

# Courts v Policymakers: Who sets the pace? The courts and IGFR in SA

Presenters

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# Introduction

- Constitutional ethos pervasive in SA fiscal policy
  - Macro prioritisation (eg DoRA)
  - Info, processes
- But uneven
  - Especially in respect of socio-econ rights
  - At micro-prioritisation level
  - SA Human Rights commission reports
- So how can courts impact on budgets and the IGFR system?

# The fiscal constitution (1)

- Lays out the fiscal “rules of the game”.
- Courts are the referee
- Why do we need a fiscal constitution in the first place?
  - Basic political choice in CODESA for a more decentralised system with constitutionally entrenched rights and powers
    - What prevents national govt from encroaching and subsuming powers of other spheres?
    - What prevents opportunistic strategic behaviour on the part of subnational govts
    - Need a credible commitment by all govts not to infringe on their counterparts – “commitment dilemma”
  - Socio-economic rights
    - Intertemporal commitment (i.e not throwing away your raincoat!!)

# The fiscal constitution (2)

“The danger exists in our country as in any other, that a new elite will emerge which will use its official position to accumulate wealth, power and status for itself. The poor will remain poor and the oppressed. The only difference will be that the poor and the powerless will no longer be disenfranchised, that they will only be poor and powerless and that instead of racial oppression we will have non-racial oppression.”

Albie Sachs, 1992

# Court decisions: So what?

- Constitutional Court is thus
  - the ultimate arbiter of IG disputes
  - Enforcer of justiciable socio-economic rights
- Constitutional Court decisions do not just bind litigants
  - Provide authoritative interpretations of the constitution binding other courts in future
  - A case on rights to housing in the Western Cape affects housing in all other provinces, but also other services
  - Convert implicit informal contingent liabilities into explicit liabilities
  - Can therefore impact on the structure, processes and future operations of IGFR system.

# Courts and the IGFR system

- What is the appropriate role of the courts in cases with budgetary (and possibly by extension IGFR) implications?
  - Third party enforcement of checks & balances on the legislature and the executive
  - limitations on judiciary self-imposed
    - arising from judicially developed and enforced interpretations of justiciability, precedent and policies of deference to other branches of government that the court has elected to follow
- What approaches to these issues are SA courts developing and what could be their future impact on the fiscal system?

# Courts and budgets

- Politicians, bureaucrats and judges alike believe that courts should have as limited role in policymaking (and budgeting) as possible
- Why?
  - Expertise and capacity of judges to engage with “polycentric decisions”
    - Are other branches better off? Eg the Legislatures?
  - Need for independent judiciary and related separation of powers concerns
  - Case by case adjudication vs comprehensive intergovernmental budget process
  - Inherent value judgements on marginal social returns of public funds rather than pure reason
  - The value judgements of non-democratically accountable judges replacing value judgements of democratically elected arms of government.



“It is true that the inclusion of socio-economic rights may result in Courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of State benefits to a class of people who formerly were not beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.... At the very minimum, socio-economic rights can be negatively protected from improper invasion.

- *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (“First Certification Judgement”) paras 77 and 78.*
- Narrow versus broad interpretation of socio-economic rights



# What SA constitutional court has actually done (1)

- In Grootboom, TAC, Khosa question facing court
  - How strictly should court interpret the right in question?
- 3 possible approaches:
  - Rationality
  - Reasonableness
  - “Could the job be done better”
- Rationality test
  - ≈ a rational link between govt action and outcome (in respect of the right)
  - Housing policy was “systematic” and “not haphazard” and would have passed this test
- Reasonableness test
  - Court must be convinced it will work
    - (“The programme must be capable of facilitating the realisation of socio-economic rights” – Yacoob J)

# What SA constitutional court has actually done (2)

- Reasonableness test (continued)
  - Law/right/policy must be assessed in full context
    - Economic/social/historical context
  - Capacity of relevant institutions to implement the right will be examined
  - Housing policy not reasonable because
    - excluded an exceptionally vulnerable group, giving them no prospect of housing in the short term (no emergency housing)
    - Housing policy not deemed flexible or comprehensive enough
- “Can the job be done better?” approach
  - In deciding whether limitation of a right is constitutional, court asks:
    - “Are there less restrictive means to achieve this purpose”.
    - Courts actively consider other alternatives
    - And in effect could substitute its view for that of the executive or legislature

# What SA constitutional court has actually done (3)

Court has set the second test – it has been cautious.

- Not so weak that socio-economic rights are worth nothing
- But respects the role of political branches in determining policy & budgets

In court orders (eg Grootboom), Constitutional Court has required that the state plan and implement a reasonable programme, but no details specified.

Court is aware it should not interfere with govt:

“In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries.) As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly”.

# Polycentric decisions: scenarios

- Social grants
- Insolvent municipality due to exogenous, structural economic shocks
- Grant structures
- Free basic services
- Municipal roles

# German case

- Uniform living standards + constitutionally entrenched subnational govt expenditure and revenue assignment
- Addition of East German Lander in 1990
- German Constitutional Court has handed down precise directions to federal government and states on fiscal equalisation
- Exacerbated perverse incentives inherent in the constitutional structure.

# Courts & Policymakers: Quo vadimus? (1)

- **Aggregate fiscal discipline**
  - Court has refrained from defining a “minimum core content” for any of the rights
  - Financial vs institutional and managerial constraints
- **Allocative efficiency**
  - Court has hesitated to order govt to reconsider spending patterns
  - Or impose a temporal sequence for prioritisation
  - Avoided quantifying precise amounts needed to remedy
- **Operational efficiency**
  - Court did not consider alternative service delivery modalities
  - But unspent budgets would fall foul of reasonableness test

# Courts & Policymakers: Quo vadimus? (2)

- In the near term, courts a background issue
- But things could change in the future
  - Decline in ANC political dominance, reducing the power of the centre
  - Fiscal shocks increasing intergovernmental conflict over resource envelope
  - Given dominance of executive over the legislature, courts could increasingly be thrust onto the public resource allocation state
- Court decisions  $\Rightarrow$  incentives  $\Rightarrow$  behaviours of IGFR stakeholders  $\Rightarrow$  IGFR outcomes
- But courts will be influenced by the programmes and approaches developed in the political branches of government and are unlikely to second guess.



## Concluding remarks:

Institutions are not only created through conscious design in formal constitutions and legislation. Rather they also evolve through the myriad decisions and actions of independent roleplayers who co-create the formal and informal institutional norms underpinning institutional culture. This is as true for the development of constitutional jurisprudence as policy. It is therefore even more important that politicians as well as all public managers with control or oversight responsibilities over public resources should engage with these issues, so that they exercise their authority fully conscious of the constitutional implications, the fiscal institutions they are creating and maintaining, and their implications for the societal vision embedded in the Bill of Rights.