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Objective invalidity revisited

Stephen J. Ellmann

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Objective invalidity revisited

The doctrine of objective constitutional invalidity says that when the Constitutional Court declares a law unconstitutional, what that decision means is that the law has always been unconstitutional since the adoption of the constitution in 1996. I blogged about this doctrine on June 11, 2009 and said that this doctrine could not survive the day -- not yet arrived -- when the Constitutional Court overrules one of its own earlier decisions. Even now, however, it produces practical complications, as the Court has recognized for years. In response, as Justice Van der Westhuized said for the Constitutional Court in *Weare and Another v Ndebele NO and Others* (CCT 15/08, decided 18 November 2008), "[t]he duty to give just and equitable relief recognises that the position dictated by the objective doctrine may not always be a feasible one in practice" (para 42).

Weare addressed the question of whether it was unconstitutional for one province, KwaZulu-Natal, to bar bookmaking by corporate entities, while it permitted bookmaking by individuals and partnerships and while the rest of South Africa permitted corporate entities to practice in this area. The answer, the Court held, was "no," a decision I agree with. Not every difference is an unconstitutional discrimination.

But the case also presented a wonderful technical complication. The KwaZulu-Natal law in question was actually an "Ordinance," first adopted by the "provincial council" of what was then Natal, in 1957. A lower court had declared the Ordinance unconstitutional. But if the Ordinance was a "provincial Act," then under section 167(5) of the Constitution that judgment would be without effect unless the Constitutional Court confirmed it. Now an "Act," it appears, is a piece of original legislation, such as a provincial legislature today would enact. The old "provincial council" would have been the 1957 equivalent of such a legislature -- so far, so good. But in 1986 (still in the apartheid era), Parliament "abolished the provincial councils and transferred their legislative authority to the provincial administrators, who were members of the executive." (para 26) When they acted, by Proclamation rather than "legislation," they were making "delegated legislation" (rules, we might say in the U.S.) rather than "original legislation" (statutes). In fact the Natal administrators did modify the statute of which the no-gambling-by-corporate-entities provision was a part, nine times (though they may not have touched this particular provision). (para 27)

That might have made a big difference to the question of whether the Constitutional Court had to review the lower court's decision to invalidate this section. A piece of delegated legislation lacks the status of being an Act, and under the post-apartheid constitution lower courts can invalidate delegated legislation without the need for the Constitutional Court to confirm their decisions. The constitution's theory for this rule presumably is that invalidating a regulation is not a disagreement with the elected representatives of the people, while invalidating an "Act" is.

But this wasn't the end of the story. Then apartheid ended, and the Ordinances of the old order were carried over to the new era, and the provinces (such as what was now named KwaZulu-Natal), with their provincial Parliaments, acquired original lawmaking authority again. In fact, the KwaZulu-Natal provincial legislature then passed legislation in this field, incorporating the old Ordinance by reference and thus continuing it in effect (para 33), and also amended the Ordinance three times, though not touching the particular provision that this case challenged.

So the upshot was that it was not clear whether an old order Ordinance which, like this one, had once been produced as an act of original provincial legislation, then became the purview of provincial administrators making delegated legislation, then became again the subject of original provincial legislation -- was or was not a "provincial Act." The Constitutional Court decided that it was, an entirely reasonable decision.

But this ruling automatically meant, by virtue of the doctrine of objective invalidity, that any other similar Ordinance that might have been held unconstitutional by a lower court since 1996 without the Constitutional Court's having reviewed and approved the decision had not been validly invalidated! Apparently no Ordinance invalidation case had been brought to the Constitutional Court prior to this one, and so it is possible that there are a number of these invalidly invalidated laws. Moreover, the Constitutional Court's rules provide time limits for litigants seeking confimation of a lower court judgment of invalidity, and those time limits "will almost certainly have expired" by now. (para 41)

What to do? Here is whether the Constitutional Court's authority under section 172(1)(b) of the Constitution -- its "duty," as Van der Westhuizen J refers to it in para 42 -- to "make any order that is just and equitable" in connection with a decision on a constitutional matter comes in. The Court notes that "[c]itizens and the state alike may have treated the orders as binding, it may now be years since the orders were made, and the ordinances might have become irrelevant. New legislation may have replaced them." (para 44) Van der Westhuizen J

concludes: "In light of these considerations, no general rule is made as to court orders in connection with the constitutional validity of ordinances that have not been confirmed by this Court. Should the special circumstances of a specific case mean that any injustice or uncertainty does result, parties are of course free to approach this Court or the High Court to seek relief." (para 45)

This was certainly a wise decision. But it is worth noting that it was a decision that would have been unnecessary but for the doctrine of objective invalidity. Absent that doctrine, the earlier decisions would have remained good law, since they were court judgments that were never appealed and so had long since become final. It was only because the doctrine of objective invalidity meant that a decision in 2008 automatically ran back, unqualifiedly, to 1996 that any question about those decisions between 1996 and 2008 arose. This is a case, then, in which a legal theory generated quite unnecessary practical complications.

It's also a striking illustration of two very different aspects of South African jurisprudence. The question of whether an Ordinance is an "Act" is a matter resolved by quite painstaking attention to legal detail. Once that is decided, the resulting question of what to do about the implications of the doctrine of objective invalidity is decided by broad, pragmatic adjustment. The courts have the authority to operate in both ways.

In general, it seems to me that the courts' ability to render principled constitutional decisions and then guide their implementation by practical adjustment is very helpful and appropriate, and has been used to very good effect in South Africa. In most cases, moreover, the kind of reasoning at issue in these two stages of adjudication probably is broadly similar: the judgment of unconstitutionality rests on broad constitutional weighing and the implementation decision takes comparably broad considerations into account. But occasionally, as here, the judgment of unconstitutionality involved quite technical analysis -- and over time there will surely be many relatively technical constitutional questions, given how long and detailed South Africa's constitution is. (For another example, see *Kruger v President of the Republic of South Africa* (CCT 57/07, decided 2 October 2008.)

I wonder just how wide the gap between the technical analysis of such issues and the practical implementation judgments that follow should be. In principle, I think it might be desirable for South African jurisprudence to evolve so that these two forms of reasoning converge: the technical legal analysis becomes more infused with practical considerations, and the pragmatic adjustments become more regulated by legal rules. There is, I think, some inconsistency in applying technical precision to the determination of the rights and wrongs of the parties before the court, including Presidents and Parliaments, while

the courts themselves effectuate their decisions by practical adjustments to the necessities of events. The inconsistency, moreover, is not simply a technical disparity, but may instead have broader significance: in principle, all actors should be subject to similar legal requirements via rules that provide similar degrees of formal precision and functional flexibility. This isn't an absolute or a precise principle, but it seems fair to say that it is a part of the basic idea of the rule of law.

It is not shocking that current South African law reflects such a disparity. South Africa's courts have been engaged in constitutional adjudication for only about 15 years, and they wield broad authority over a tremendous range of controversial issues. They are, it seems to me, still in the process of determining just how to wield their own power. So this post is a suggestion for a direction this process might take in cases to come.