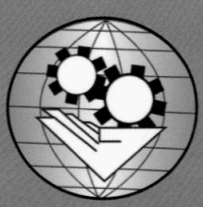
Access to Social Security for Non-citizens and Informal Sector Workers

An International, South African and German Perspective

EDITORS
ULRICH BECKER & MARIUS OLIVIER



Centre for International and
Comparative Labour
and Social Security Law (CICLASS),
University of Johannesburg

Max Planck Institute for
Foreign and International
Social Law

CHAPTER 6

TAKING INCLUSION SERIOUSLY

AN OUTSIDE PERSPECTIVE ON KHOSA v MINISTER OF SOCIAL DEVELOPMENT; MAHLAULE v MINISTER OF SOCIAL DEVELOPMENT (DECISION OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA)

Alexander GRASER

I. INTRODUCTION

In its 2004 decision in the related matters *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*[1] (hereinafter *Khosa*) the Constitutional Court of South Africa held unconstitutional the restriction of certain social assistance benefits to citizens, and it ordered these benefits to be granted also to permanent residents. Recent though the judgment still is, it has already received considerable attention, both in and outside South Africa. And indeed it seems remarkable for a court to widen thus significantly the scope of a country's welfare system. Rather, one might expect a country either not to extend such benefits to non-citizens at all, which according to the respondents' assertion was the case in Britain, Canada and the United States of America (hereinafter the US).[2] Or one would expect that such inclusion was granted by the legislature on a statutory basis, following typically some international agreement assuring the mutuality of such generosity. In particular, the relatively inclusionary regime in the EU can be read as an example for this.[3]

1 2004 6 *BCLR* 569 (CC).

2 Paras. 54 and 124.

3 For a detailed account see Schulte B "Institutional framework, legal instruments and legal techniques relating to the promotion of access to social security for non-citizens: A German approach" in Becker U & Olivier MP (eds) *Social Security for Non-Citizens and Informal Sector Workers: An International, South African and German Perspective* (2007 Max Planck Institute for Foreign and International

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So, *Khosa* certainly deserves attention, and it is tempting to join the discussion even from an outside perspective. It is, however, always a daring endeavour to deal with foreign law. Knowing about the complexity of one's own legal order, there is every reason to be cautious about commenting upon another one. There is an overt risk of missing not just the niceties, but the essentials of the other system and its social underpinnings. This is all the more true if – as it is the case here – the intention is to deal with so elaborate a judgment as we encounter it in *Khosa*, and thus to contribute to an ongoing and sophisticated debate as it is currently taking place in the SA legal community.[4]

Accordingly, in order to at least reduce the risk of complete irrelevance, I will refrain from any discussion of issues related to the construction of the South African Constitution. Instead, I will limit myself to some of the non-doctrinal aspects of the judgment. So the *Khosa* decision will be discussed here not as a piece of legal interpretation, but as an act of "judicial governance."[5] Thus, the focus will be, first, on the effects of the decision, i.e., more specifically, on the question whether from an inclusionary perspective the decision might turn out a pyrrhic victory (2.); and secondly, on the institution which took the decision, i.e. more specifically, on the issue of whether it is appropriate for a court to take such a step (3.).

Admittedly, such an approach only makes sense if one departs from Montesquieu's classical image of the judges being "mere passive beings", "no more," that is, "than the mouth that pronounces the words of the law."[6] Rather, the assumption here is that in general there are alternative ways to decide a case and that indeed this particular matter could have been decided differently. This may typically be hard to show without the very kind of doctrinal discussion which shall be avoided here. But given the fact that in *Khosa* there was disagreement among the constitutional judges themselves and that two of them would have reached a different result, the said assumption might in this context be plausible without further substantiation.

Even under this assumption, however, the perspective taken here remains limited. For, even if the Constitution allows for different interpretations, this does not render

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4 Mpedi LG "Charity Begins – But Does Not End – At Home" (2005) 26 *Obiter* 173-186; for a discussion in the context of the Courts' approach to social rights see Liebenberg S "Needs, Rights and Transformation: Adjudicating Social Rights" (2005) 8 *NYU Human Rights and Global Justice Working Paper – Economic and Social Rights Series* 18. For a discussion in the similar context of poverty alleviation see Jansen van Rensburg L "A Rights-Based Approach to Poverty: the South African Perspective" – accessed at http://www.undp-povertycentre.org/md-poverty/papers/Linda_.pdf, in particular para. 36 *et seq*. For a discussion from a separation of powers perspective see Thipanyane T "The Courts vs. Policy Makers: Who Sets the Pace" – accessed at http://www.ffc.co.za/conf/papers/courts-policy.pdf.

5 For a recent discussion of this concept see Frerichs S "Judicial Governance in der europäischen Rechtsgemeinschaft" – accessed at http://web.uni-bamberg.de/sowi/mse/download/frerichs-judicial_governance.pdf. For a shorter version in English see http://web.uni-bamberg.de/sowi/mse/download/frerichs-legal_perspectives.pdf.

6 de Secondat C-L, Baron de la Brède et de Montesquieu *Spirit of Laws* Book 11, Chapter 6.

all interpretive efforts irrelevant. Rather, these interpretations will differ with regard to their plausibility as well as to their consequences for the future construction of the constitution. So, the debate about competing constructions remains – of course – important, and accordingly, the issues which will be touched upon in the following are but complementary considerations.

2. SWAMPING THE WELFARE STATE?

It is, no doubt, noble to extend social assistance to non-citizens. However, it is also plain that this decision entails an additional burden to the South African welfare budget and that it might, under the assumption of limited overall welfare spending, ultimately require individual benefit levels to be reduced. The exact impact of this burden, however, is unclear, and arguably more so than becomes apparent from the judgement. In the following, I will distinguish three versions of this concern about the welfare budget and discuss the decision in light of this distinction.

2.1 The uncertainty about the number of permanent residents and its treatment by the majority judgement

Writing for the majority of the Court, Justice Mokgoro plainly states that government's concern about the financial burden of including non-citizens is, in principle, legitimate.[7] In particular, she explicitly acknowledges that "there are compelling reasons why social benefits should not be made available to all who are in South Africa irrespective of their immigration status."[8] However, Justice Mokgoro went on to state that a distinction had to be made between those "who have only a tenuous link" with the country and those who had made South Africa their home – permanent residents, that is.[9]

Having drawn this line, Justice Mokgoro then addresses respondents' argument that the inclusion of permanent residents would impose "an impermissibly high financial burden". The factual evidence put forward by the respondents is relatively vague. Neither could they provide the Court with the exact number of non-citizens who actually hold permanent resident status, nor did they know how many of them would qualify for social assistance. Accordingly, there are only rough estimates as to the additional costs which would be incurred if permanent residents were to be included in the scheme. After an extensive assessment of these estimates, Justice Mokgoro concludes that the additional cost would at most amount to 2% of the overall government spending on social grants and that respondents' contention was therefore untenable.[10] No further consideration is given to the financial burden argument by the Court's majority.

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7 Para. 58.

8 *Ibid.*

9 Para. 59.

10 Paras. 60-62.

There is, however, another aspect to the financial burden issue. It is spelled out succinctly by Justice Ngcobo writing for the minority. Starting from the assumption that the availability of such public benefits might constitute an incentive for immigration,[11] he goes on to argue that "if there is merit in the possibility that the state could become a magnet for new immigrants seeking permanent resident status, estimating the likely size of the pool of grant applicants and an accurate estimate of the financial burden would be even more arduous a task."[12] So, the argument is that including non-citizens might lead to an influx of destitute free-riders from abroad which in turn might render the additional cost of such inclusion much higher than what has been taken into account by the Courts' majority.

This version of the financial burden argument is considerably harder to rebut. It is trickier legally as it provides at least some kind of reason for treating citizens and others differently – beyond the mere reference to their respective status. And it is harder to reject also on factual grounds. Partly this difficulty can be ascribed to the prospective nature of the argument. For it is about future immigrants, and how should one predict the exact numbers, be it of those who might be attracted by prospect of receiving such benefits, be it of those who come irrespective of them it but might nevertheless eventually be in need of such assistance? The only serious way to get to such a prognosis would be to look back and analyse similar experiences in the past. However, even in retrospect, it is typically hard to single out welfare benefits as a cause for migratory flows.

In light of its relative immunity against falsification, it is not surprising that this version of the argument is present in similar contexts elsewhere in the world as well. There have been references to it recently in a similar proceeding in the German Constitutional Court.[13] In the European Union (hereinafter the EU), it has been very common with respect to the consequences of EU enlargement. There were dramatic estimates as to the consequences to be feared if the citizens of the new member states were granted the (limited) kind of access to the old member states' social security systems which is provided by the established rules of EU law.[14] And there was a similar discussion a few years ago with respect to welfare-induced interstate migration in the US.[15] In all these

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[11] Paras. 121 and 124.

[12] Para. 129.

[13] See German Constitutional Court (BVerfG), Decision of July 6th 2004, case numbers (Az.): 1 BvL 4/97, 1 BvL 5/97, 1 BvL 6/97.

[14] For such estimates see e.g. Sinn H W *EU-Erweiterung und Arbeitskräftemigration* (2001 ifo Beiträge zur Wirtschaftsforschung München) 5 at 23. On the legal regime in the European Union see Schulte "Institutional framework, legal instruments and legal techniques relating to the promotion of access to social security for non-citizens: A German approach" in Becker U & Olivier MP (eds) *Access to Social Security for Non-Citizens and Informal Sector Workers: An International, South African and German Perspective* (2007 Max Planck Institute for Foreign and International Social Law and Centre for International and Comparative Labour and Social Security Law Munich and Johannesburg).

[15] See the detailed discussion below.

cases, opponents of the inclusion of migrants would argue that the cost of inclusion is raised by the magnet effect, and that under the assumption of a limited welfare budget, this will lead to a considerable decrease in the level of individual welfare benefits.

2.3 Of unreal fears and real decisions

There is yet another version of the argument, still more twisted and maybe even harder to deal with. It might be illustrated by the US example which has just been referred to. The US experience is particularly interesting in this context because this discussion has had a long history in the US and there have thus been many efforts to put the "welfare magnet thesis" to an empirical test.[16]

In particular, the discussion relates to a specific welfare benefit as granted by all the states in the US and which after a 1969 ruling of the Supreme Court[17] had to be extended to migrants from other states within the US. The benefit was a tax-financed cash grant for incomplete needy families with minor children. It had existed for many decades up until the mid-nineties,[18] and it was based on federal regulation and co-financed by the state and federal governments. However, the states were free to determine the benefit level. And in fact, there was considerable variation in this respect across the states. From the recipients' perspective, this meant that by moving to a more generous state, they could immediately raise their level of income support. And the states, accordingly, feared that in case they set the benefit level too high, they would become a magnet for all recipients in the US.

Obviously, these are ideal conditions to put the welfare magnet argument to an empirical test: Some 50 jurisdictions, adjacent to each other, were running welfare schemes which are largely similar yet different with regard to benefit levels. Further, there were no legal and hardly any cultural barriers to such migration. And the whole system could be studied over decades.

At first glance, the empirical evidence seems to be quite in line with the argument's predictions. There was, to be sure, no indication that at any point in time the states had engaged in "ruinous race to the bottom", as it had been predicted by some commentators. However, there has been something like a "stately walk"[19] downwards, a slow yet steady

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16 See, in particular, Peterson PE *The Price of Federalism* (1995 Brookings Institution Press Washington D.C.), Peterson PE "Devolution's Price" (1996) 14 *Yale Journal on Regulation* 111 and Rom MC & Peterson PE *Welfare Magnets* (1990 Brookings Institution Press Washington D.C.). For a more thorough discussion of the empirical evidence and the legal setting see Graser A *Dezentrale Wohlfahrtsstaatlichkeit im föderalen Binnenmarkt? – Eine verfassungs- und sozialrechtliche Untersuchung am Beispiel der Vereinigten Staaten von Amerika* (2001 Duncker & Humblot Berlin) especially in Part II.

17 *Shapiro v Thompson* 394 U.S. 618.

18 Until then, it was called "Aid for Families with Dependent Children" (AFDC). The successor's name is "Temporary Aid for Needy Families" (TANF).

19 Peterson 120.

trend, that is, towards lower benefits which began right after the Supreme Court decision mentioned above and which could be observed over a period of more than two decades.[20]

Further, it could be shown that a change of the benefit level in one state would typically induce neighboring states also to change their benefit levels. The average impulse was found to amount to some 30 % of the initial change.[21] Again, this appears to corroborate the welfare magnet thesis. Apparently, the magnet needed its time to attract welfare recipients, but then it caused the predictable decrease in benefit levels.

On a closer look, however, this interpretation proves wrong at least for the US case. For, the evidence also shows that there were only negligible numbers of interstate migrants who qualified for the said welfare benefits. There are relatively recent data for California[22] which had for long been among the states with the most generous benefit levels. Still, the immigration of welfare recipients was so little that it would have sufficed to cut the benefit level by less than one per cent per year in order to leave the overall spending unchanged. And note that these numbers might include many who were attracted not by welfare benefits, but by other factors such as, in particular, employment opportunities. This suggests that the reduction in benefit levels occurred across the board even though in reality there was hardly any migration of welfare recipients. Apparently, it was enough for such migration to be feared – or used as an argument – in the political debate.

These findings render the issue of the costs of inclusion still more complicated in that they detach the prediction that welfare benefits will be lowered from the question whether and to what extent such inclusion would really operate as a magnet. For it is not actual immigration, but its mere anticipation that might have a negative impact on the overall level of welfare benefits. Thus, the prediction becomes still more resistant against falsification, because it would not even help to show that welfare induced migration was not to be expected.

2.4 Again: Swamping the welfare state

The concern about the negative consequences of the inclusion of non-citizens on the welfare budget can thus be framed in at least three ways. The first, plain one refers to the additional costs caused by the inclusion of all those non-citizens – or more specifically: those permanent residents – who are in the country at the time of assessment. This version was addressed and rejected convincingly by the majority of the Court as these effects of inclusion could be shown to be minimal.

The second version of the argument points to the potential future costs, taking into account that inclusion might operate as a magnet for poor non-citizens from abroad. This concern was addressed only by the minority vote in which it functions as a key argument

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[20] Peterson P & Rom M 8 at 9.

[21] Peterson 117.

[22] The data were used in the 1999 U.S. Supreme Court decision in *Saenz v Roe and Doe* 119 S.Ct. 1518, which basically confirmed the *Shapiro* ruling.

for the dissent. As has been stated before, it is difficult to assess the merits of this argument because welfare induced migratory effects are generally hard to establish and even harder to predict. However, there are some parameters which are likely to be relevant and which might, if known in a particular case, give at least some rough indication as to the likelihood of a magnet effect to occur. Among these parameters will certainly be the availability of relevant information for the potential migrants, the differential in living conditions, and the actual possibility for the individuals to migrate. This latter parameter includes the legal rules governing such migration and, in our specific context, the acquisition of the status of a permanent resident. And this is a factor which is not determined by the potential migrants, but which depends upon a decision on the part of the "magnet country."

There are, to be sure, many considerations involved when it comes to granting the status of a permanent resident, not just the applicant's risk to become dependent upon welfare benefits. And it may well be that in some cases, the South African government will feel bound to grant this status even in spite of such dependence or of the likelihood of it to occur. But still, it seems that as long as this status remains a condition for the entitlement to social assistance, the South African government retains considerable leverage on the future numbers of those who acquire a right to inclusion into these schemes under the *Khosa* ruling. So whether or not there will be any migratory effects, government has a tool with which to contain, if not fully control, potential increases in welfare spending. This might explain why the majority did not consider it necessary to deal with this second version of the argument.

However, the fact that the minority judgment did deal with it, underscores the relevance of third version of the argument, i.e. the one which predicts a reduction of welfare benefits because of the anticipation of an influx new recipients, no matter how unreal such fears might be. It remains to be seen whether such fears will play any significant role in South African political debates and decision taking in the near future, and whether the decision in *Khosa* will turn out to have contributed to this. One should not be too quick, though, in discarding Justice Ngcobo's discussion of the magnet issue. For he merely speaks of a possibility that the state could become a magnet, and he treats this issue in close conjunction with another argument, namely the suggestion that the court should leave such prognostic work to policy makers.[23] This is related to the doctrine of separation of powers – another issue thus which is of central importance to the judgment and which will be discussed in the next section.

But before, by way of conclusion to this section, it may be stated that the *Khosa* decision does not seem to contribute in any significant way to a "swamping" of the South African welfare system. First, the inclusion of today's permanent residents will certainly not do any significant harm to the existing system. Second, the likelihood of a magnet effect that moreover could not be controlled is little, and thus that the decision not to give way to this concern seems justified as well. Maybe, it would have been desirable, though, for the majority to at least address the issue, if only to help prevent the third mechanism to come

[23] Para. 128.

into operation, i.e. that the threat of welfare induced migration in and of itself triggers political counter action.

3. JUST JUDICIAL ACTIVISM?

Whenever the constitution is open to divergent interpretations, there may be room for the contention of "judicial activism", understood here as an unwillingness on the part of the judiciary to defer to the reading of the constitution as it is implied in the actions of the other branches of government, and of the legislature in particular. *Khosa* certainly is a case in point. For if the outcome of the decision could have been different, and this has been our presupposition here, then one can distinguish between approaches which are more activist and others which are more deferent. Obviously, in *Khosa* the majority of the Court was less prepared to defer to the legislature than was the minority who would have left in place some of the provisions under review. On the other hand, the majority may be said to have been less "activist" than the High Court which had ordered to include not only permanent residents but other groups of non-citizens as well.

3.1 Activism versus abdication

The term "judicial activism" commonly bears bad connotations, and understandably so. For it implies that beyond the mere application of the law the court exercises a choice, and this in turn is a task which is traditionally[24] considered the domain of the other branches of government which are bestowed with a democratic mandate to take such – "policy" choices, as it were. So the suggestion implied in the term "activism" is that the court transgresses the competences it is assigned with in the interplay of separated powers.

However, there are grounds upon which to object to this suggestion. One is that the law is often – and maybe inherently – indeterminate. This is a problem for judicial decision-taking in general and for constitutional adjudication in particular as the degree of generality and thus vagueness will typically be higher for constitutional norms than for others.

The other ground is that the juxtaposition of deference versus activism might be misleading. For Courts have to deal with conflicts between opposing parties, and as they have to reach a decision, there is no way for them to remain passive or even neutral as the said terms might suggest. So under these conditions, "deference" necessarily means deference to one side, i.e. the legislature in this context, and it thus involves the decision to reject the claim of the other side, i.e. of the individuals seeking inclusion to the scheme.

This might seem all the more problematic if one considers it a central task of constitutional law and adjudication in a democracy to protect individuals against undue encroachment by the majority which commands the other branches of government, and in particular to safeguard the rights of those who cannot avail themselves of sufficient protection within the political process. So, taken together, the objection is that deference on the

[24] For the classical rendition of this concept by Montesquieu see fn. 615 above.

part of a constitutional court might mean its constant abdication from the very role it is designed to play.

This objection should, however, not be taken to suggest that a Constitutional Court could, whenever called upon, freely arrogate the functions of the other branches. The legitimacy-based argument against such arrogation is certainly not invalidated by the objection. But neither does it suffice to make a conclusive case for judicial deference whenever the law allows for divergent interpretations. The concept of separated powers may indeed have survived both, the "invention" of judicial review[25] and the "discovery" of the law's indeterminacy.[26] But under these new conditions, it needs refinement, and this implies that for an assessment of the *Khosa* decision in light of the doctrine of separation of powers, further considerations are necessary.

3.2 The Court's treatment of the issue

There are recurrent references to the separation of powers issue in the *Khosa* decision itself. Most of them, however, are rather implicit. Arguably, the very concept of "socio-economic rights", which is referred to by both the majority[27] and the minority vote,[28] owes its existence as a distinct category to the heightened concerns that such rights trigger with respect to the separation of powers. For, with respect to these rights, a Court ruling may have particularly strong budgetary effects[29] – more so than in the case e.g. of the fundamental freedoms of the liberal tradition. Further, when Justice Mokgoro emphasises that foreign citizens were "a minority" and had "little political muscle",[30] this can be read as another implicit reference to the separation of powers discourse, containing thus the argument that in this case there was an increased necessity for the court to protect minority rights against majoritarian oppression.[31] And there is, of course,

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25 To speak of an "invention" renders it difficult to find a suitable reference as one should then make sure to quote the first occurrence of this idea or practice. This I confess I cannot do. May it suffice, thus, to note that it is common to quote for this "invention" the early nineteenth century decision of the US Supreme Court in *Marbury v Madison* 5 U.S. 137 (1803).

26 Finding the first to have made this "discovery" appears even less practicable than finding the "inventor" of judicial review. So I chose the following reference which certainly does not represent the "discovery" of legal indeterminacy, but definitely contains one of its nicest presentations: Cohen F S "Transcendental Nonsense and the Functional Approach" (1935) 35 *Columbia Law Review* 809.

27 Para. 40.

28 Para. 104.

29 An allusion to this, if not more, can be found in the minority judgment in para. 124.

30 Para. 71.

31 This reading of the Justice Mokgoro's remark is supported especially by the facts that, first, her reasoning recurrently draws upon American legal thought and debates (see paras. 57, 66, 74 and 90) and that, secondly, in the US the problem of judicial review has often been treated along these very lines. See in particular on this approach in US law the decision of the US Supreme Court in *United States v Carolene Products Co.* 304 U.S. 144 (1938), including the "legendary" footnote 4 to the Justice Stone's opinion for the Court, and see also the seminal work by Ely JH *Democracy and Distrust: A Theory of Judicial Review* (1980 Harvard University Press Cambridge M.A.).

the more explicit reference in the minority vote mentioned above, in which Justice Ngcobo insists that the Court should be "slow to reject reasonable estimates made by policymakers."[32]

So in sum, the issue is ubiquitous in the decision. But it has not been confronted overtly. Thus there may be scope for some further remarks on this matter here.

3.3 What courts can(not) do

So far, we seem to be faced with a draw. On the one hand, Courts should in a democracy not impose their policy choices upon the legislature which is bestowed with more immediate a democratic mandate. Such "deference" is even more vital if the decision to be taken may have considerable budgetary consequences. On the other hand, it is the Courts' very mission to protect individual rights, and this is all the more vital if the individuals involved have virtually no voice in the political process.

So the matter might turn on considerations which are not primarily related to legitimacy, be it procedural ones as in the case of the legislature, or be it substantive ones as in the case of the judicial protection of individual rights. Rather, it may be functional considerations which turn the balance, such as the one put forward by Justice Ngcobo suggesting that it should be left to policymakers to estimate the numbers of additional recipients and costs in case of an extension of welfare benefits.

Indeed, Courts are primarily designed as institutions to solve legal problems. So when it comes to factual matters, they do not seem to be as well equipped as the other branches of government. Courts do not have immediate access to the relevant information, they cannot collect data on their own, and typically they cannot process such data either. This renders Courts inapt to devise long term policies, let alone to implement them. Nor are they capable of responding to the day-to-day needs of public administration. And accordingly, none of these tasks is entrusted to them.[33]

However, this institutional inferiority does not rule out that courts could review the respective activities of the other branches. Quite to the contrary, it seems highly desirable that they do so and for this purpose require the respective evidence to be presented to them, if only to ensure that such empirical underpinnings are present in the decision-taking processes of the other branches of government. More specifically, there is no indication in *Khosa* that the court was not able to assess the evidence presented to it, even though it obviously was dependent upon respondents to produce it. To be sure, the discussion of the court did not relate to any prognostic decisions. But presumably, this was because there was no such evidence available, and if it had been, there is again no reason why the court could not have reviewed this as well. Moreover, the majority's treatment

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[32] Para 128.

[33] For an in-depth treatment of the functional constraints of adjudication within the US context see in particular Fuller L "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353. For a German perspective see Schuppert GF *Funktionell-rechtliche Grenzen der Verfassungsinterpretation* (1980 Athenäum Königstein).

of the retrospective evidence illustrates that the factual issues are hardly separable from the value choices which are involved in acting upon such factual findings. So if judicial deference were to be paid to all governmental decisions which are based upon factual assessments – as one might read Justice Ngcobo's suggestion[34] referred to above -, this would mean to grant unnecessarily much leeway to governmental actions which may well infringe upon individual rights.

There are, however, restrictions to the capacities of the judiciary which go beyond what has been pointed to in the minority vote. These restrictions relate to the revisability of judicial actions.[35] This is a problem of constitutional courts in particular. For as they "apply" the constitution, their interpretations become part of the "supreme law of the land", revisable only by either an amendment to the constitution or a later decision by the constitutional court itself, overruling its own prior judgement. Neither option seems particularly practicable. The first one is very demanding in terms of the consensus required.[36] The second one is restricted in that courts cannot get active on its own initiative but only upon a suit which moreover has to be dealt with in a lengthy procedure – not to mention the concerns directed against the overruling of judicial decisions in general.

In light of this, it becomes all the more important for a constitutional court not to unduly extend the reach of its decisions beyond what is dictated by the law. For if there is uncertainty as to a decision's practical effects, it is crucial to preserve flexibility for future adjustment. It seems that in *Khosa* the Court has been quite responsive to this concern.

In order to illustrate this, we have to ask whether it would make a difference under the majority's reasoning if the cost of the inclusion of permanent residents turned out to be significantly higher. The answer to this is not quite clear. The thoroughness with which the majority vote had scrutinized the cost related evidence seems at first glance to suggest that the amount of the financial burden is indeed critical. Otherwise, Justice Mokgoro could have avoided the issue.

But the decision is ambiguous in this respect. While the passage which had been referred to above[37] relates to section 27 of the Constitution of the Republic of South Africa, 1996, i.e. the right to social security, it is followed by another extensive discussion which refers to section 9, the equality clause.[38] And here, the Court's reasoning points into another direction. Having established that "differentiation on grounds of citizenship is clearly on a ground analogous to those listed in section 9 (3) and therefore amounts to discrimination",[39] the majority goes on to state that "a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents

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34 Para. 128.

35 For a more extensive treatment of this problem of revisability see Graser A "Dispositives Verfassungsrichterrecht" (2001) *Der Staat* 603 at 621.

36 This applies to the South African Constitution in particular; for details see section 74.

37 See 2.1. above.

38 Para. 68 et seq.

39 Para. 71.

are in some way inferior to citizens and less worthy of social assistance."[40] If, however, such inferiority may not be expressed by a statutory scheme, it is hard to see how the cost of including non-citizens could ever matter. For even if the number of permanent residents were much higher and even if the resources were much more limited, the restriction of the scheme to citizens would still – and arguably even more so – convey the message of an order of priorities in which citizens ranked higher than others. The consequence would be that whatever the amount of financial resources available at any given time, these resources had to be spread evenly between citizens and permanent residents. In fact, this part of the reasoning even seems to open a door towards the other direction, i.e. the inclusion of further groups of non-citizens. For under this strong universalist reading of section 9 and its strict application to distinctions based on citizenship, it would seem problematic even to maintain the distinction between permanent residents and other groups of persons whose immigration status is weaker still.

So, there is some divergence in Justice Mokgoro's discussions of sections 27 and 9 respectively. This ambiguity is by no means surprising. There is an innate tension in many constitutions between on the one hand the universalist dynamics of human rights and the equality principle, and on the other the confinedness of the community which guarantees them.[41] This tension is typically reflected in the distinction between citizen rights and human rights, and it is visible in the South African Constitution as well, universalist though it certainly is.[42] Also, it is quite common for a constitution not to draw this line with final clarity for every conceivable case, and it is thus left to the political – and judicial – process to fill these gaps.

This is what the Court had to do in *Khosa*, and it drew a clear line – in the specific case, that is, and laudably no further. For due to the ambiguity of its reasoning, it remains largely open where the line might be drawn in future cases. In particular, it is not ruled out that even permanent residents might be excluded if scarcity should one day become significantly more pressing, or that, conversely, even other groups of non-citizens might be included, depending on the financial impact of such an inclusion – or even regardless of it.

Now it may, admittedly, sound irritating to praise a judgment for its lack of clarity. Especially among lawyers, ambiguity is rarely considered a virtue, common though it certainly is in this discipline. If viewed, however, from a perspective not of jurisprudential aesthetics, but of judicial governance, the beneficial effects of such ambiguity might well prevail. For, not only does the ambiguity preserve some degree of flexibility for the interaction of the different branches of government in the future handling of the inclusion of non-citizens. It might also set off a discussion about which of the different

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[40] Para.74.

[41] For an impressive discussion of this tension in the German constitution and of its historical roots see Siehr A *Die Deutschengrundrechte des Grundgesetzes – Bürgerrechte im Spannungsfeld von Menschenrechtsidee und Staatsmitgliedschaft* (2001Duncker & Humblot Berlin).

[42] See in particular sections 19 (political rights), 21(3) (freedom of entry and residence), and 22 (freedom of trade, occupation and profession) which in contrast to the large majority of guarantees refer to citizens only.

readings of the constitution is preferable – a discussion from which in turn the Court and other governmental branches may benefit for their future actions.

3.4 Again: Just judicial activism?

Contrary to the insinuation by the minority vote, the majority's decision in *Khosa* does not seem to be at odds with the doctrine of separation of powers in a post-Montesquieuian understanding. It may well be that there remains some uncertainty about the practical effects which the judgment might have (especially with regard to the third possible effect of imagined migration), and that, moreover, the decision would be cumbersome to revise if it should prove inappropriate. But this is a common downside of constitutional adjudication – the price, so to speak, for the protection that constitutional courts afford to the rule of law in general and to individual rights in particular. Further, the Court has kept the reach of its decision quite limited, and there is no indication as of now that any such revision would become necessary. Going back thus to the initial question of whether it was just judicial activism what we are dealing with here, I am inclined to respond that it may well have been an act of judicial activism, but that it seems just nevertheless.

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