The Constitutional Court and Supreme Court of Appeal after 1994

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For many South Africans, 'change' is such an intensely contested concept that we sometimes forget how much our country has transformed in the last decade and a half – and how remarkable some of the changes have been. In the 16 years since 1994, there have been upheavals in all our major institutions. This is true also of the courts, even though they are seen as the most staid arm of government.

Since the advent of democracy, the job of the judiciary has been to oversee the country's democratic revolution while undergoing transformation itself. Unavoidably, this dual responsibility has generated tension – much of which has been creative and constructive.

Some familiar statistics merit repeating. In 1994, all but three judges were white. There were no black women on the Bench; and only two women.[1] Today, the two highest courts, the Constitutional Court and the Supreme Court of Appeal, are both black-led, black-majority courts. Both have significant (though plainly not enough) women on the Bench. High Court Benches show similar improvement.

Some grumble about the pace of change. But courts are designed to move slowly. Judiciaries entail essentially conservative structures. Courts introduce change through incremental development. They avoid deciding inessential questions. They eschew laying down principles that go beyond the facts before them. They strive for coherence with previous decisions.

There are good reasons for this caution: judicial modesty and the rule of law require consistency and prudence.

But the South African judiciary also now has an explicitly 'political' role. It must enunciate and enforce the political values of the new Constitution; it must adjudicate difficult questions about the common good, many involving clashes of fundamental rights; and, perhaps most difficult of all, it must realise the country's new values in its own institutions.

To do so successfully, the judiciary must itself embody South Africa's new liberal egalitarian political culture. And it must also be capable of resisting pressures to depart from our Constitution's founding values. This requires strong-minded independence.

Where these conditions hold, as Joseph Raz has observed –

'one finds the familiar view of a judiciary which appears conservative and radical at the same time. It is conservative in its adherence to the persisting, only slowly changing tenets of a country's political culture. And yet it is radical in its willingness to ride political storms, to court unpopularity and the hostility of powerful groups in being loyal to those central traditions even in times when the tidal wave of politics make the majority or the powers that be blind to their value.' [2]

Our snapshot of the Constitutional Court and the Supreme Court of Appeal since 1994 confirms this paradox. This article will discuss some of the most significant events and judgments of that period.

Changes to the judicial structure after 1994

a.The creation of the Constitutional Court

The existence of the Constitutional Court and the relationship between it and the Supreme Court of Appeal (renamed in 1997) was one of the outcomes of our 'negotiated revolution'; a revolution

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that resulted from the multi-party negotiations in Kempton Park. The negotiating parties agreed that South Africa was to have a supreme constitution and a justiciable Bill of Rights. The question was how this was to be enforced. Many negotiators viewed with apprehension the prospect of an untransformed and reactionary judiciary reviewing and potentially setting aside the actions of a democratically elected government. The result was the Constitutional Court, an entirely new addition to the existing judicial structure; one that would be broadly acceptable to a restive and sceptical public that was emerging from deep divisions, conflict, and gross violations of human rights.

The Constitutional Court was not only the product of the multi-party negotiations process, but it was also crucial to its outcome. In November 1993, negotiations had reached an impasse. Neither the outgoing National Party government nor the ANC-dominated government-to-be trusted the other with the responsibility of enacting the final Constitution. The Constitutional Court was central to the compromise that was reached. An interim constitution was to be passed by the existing old-order Parliament. This was to include 34 'Constitutional Principles.' A fully democratic national assembly would later have the power to enact a final Constitution, but its power was strictly circumscribed by the Constitutional Principles. Finally, the Constitutional Court was to review the final Constitution and certify its compliance with the Constitutional Principles.

The creation of the court reflected a new direction for the judiciary. Only four of the first eleven judges were required to be sitting judges at the time of their appointment (though in fact six were). The remaining seven could be drawn from academia and the legal profession. What emerged was a Bench that more closely resembled South Africans racially, gender-wise and in terms of life experience. The appointment procedure was itself novel – no longer were seats on the Bench within the gift of the executive (more particularly, the Minister of Justice). The first President of the court, Arthur Chaskalson, was appointed by President Mandela in consultation with his Cabinet and the then Chief Justice, Michael Corbett. Four further judges were appointed (Ackermann, Goldstone, Madala and Mahomed JJ). The remaining six (Didcott, Kriegler, Langa, Mokgoro, O'Regan and Sachs JJ), were appointed by the President from a list tendered by the Judicial Services Commission (JSC), itself a newly established representative body, after rigorous public interviews. The JSC has since played a pivotal (and often controversial) role in the appointment and regulation of the judiciary.

b. The Constitutional Court, the Appellate Division and the Supreme Court of Appeal

The creation of the Constitutional Court was the Interim Constitution's only substantial change to the structure of the judiciary. The existing Supreme Court structure, with the Appellate Division at its head, was retained. Before the 1996 Constitution, the Constitutional Court and the Appellate Division formed the twin-apex of the judicial structure, with a strict jurisdictional line dividing them. The Constitutional Court was vested with the exclusive jurisdiction over constitutional matters and the sole power to strike down legislation or executive conduct. The Appellate Division continued to be a court of final instance in all criminal and civil matters, but had no jurisdiction at all over constitutional issues. This was plainly problematic, since there is no neat divide between constitutional and other matters.

Under the final Constitution, the Supreme Court of Appeal got constitutional jurisdiction, while the Constitutional Court was given jurisdiction to develop the common law. The title of Chief Justice was later afforded to its President. The Appellate Division became the Supreme Court of Appeal which, together with the High Courts, was given power to strike down Presidential conduct, Acts of Parliament and provincial Acts, although subject to confirmation by the Constitutional Court. This ushered in a radical new era of constitutional adjudication.

c. Staying out of the TRC

Soon after the establishment of the Constitutional Court, the judiciary faced a tough decision: should it become involved in an intensely topical, political process? In 1997 the Truth and Reconciliation Commission's Committee on Human Rights Violations conducted investigations into 'what it considered relevant activities of judicial officers, public servants involved in the judicial process, the Bar and the attorneys' profession, legal academics, and other persons and bodies concerned with the working of the law.' [3] It invited lawyers – including judges – to testify, and heard testimony on 27, 28 and 29 October 1997.

Judges (both newly appointed and those appointed by the outgoing government, who still predominated) had to decide whether

to appear before the TRC and be subjected to questioning. After agonised debate and much controversy, the leaders of the judiciary decided not to appear. Their essential reason was fear that their independence would be compromised if they had to account for their actions.

Nevertheless, about twelve judges, including Chief Justice Ismail Mahomed, President of the Constitutional Court Chaskalson, judges of the Constitutional Court and the Supreme Court of Appeal, made written submissions. The Magistrates' Commission made no representations, nor did any individual magistrate. The Magistrates' Commission wrote that it was 'without clarity' on what the exact allegations were, who the accused were, and 'which section of the legal system is accused'.[4]

While the written submissions (including submissions by each of us) had significant value, we think the judiciary's decision to stay out of the TRC was wrong. Judges should have attended the hearings voluntarily, and submitted to questioning (the TRC had powers of sub poena, which it wisely didn't exercise). Their participation would have legitimated both the TRC and the judiciary itself. It would have countered the perception that judges viewed themselves as somehow separate from and above the politics of the rest of the country.

Of course, in retrospect that decision seems easier than it would have been in 1997. At the time, a strict ideological separation between 'law' and 'politics' made participation seem potentially dangerous. And of course the judiciary might have emerged even more tarnished from the process. There was also concern that the TRC might be used as a stalking horse for settling personal scores. We still regret the decision.

Jurisprudence

a. Supreme Court of Appeal

We can offer only the briefest glance at some Supreme Court of Appeal decisions we think most eloquently represent the power and experience of that Court.

In the complex tangle of new-order appellacy (ConCourt, SCA and Labour Appeal Court (LAC)), *NUMSA v Fry's Metals* 2005 (5) SA 433 asserted the Supreme Court of Appeal's status as the penultimate court of appeal on constitutional matters and its role as the highest court of appeal in all non-constitutional matters. *NUMSA* held that the Constitution incontrovertibly vests the SCA with power to hear appeals from the LAC in both constitutional and non-constitutional matters – though the court made it clear that the power would be exercised as rarely as in appeals from three-judge appeal panels in the High Courts, where special circumstances are required to justify a hearing.

In exercising its constitutional jurisdiction[5] since 1997, the Supreme Court of Appeal has delivered judgments that have contributed significantly to public law and expanded the scope of constitutional rights. In judgments like *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431, it set out an eloquent framework for developing common law rights under the strategic force of constitutional principles.

In administrative law, two judgments have particular practical importance. *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 affirmed that government tender processes are administrative action and thus subject to administrative law review under the Constitution. So tenderers are entitled to a lawful and procedurally fair process and an outcome that is justifiable in relation to the reasons given for it.

In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 the court defined and developed the concept of administrative action (and gave the unkempt statutory definition a deft shave and trim). It held that the decision by the Minister of Public Works to let a harbour property constituted administrative action.

The effect of *Logbro* and *Grey's* is to bring important exercises of state power – where public allegations of corruption and malfeasance are rife – under the reading glass of judicial scrutiny.

In *Brisley v Drotsky* 2002 (4) SA 1, the court opened the door to the horizontal application of the Bill of Rights to disputes between private contracting parties. The case concerned a non-variation clause in a standard lease contract. The court held that unequal bargaining power did not arise without more simply because there was a non-variation clause – indeed, such clauses could operate for the protection of both parties.

The court has also created innovative constitutional remedies. In *Modderfontein Squatters v Modderklip Boerdery* 2006 (6) SA 40 the applicant sought to enforce a properly obtained judicial eviction order against a large number of people unlawfully occupying its land. All arms of government had declined to assist, and the Sheriff of the court demanded a huge sum to comply. And since no alternative land had been provided, enforcement of the eviction would cause great suffering. Scything this knot, the court ordered the state to compensate the landowner for the violation of its property rights under the Bill of Rights. It held that the government's duty to protect citizens' rights included protecting them from damaging acts by third parties. The state had failed in that duty by failing to provide squatters with alternative land, which would have enabled the applicant to enforce its eviction order. The remedy was to order the state to pay damages to the applicant, calculated at the fair cost of expropriation. This allowed the occupiers to stay where they were, compensated the landowner (who had unavailingly begged local government for just this way out), and let the state off the hook of having to come up with alternative land. The Constitutional Court confirmed this luminous solution.

In *MEC Department of Welfare v Kate* 2006 (4) SA 478 the court was confronted with the endemic failure of the Eastern Cape government to pay out social assistance grants timeously. Building on the High Court judgment, it awarded unpaid claimants constitutional damages in the amount equivalent to interest payable when money is unlawfully withheld.

b. Constitutional Court

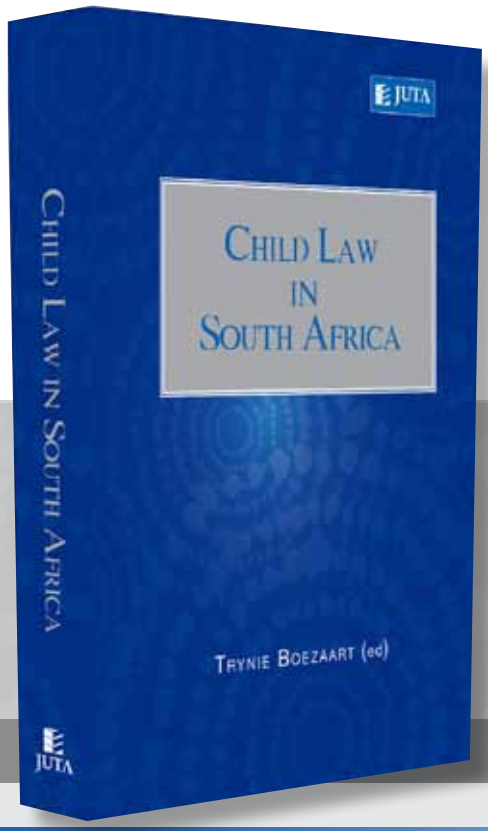
Avoiding a case-by-case assessment, we highlight instead just three areas in which the court's rulings have had significant impact.

The first is the court's role in checking executive and legislative power. The Constitution brought a dramatic shift in the courts' powers of review. Pre-1994, the twin doctrines of parliamentary sovereignty and legal positivism rendered judges little more than 'technicians who could mitigate the effects of unjust laws only on procedural and technical grounds.'[6] While some judges sought to find just outcomes under these conditions, their role was always narrowly circumscribed.

The Constitution swept many of these constraints away. It has in two ways revolutionised the judicial oversight of public power. First, it empowered courts to strike down laws and conduct inconsistent with the Constitution, allowing courts to hold the public officials accountable on both substantive and procedural grounds. Second, it entrusted the courts with the task of developing and applying an ambitious set of principles and values informing the exercise of all power.

Child Law in South Africa

Trynie Boezaart (ed)



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As was emphasised in *Pharmaceutical Manufacturers*[7] (where the court discountenanced a suggestion in the SCA that common law rules and rights might develop alongside the Constitution), all exercises of public power are constitutional matters that may be reviewed for consistency with the Constitution. The court has emphasised here that while its decisions have political consequences, its decisions

Justice Lex Mpati, President of the Supreme Court of Appeal

cannot themselves be political in nature in a party-political or partisan sense. Thus, separation of powers requires that the court not 'second guess' the Executive or the Legislature. Rather, its job is to ensure consistency with the Constitution.[8]

The balance between effectively checking the powers of the Executive and Legislature and intruding into their domains is necessarily fraught, here no less than in other democracies. Nowhere has this been more apparent than in the court's adjudication of socio-economic rights – the novel class of justiciable rights the Constitutional Assembly (not without controversy) super-added to the final Constitution.

Socio-economic rights explicitly recognise that civil and political rights are worth little if citizens lack food, shelter and the basics material conditions necessary to life. Enforceable socio-economic rights therefore enable citizens to hold government's feet to the fire when it fails to provide these basic prerequisites.

But in practice the court has given government fairly wide leeway. It has ruled that the Constitution does not give individuals an entitlement immediately to demand a house, a plate of food, or a hospital bed. Instead, it has held, these rights place a duty on the state to take reasonable legislative and other steps to ensure the progressive realisation of this right. Government's overall programme will then be scrutinised to see if it is 'reasonable' as the Constitution demands. Achieving this requires a balance between the urgent needs of an expectant public and strictures of finite state capacity.

The court's role here has never been easy. This was painfully illustrated in its first socio-economic rights decision in *Soobramoney*.[9] The applicant was in the final stages of chronic kidney failure and was not eligible for a kidney transplant. He sought to compel the state to provide him with renal dialysis at one of its hospitals. Recognising the dire shortage of dialysis resources, which had to be rationed somehow, the court upheld as reasonable the state's policy that it provided renal dialysis only to those who were eligible for kidney transplants. Mr Soobramoney's claim was dismissed and he died soon after.

Yet the court's approach has had bite. Despite capacity constraints, the state's policies for providing basic goods and services must always be reasonable. In *Grootboom*[10] the court found that a state housing policy that omitted temporary relief to those most in need (those with ' no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations')[11] was unreasonable. The result was that the state developed the National Housing Code, which has functioned without challenge since *Grootboom* to shape housing delivery.

On the other hand, Mrs Irene Grootboom died, more than ten years after the decision in her name, without ever having been provided with a house.

The most dramatic socio-economic rights case was *TAC*.[12] There the state's failure to make the antiretroviral drug nevirapine available to pregnant mothers in state hospitals to prevent the mother-to-child transmission of HIV was declared unreasonable and in breach of the positive obligation to provide healthcare. The court did not flinch from issuing this unanimous ruling in the midst of a bitter political controversy about President Mbeki's scepticism about whether HIV caused AIDS.

The effect of this jurisprudence was captured in the court's most recent decision on socio-economic rights in *Mazibuko*.[13] While socio-economic rights cannot give essential services on demand, they do entrench a culture of justification (the court said) where the state is obliged to account for its actions in progressively realising these rights.[14]

The third element of the court's jurisprudence we highlight has been its role in promoting a rights-based culture. In its first 16 years the court has been called on to adjudicate issues of pressing social importance: the death penalty, abortion, corporal punishment, gay rights, housing and customary law have all passed through the court. The court's analysis and application of the Constitution to these issues has avowed an intent to make the Constitution a daily reality for South Africans.

The result has been a growing public awareness of constitutional rights and the creation of a sense amongst citizens that they themselves are individual constitutional agents, rather than merely 'subjects' of the law. This is evident in the widespread 'rights-speak' in popular culture.

The court's role in disseminating a culture of rights has also demanded that it confront prejudices and deep-seated beliefs where they are in opposition to the Constitution. This has required the court to play an 'educative role' in popular discourse, using careful, reasoned argument based on the norms and values of the Bill of Rights to combat prejudice.[15]

The court's decision in *S v Makwanyane*,[16] perhaps its most famous judgment, illustrates this. In concluding that the death penalty violated the rights to life, dignity and freedom from cruel and inhuman punishment, the court traversed public opinion in two ways. First, through rigorous argument the court confronted the belief that the death penalty was an effective deterrent to violent crime. It contended that the true deterrent is effective policing, since harsh punishments carry little weight if criminals do not believe they will be caught. More difficult was the public's desire for retribution. As the court urged, punishment purely for the sake of revenge and retribution has little place in a country founded on respect for human dignity. Instead, our Constitution envisages a ' more mature society, which relies on moral persuasion rather than force; on example rather than coercion.' [17]

This educative role does not arise from a misguided sense of paternalism or condescension on the part of the court. Instead, it is a necessary function of a Constitution that seeks to establish 'an objective, normative value system' ,[18] one that places values of freedom, equality and human dignity above ephemeral public opinion. The rationale for this is powerfully expressed in the judgment of Sachs J in *Fourie*:[19]

'Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce [majoritarianism]. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.'

This illuminates the court's commitment to ensuring that the law and the Constitution should not exist in a vacuum, hermetically sealed from the often-grim realities South Africans must confront in their lives. Violence, deprivation and corruption are the lived realities of many South Africans. This fosters a sense of humility in the court, which appreciates that much more needs be to be done to promote a deep-going constitutional culture.

Conclusion

The South African judiciary since 1994 has confirmed Raz's view that an independent judiciary is both radical and conservative. The Supreme Court of Appeal and Constitutional Court have internalised the political culture of our new Constitution, and have largely been true to the values of that culture, articulating it fairly resolutely and consistently, despite significant political and popular hazards.

Endnotes

[1] O'Regan, K 'Human Rights and Democracy – A New Global Debate: Reflections on the First Ten Years of South Africa's Constitutional Court' 2004 (200) *International Journal of Legal Information* 204.

[2] Joseph Raz *Ethics in the Public Domain* (Oxford University Press 1994) 58.

[3] Kahn, E 'The Truth and Reconciliation Commission, and the Bench, Legal Practitioners and Legal Academics – Prefatory remarks by the editor' (1998) 115 *South African Law Journal* 15.

[4] Id at 16.

[5] See ss 168(3), 172(2)(a) and 173 of the Constitution.

[6] Sarkin J, 'The Political Role of the South African Constitutional Court' (1997) 114 *SALJ* 134.

[7] *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

[8] *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa And Others* 1995 (4) SA 877 (CC) at para 99.

[9] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

[10] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

[11] Id at para 99.

[12] *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC).

[13] *Mazibuko and Others v City of Johannesburg and Others* (unreported; decided on 8 October 2009, case no CCT 39/09.

[14] Id at paras 71 and 161.

[15] See Du Plessis, M 'Between Apology and Utopia – The Constitutional Court and Public Opinion' (2002) 18 *SAJHR* 1.

[16] 1995 (3) SA 391 (CC).

[17] Id at paras 221-222.

[18] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 54.

[19] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at para 94.