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"Social policy in a development context:
how research can be translated into policy and action"

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Using law to develop social policy

1 Introduction

Social policies are subject to law, just like any other administrative action. Legal processes can be used to contain social policies that are unlawful, unreasonable and procedurally unfair. There are many examples of this. But law and the litigation process can also be used in the development of social policies. I want to describe to you some ways in which this has been done.

I will firstly speak about three cases which show how carefully positioned and innovative litigation can stimulate policy development and facilitate poverty alleviation and social development. Then I will give a common sense description of the essence of why this approach works, and will describe how I think it could be used to compel the delivery and development of measures against extreme poverty and hunger.

At the heart of this approach lies the basic concept of the separation of powers: the judiciary, legislature and the executive all perform discrete functions in an administrative state, and operate as a check and balance on each other. Law does this by containing action of the state that is unlawful, unreasonable or procedurally unfair.

2 The cases

2.1 The first case demonstrates how litigation can be used to unblock development, even if the cause of the problem lies in management or budgeting and is not the direct target of the litigation.

South Africa has nine provinces, each with a provincial government. Social assistance is the principal poverty eradication measure in the country. During 1996, the President assigned the administration of social assistance to the various provinces. He was permitted to do so provided that uniform national standards were not necessary for the effective delivery of the particular function. The assignment had the effect of allowing provinces to decide upon criteria to qualify for grants, decide upon their own administrative procedures and to select which programmes out of the national social policy programme they chose to introduce. The national Minister had difficulty in enforcing national policy when his nine

provincial counterparts had original legislative powers as a result of the assignment. And the money budgeted for the provinces to pay social grants was allocated to them as part of a discretionary fund, which the provinces could allocate to either health, education or welfare. It meant that the provinces could decide how to spend the money that was allocated to them, and could restrict the money made available for social grants. Some of the provinces also under-budgeted for social grants. The result was reflected in poor delivery that varied across the country.

Mr Mashavha, a disabled person who was made to wait for more than 2 years for a social grant because of the administrative practices peculiar to the Limpopo province, and he applied to strike down the assignment on the grounds that it breached the constitutional requirement of uniform national standards.[1] The national government did not oppose the matter, but it was opposed by one of the provinces which wished to retain its power to administer grants. After argument, the Constitutional Court agreed with Mr Mashavha that uniform national standards were required in social assistance and it struck down the assignment.

A quick analysis of the case will show that it used a provision of law which made a rational governance standard, the need for uniform national standards to attain efficiency, a prior condition for the President's powers to assign. To prove that the administration of social grants required uniform national standards was a simple matter, but its purpose was really to revise the state's budgeting and management system. Those would not normally be matters that the court would have jurisdiction over, but the intersection of the legal discourse with the financial and management discourses allowed the legal discourse to be used to impact upon budgeting and management.

The state's response was to revise its budgeting for social assistance so that nationally allocated funds for social assistance were channelled to the national ministry and were not subject to provincial discretion. Parliament instituted a national social security agency. A policy was adopted to implement social assistance uniformly across the country. National standards were adopted and budgeting improved.

This was not an outcome that could be easily accomplished through political processes. Provincial functions and the basis on which the provinces received funds from the national government could only be amended by legislation passed by a two-thirds majority in the National Assembly and by not less than 6 of the 9 provinces in the National Council of Provinces. It would probably have required a considerable struggle. But by using a rational governance standard, founded as a requirement of

[1] *Mashavha versus the President of the Republic of South Africa and others* 2004 (12) BCLR 1243 CC

the law, it was possible to approach the courts to enforce the point through reason and argument rather than through political processes. It was, in essence, a therapeutic intervention to redress structural and communication blockages. Its lesson is general: within the doctrine of the separation of powers, if a problem in implementation or development of a policy can be categorised as unlawful, unreasonable or procedurally unfair, there may be a legal intervention to address it.[2]

2.1 The second case shows how the legal process can be used to develop substantive social policy on poverty alleviation measures.

The South African social assistance system caters for people in vulnerable categories, such as the aged, disabled, foster children and so forth. Many people living in frequent hunger fall between these categories. Two generally accepted principles for the delivery of socio-economic rights under the South African constitution is that the state must have a reasonable plan to deliver socio-economic rights, and this plan must give appropriate attention to people in desperate need.[3] Regulations under the Social Assistance Act[4] provide for temporary emergency assistance to people facing "undue hardship" in "exceptional circumstances", which could cater for people in desperate need. This provision means that starving and malnourished people should qualify for relief even though they do not fall into a vulnerable category, and it provides a general remedy for a right to food in desperate circumstances. But the state was concerned about the possible costs of this benefit and the risks of fraud in its and it consequently did not determine working procedures or definitions to implement social relief of distress. The regulations were thus not properly implemented, no guidelines existed on what constituted "undue hardship" or "exceptional circumstances" and no operational procedures existed for accessing the funds required.[5] Whatever efforts had led to the enactment of social relief was wasted, the rights might as well not have been provided in law.

A case was brought for people who had been denied the temporary relief to which they were entitled.[6] The applicants lived in the North West

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[2] There are differing formulations in the various jurisdictions for the criteria to determine when the judiciary is empowered to intervene in the exercise of executive power. This formulation derives from the South African constitution.

[3] *Grootboom and others v the Government of the Republic of South Africa* 2001 (1) SA 46 (CC) at para 44

[4] Regulations 26(1) and 26(3) promulgated as R 418 of 31 March 1998 and amended by R 813 of 25 June 1999, R 1233 of 23 November 2001 and R 460 of 31 March 2003.

[5] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at paragraphs 52 to 56 on the need for operational guidelines for line functionaries deciding applications affecting fundamental rights.

[6] *Kutumela and others v the Member of the Executive Committee for Social Services, Arts and Sport in the North West Province and another,* unreported Bophuthatswana General Division case number 671/2003 and the discussion on this and other similar cases described in De Villiers

province. Mr Kutumela is unemployed and permanently disabled and had been trying to get a disability grant for months. He and his wife only ate every second or third day. His family had disintegrated due to his poverty as his children had been sent to live with relatives who had better access to food. He tried to apply for social relief, but received no response to his applications. With two other applicants in similar circumstances, he asked the court to compel the state to implement social relief of distress and bring out the necessary guidelines and operating procedures while he waited for a decision on his grant application. He brought the case as a class action for all people in desperate need.

The state did not oppose the case. The Minister agreed to a comprehensive order declaring that crisis and desperate need categories of relief are necessary parts of a reasonable constitutional programme for social assistance, directing that social relief be implemented for the class, clarifying parts of the regulations, directing that guidelines and manuals be prepared, providing training to civil servants in the application of the manuals and directing that the public be informed of their rights.

An analysis of this case too is useful. It did not compel the state to devise social relief of distress for people in desperate need, but merely to develop it and implement it reasonably. Developing policy in effect required the Director-General of Social Development to determine a level of hardship that is "desperate", and accordingly determine the level at which the state would intervene to help people in desperate need. The concept that there is a minimum core of socio-economic rights that are essential to ensure a basic access to the right in question has been an approach adopted by the United Nations Committee on Economic, Social and Cultural rights as a tool to measure compliance and development in nations that are signatories to the Covenant on Economic, Social and Cultural Rights. It is not an appropriate tool for courts when exercising constitutional jurisdiction, not the least because it draws them into policy formulation rather than evaluation, and in South African jurisprudence it has been rejected in favour of a case-by-case evaluation of state policy on the content of socio-economic rights using the criterion of reasonableness.[7] In developing the manuals on social relief, the state also did not adopt a minimum core, but relied on the trained discretion of an administrator to determine access to the benefit guided by a list of model circumstances in

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N., *Procedural fairness and reasonable administrative action within the social assistance system: implications of some settled class actions*, in 22 [2006] SAJHR part 3 (in publication)

[7] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at paras 26 to 33; *Minister of Health v Treatment Action Campaign (no.2)* 2002 (5) SA 721 (CC) at paras 26 to 39. For academic opinion supporting the minimum core approach in jurisprudence, see D Bilchik "*Towards a Reasonable Approach to the Minimum Core*" in 2003 SAJHR 1 and M Wesson, *"Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court"* in 2004 SAJHR 284. These arguments are convincingly rejected by C Steinberg, *"Can Reasonableness Protect the Poor?"* in 123 (2006) SALJ 264.

which people may qualify. By compelling the state to develop a test and a standard, albeit not a minimum core, litigation developed the policy. The state retains responsibility for developing a multi-layered approach to the social problem, and is compelled to do so through the pressure of the litigation and the resultant order.

2.3 The third case demonstrates how litigation can prioritise and drive policy development, even if it does not determine the content of the policy itself.

Under South African statutory law, social assistance to disabled people is only available to citizens or permanent residents. Refugees are not covered. Four destitute and disabled refugees who were living in great hardship, under the lead of the Scalabrini Centre, approached the court to declare their exclusion unlawful and to direct the state to develop a programme to provide social assistance to them.[8]

They relied firstly upon terms of the statute regulating refugees, which guarantees the full protection of the law to refugees. Secondly, they relied upon the South African constitution, which guarantees dignity, equality and access to social assistance to everyone, regardless of citizenship. Thirdly, they relied upon the South African government's ratification of the UN Refugee Convention (which obliges the state to accord the same treatment to refugees as it does to its citizens) and the African Charter of Human and People's Rights (which requires that all disabled people within South Africa's borders will enjoy special measures in keeping with their physical needs).

The state did not oppose the case and has filed a plan to provide social assistance to refugees. The plan was developed in consultation with the representatives of the refugees, and because it took place in the context of litigation rather than policy formulation and debate, it provided a platform to negotiate and make representations on aspects of the state's plan.

3 The mechanism

What all these cases have in common is a simple mechanism: an enforceable norm or standard is identified, executive policy or conduct is measured against that standard and, if it is lacking, the court is asked to remedy the policy or conduct in an appropriate manner.

In the *Mashavha* case, the standard was the conditions for an assignment by the President, and the conduct was the assignment in question. The

[8] *Scalabrini Centre of Cape Town and others v Minister of Social Development and others;* unreported Transvaal Provincial Division of the High Court of South Africa case number 32056/2005

assignment breached one of the conditions for its validity. It was very simple. In the *Kutumela* case, the standard was the existing regulations, read with the principle that the state must provide reasonable guidelines to operationalise its policies. The standard in each case will obviously have a source in law, in this case it was significantly amplified using reasonable measures and established principles of governance to achieve a lawful and practical outcome. The conduct in question was the failure to provide the benefits set out in the regulations but the remedy included extensive orders regarding the expansion of the benefit, all of which were based on reasonable measures to ensure an effective order. The *Scalabrini* case on refugees relied upon constitutional, statutory and international law norms to compel the state to develop a reasonable plan to extend social assistance to refugees.

4 Sources of norms

4.1 Statutory domestic or common law rights are the easiest standard to use and the mere enforcement of existing rights is often a real advance for people. To compel a state to deliver what its laws provide for, and to protect existing benefits from incremental administrative erosion, is a basic but vital aspect of policy monitoring and implementation. Until the state implements what it has already adopted, it will not further develop policy on the point. Merely compelling it to implement what it has adopted sets the scene for its further evolution.

4.2 If no direct right is available, it becomes necessary to look to more general normative instruments, typically a country's constitution. The constitutional rights of the country may require interpretation. A right to life or dignity, for example, can easily be expanded to include a right to food support for starving people in appropriate circumstances.

4.3 Even if there is no domestic constitutional right to life or dignity, most states have adopted international instruments that provide for a right to life and dignity. These instruments are not usually enforceable within a domestic jurisdiction unless incorporated into domestic law, but even if only ratified or adopted they can be used to argue that the state has subscribed to those standards as reasonable standards and in appropriate circumstances it would be grossly unreasonable to deny their benefits to its citizens.

4.4 Even if no rights are available, litigation can still be used. A legitimate expectation to a benefit or a procedure under a policy or programme, or an attack on a discriminatory policy or one that is implemented in breach of other laws, can form the basis for an

intervention to address the underlying social policy if the approach is appropriately formulated.

5 Some strategic considerations

5.2 Litigation of this sort is obviously not appropriate to all issues, and requires careful prior analysis and planning. It often needs to be consolidated into other social processes. Very briefly, this means that the litigation must be conducted in a way that entails:

- retaining a cooperative relationship with all stakeholders, particularly the state, mindful that we share a common goal of an effective social system,
- advertising and implementing the order by training state officials, training civil society organisations and publicising the outcome through academic articles or by providing information to people and communities and to people in other relevant fields, such as the legislature and constitutional institutions,
- monitoring the implementation of the court order, by either bringing further cases to reinforce the same point, or by involving some other appropriate monitoring body, the state's auditors, a parliamentary select committee, an international convention body and so forth, and
- possibly developing further cases in a cycle of litigation that will establish or advance the policy.

5.1 If a legal standard can be identified, what makes this mechanism an effective and underutilized tool in the development of policy is that:

- Reason rather than a political influence is favoured as the means of arriving at a decision.
- Court orders have the authority of law. An enforceable court order can be used to control and compel delivery by the state.
- Ordinary people can access the courts using only good arguments and reason.
- Litigation provides leverage in negotiations that ordinary citizens would not otherwise enjoy, particularly if linked to media coverage.

4 Conclusion

The three cases discussed here demonstrate some of the ways litigation can stimulate policy when it is carefully planned with a policy goal in mind. Although

the law could not produce the policies necessary in each case, it could be used to dissolve problems and catalyze new developments. The purpose of this paper has been no more than to describe a few cases with the intention that you will adapt the processes to similar factual circumstances and have some insight into the strategic possibilities available. There is still much that can be said about the contextual analysis necessary for such cases, the limits on approaching the courts to intervene in policy processes, the manner of conducting such litigation, the interaction with the state's role in developing and implementing policy, the process of implementing the outcomes of such litigation, and so forth.

The most obvious application of this is in relation to hunger and extreme poverty. The time may be right for the universal rights to life and dignity to be used to drive the development of social policy aimed at implementing and developing policies to alleviate hunger and extreme poverty. With appropriate contextual, social and legal research and a bit of acumen, these and other standards can be identified and applied in particular jurisdictions and factual settings to facilitate the implementation of existing policies and programmes, and to create the circumstances to develop and improve them.

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