to the interpretation of the sections that focused literally on the requirements of section 26(2) and its equivalents themselves. There was a requirement for "*reasonable* legislative and other measures". The obligation was bounded by "available resources". And the effect must be "progressive achievement" of the right. In examining the actions taken by governments by reference to these various requirements the Court repeatedly acknowledged the efforts that had been made. It also noted that it was concerned only whether these requirements are met and not, for example, with whether they would have been more effectively met by different policies. There was a breach of section 26(2) nevertheless, because the existing policies made no provision for people in crisis in circumstances where no relief could be expected in the short or medium term.[22] It followed that the requirements of section 26(2) and in particular the requirement of "reasonableness" were not met.

The decision of the Court in *Grootboom* required revision of government policy, and reallocation of resources. It was hailed as a major breakthrough in mechanisms for judicial enforcement of constitutional protection for social and economic rights; and indeed, it was important for this reason. It is clear, however, even in this case, that the Court had a wary eye on the proper scope of its own authority. The remedy that it eventually granted gave to the government the responsibility of developing an appropriate plan, within very broad guidelines. It gave the applicants themselves no directly enforceable entitlement to housing and rebuked the Court below for its order to that effect: "The High Court order…ought not to have been made".[23] The remedy granted by the Constitutional Court was cast in terms of a declaration instead, although there was some suggestion that the Human Rights Commission would monitor and report on performance.

The *Treatment Action Campaign* case was highly politically charged. At issue was the question whether the government was in breach of the Constitution by failing to provide an anti-retroviral drug to pregnant women, to inhibit the transmission of HIV/AIDS to their babies, except in a few controlled "pilot" studies. The applicants argued that the government was in breach of section 27, in relation to "health care services, including reproductive health care" or, alternatively, to an aspect of the rights of children under section 28. The court below accepted the argument, ordering the government to make the drug available in prescribed circumstances and to introduce an effective program for the reduction

[20] Although not in the care of their families have a (presumably enforceable) right under section 28
[21] [33]-[36]
[22] [64-5]
[23] [95]

of mother to child transmission of HIV, to be submitted to the Court itself. The government appealed to the Constitutional Court.

The explanation of and treatment for HIV/AIDS was at the time a politically contested issue in South Africa. The policy on the provision of drugs to pregnant women was part of the wider debate. Resources were at best a minor issue. The government made it clear in argument, however, that it regarded the case as one that raised questions about the boundaries between the authority of the Court and the elected branches of government. In particular they argued that the Court should show "deference" to the government in the formulation of its policies and be restrained in the order that it makes when it has concluded that the government is in breach.[24] The Court nevertheless held that the government was in breach and issued a mandatory order, although in terms somewhat less intrusive than the order of the High Court.

Once again, the techniques adopted by the Constitutional Court in meeting these various pressures are of some interest. They may be characterised as follows. First the Court consolidated the jurisprudence that had emerged in the two earlier cases. It read the sections in their textual, historical and social context; it dismissed arguments that there was a guaranteed core of rights to which individual applicants were entitled. Secondly, it examined the government's own arguments in great detail, carefully refuting each one. In this respect it was somewhat assisted by the weakness of the government's own case. Thirdly, it confronted directly the issue of institutional boundaries that the government had raised. In this context, while it acknowledged the limitation on the role of the courts and the reality that certain matters are "pre-eminently within the domain" of particular institutions,[25] it equally insisted on its own obligations, "to the Constitution and the law", mandated by the Constitution itself.[26] In this connection it also explained again its role in relation to rights provisions of this kind: "to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation".[27] Fourth, in applying the by now established reasonableness test, it adverted once again to an apparent gap in the policy, which failed to make provision for those most desperately in need.[28] Finally, it examined the arguments against mandatory orders in detail, but made specific orders just the same, requiring the provision of the disputed drug, although acknowledging that the government retained flexibility to develop other and different policies that would prevent mother-to-child transmission of HIV.

The outcome was broadly consistent with the two previous cases, thus adding to what was becoming an established and relatively predictable body of jurisprudence. The politically delicate issues were handled by meeting the arguments directly, giving the government some leeway, but insisting on compliance with the terms of the Constitution. Particularly remarkable was the willingness of the Court to make a mandatory order, running the risk that the government might not comply (and, indeed, it was slow to do so).

The final case of *Khosa* raised an issue of a different kind: the constitutionality of legislation restricting welfare benefits to South African citizens and thereby denying them to permanent residents of the State. The issue potentially engaged section 27 of the Constitution, conferring on "everyone" a right to

[24] [22]
[25] [98]
[26] [99]
[27] [38]
[28] [67]ff

access to "social security", subject to the usual caveat in sub-section (2). This time, the issue had potentially significant financial implications, the precise extent of which remained unclear. In argument the government asked whether, in the event that the Act was found to be in breach of the Constitution, the Court would agree to suspend any order for 18 months, to allow the government and legislature themselves to deal with the defects in the legislation.

The Court held that the legislation was in breach of the Constitution and effectively read into it additional words to ensure its application to permanent residents of the State. It acknowledged the significance of a case that, in effect, challenged law enacted by the Parliament. It proceeded, however, on the basis that the Constitution was clear, understood in the light of previous jurisprudence and of the purposes that the Constitution had been enacted to achieve.

3. Conclusions

The examination of this series of decisions by the South African Constitutional Court on the meaning of social and economic rights reveals a range of predictable political and financial tensions. The outcome of the cases, individually and collectively, has been the subject of long and critical examination, and it may be that they have fully satisfied no-one. On one side the Court is criticised for not going further to evaluate, for example, the government's policy priorities[29] or to identify a minimum core of social rights that individuals might claim. On the other, critics charge the Court with interfering with policy making and implementation that is the task of the other branches of government.

Nevertheless, the efforts of the South African Court must be accepted broadly as a success. The Court has developed a distinctive and, now, reasonably settled jurisprudence that gives social and economic rights effect while preserving significant discretion for the elected branches of government. In doing so, it has explained its own reasoning, and its vision for the role of the Court, both to other institutions and the public at large, securing broad acceptance of both. Probably by chance, the Court has taken an incremental approach to the interpretation and application of social and economic rights, which may have assisted acceptance of its role in the early years, enabling it to become progressively more bold.

Of course, care must be taken in drawing lessons from South African experience for the actions of courts elsewhere. In particular, the formulation of social and economic rights in South Africa is distinctive, and the approach of the Court has often been driven by, or at least justified by, reference to the text. Certain general propositions nevertheless may be made. First, the primary responsibility of a Constitutional Court is to the law and the Constitution. Secondly, however, the law itself is often indeterminate, leaving the Court with choices to be made. Realistically, in making such choices, a Court is likely to have an eye to the wider consequences of its decisions. Those consequences must include the credibility of the Court itself and its capacity to fill the role allotted to it. A Court may be assisted in juggling the conflicting pressures on it by a range of technical legal tools, the nature of which will vary between different legal systems. It may be assisted also by the educative role that a Court can play through its judgments, in explaining its own role and its role vis-à-vis other branches in establishing and maintaining transparent, accountable and effective constitutional government.

[29] Theunis Roux, "Understanding *Grootboom* – A response to Cass R. Sunstein", 12 *Constitutional Forum* (2004)