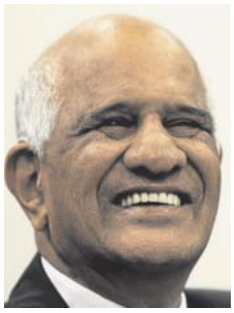
The changes brought by twenty years of constitutionalism in the South African legal order: some reflections



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Introduction

There are many perspectives from which the first twenty years of our democracy can be viewed. This article will focus on some of the consequences of the constitutional order for the relationship between the judiciary, the legislature and the executive, with particular emphasis on the way in which the legal setting has undergone fundamental change. I have spent most of this time, fifteen of these twenty years, as a judge in the Constitutional Court. Before that I served for a little more than two years, as an adviser to the Constitutional Assembly that was charged with the responsibility of crafting a final Constitution. The reflections here have been shaped by these experiences.

I must, however, say on a very personal note that the experience of voting and, more importantly, living in a democratic constitutional order has been not only indescribably fulfilling but also simultaneously extremely humbling and inspiring. It is therefore quite impossible not to recall the pain, misery, and death of the evil past, or to acknowledge the people who sacrificed their lives to get us where we are.

Constitutionalism

A significant difference between the pre-1994 order and the one that succeeded it was that the Constitution was supreme in the new era. This must be contrasted with the circumstance that the apartheid era was governed by a minority oppressive white regime characterised by parliamentary supremacy and executive excess. The notion of Constitutional, as distinct from Parliamentary supremacy, has meant that the legislature (although it represents the majority) and the executive have had to comply with the Constitution—a Constitution that continues to decree its own supremacy, proclaiming that all law or conduct inconsistent with it is invalid and that all obligations imposed by it must be fulfilled.[1] This injunction brought about a fundamental shift in the role of the judiciary and particularly in the line that was previously understood as demarcating the separation of powers between the legislature and the executive on the one hand and the judiciary on the other.

This is because, if all organs of state including the judiciary are to comply with the Constitution, an institution to determine whether there has been compliance with the Constitution, in the face of an allegation that there has not, becomes necessary. Our Constitution directs that our courts will make this determination and that the Constitutional Court is to decide these cases finally.[2] In our country, *only courts* have the duty and the power to pronounce on whether the Constitution has been complied with. By contrast, the old regime had it that the law was made by the legislature alone, implemented by the executive and merely *interpreted* by the courts. The legislature could make any law it chose, regardless of whether the law resulted in serious violations of human rights. Over the past twenty years, the elected legislature could not validly make laws that were inconsistent with the Constitution. Indeed both the legislature and the executive have been obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.[3]

IN MY VIEW, these constraints on legislative and executive power supervised by the courts of our land with the Constitutional Court making the final decision whether the Constitution has been complied with, have impacted positively on the legal landscape of our country. It is these effects that will broadly be examined below.

The final Constitution

Before doing so, however, reference must be made to an important process that took place during the first two years of our democracy which is often forgotten. We voted under an Interim Constitution that made provision for a Constitutional Assembly charged with the duty to make a final Constitution for the Republic of South Africa. That final Constitution had to comply with 34 Constitutional Principles that were prescribed by the Interim Constitution, and it was the Constitutional Court that had to determine whether the final Constitution did indeed comply with these principles. Indeed, the Court had to certify that the Constitution did comply as a prerequisite to its being brought into operation. The Constitutional Court, in the first certification judgement[4] refused to certify the first draft, concluding that it did not comply with the Constitutional Principles in various respects. The Constitutional Assembly reconsidered the text in the light of the judgement and submitted an amended text for certification. This time, a positive certificate was pronounced in the second certification judgement.[5]

For me, the conversation between the Constitutional Assembly and the Constitutional Court is perhaps the most fascinating part of our Constitutional history. One aspect of this conversation is enough for this reflection.

A Constitutional principle required that the Final Constitution should contain entrenched universally accepted fundamental rights. The fundamental rights in our Constitution could, according to the first draft submitted to the Constitutional Court for certification, be amended by nothing more than a two-thirds majority in the National Assembly. This was the minimum threshold required for the amendment of the provisions of the Constitution, and gave rise to the contention that the Bill of Rights was not entrenched as required by the Principles. The court upheld this contention, with the result that the Constitutional Assembly had to rethink the way in which any part of the Bill of Rights might be amended. The Assembly raised the threshold, providing that any provision in the Bill of Rights could be amended only by a vote of two-thirds of the members of the National Assembly and with the support of six of the provinces in the National Council of Provinces.[6] It is significant that the court increased the protection accorded by the Bill of Rights by making it more difficult to amend. A comparison of the Interim and Final Constitutions in relation to the certification judgments of the Constitutional Court could be informative and useful.

The death penalty

The decision of the Constitutional Court that declared the death penalty inconsistent with our Constitution and invalid[7] is without doubt unsurpassed in its consequences for all in South Africa. The negotiators who produced the Interim Constitution were not able to reach agreement on whether the death penalty should be prohibited. The Interim Constitution did however provide for the right not to be subjected to cruel, inhuman or degrading treatment or punishment, the right to life, and the right to human dignity. It is now legend that the court concluded that the death penalty was inconsistent with these rights and set it aside in the case of *Makwanyane*.[8] This decision of the Constitutional Court has enormous implications for the nature of our democracy, its values and its very definition. It meant that the state could no longer kill human beings in the name of retribution, justice or appropriate punishment. The decision gave new meaning and a special vigour and significance to the right to life and the right to human dignity. It signalled powerfully three essential humane values infused into our society by the Constitution. The first of these is that a perpetrator is, constitutionally speaking, as much a human being as is the victim, and that the right to life and dignity had been conferred by the Constitution on both. Secondly, our democracy, civilisation and society have turned their backs irrevocably on the centrality of revenge or on what may be referred to as the 'eye for an eye' approach. The third norm posits a distinction between a life taken, on the one hand, deliberately by a human being without state sanction, and on the other, by the state itself in the sense of having sanctioned the killing. The state must lead by example, the decision necessarily implies, and demonstrate its respect for life in the endeavour to create a culture in which the people within its borders will respect life too.

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Equality

The jurisprudence of the Constitutional Court has made an important contribution to the way in which equality and affirmative action should be viewed by our society and the courts.[9] The Constitutional Court has proclaimed loudly that consensual adult sexual intercourse between men cannot be a criminal offence in our constitutional order[10] and that the Constitution confers upon gay and lesbian people the right to marry.[11] These decisions have made abundantly plain that gay and lesbian people are human beings equally deserving of the protection afforded by the Bill of Rights to all human beings.

The jurisprudence has given meaning and substance to the Constitutional mandate that customary law is also subject to the values of the Constitution as the supreme law. So, in the first twenty years, it has already been conclusively settled that that living, vibrant and dynamic customary law (as distinct from being static or fossilised) cannot permit the unfair discrimination against women and children contemplated by the rule that the eldest male family survivor inherits all.[12] Another decision in this category is, revolutionary in its conclusion that an African woman can be made chief of a community by the community itself.[13]

The Constitutional Court has also settled a raging debate on the relationship between affirmative action and non-discrimination and, in particular, whether the affirmative action enjoined by the Constitution could amount to unfair discrimination. The Court has reasoned that, once a legislative or other measure falls within the constitutional provisional that authorises a legislative or other state measure designed to protect or advance people disadvantaged by past discrimination in order to promote equality, does not have to be evaluated for unfair discrimination.[14] This is a far-reaching conclusion that lends unbridled support for constitutionally mandated affirmative action which, on my interpretation of the judgment, *can never be unfair.*

Social and economic rights

The importance of the judicial contribution embracing social and economic rights conferred by our Constitution[15] and the small, careful but decisive steps that have been taken by the Constitutional Court in the relatively short twenty-year-period[16] have rendered these rights realistically more justiciable. The judgments in this arena[17] have the potential to contribute substantially to the quality of life envisioned in the Constitution for all in our country. The cases relate in the main to housing, health and social security. The court has emphasized that the reasonable measures enjoined by the Constitution instructs the state to develop well-co-ordinated, coherent, implementable and affordable programmes. These programmes must progressively advance the socio-economic right in issue and cannot leave out of account people who are vulnerable and in the most desperate need.

We require much work and considerable creativity from communities, interested lawyers, the judiciary in general, and the Constitutional Court in particular to ensure that the secure foundation created for the enforcement of these rights results ultimately in their effective realisation.

It might have been expected that the approach of government at all levels in these cases would have been permeated by a keenness and commitment to assist the judiciary in the process of the realisation of these rights. This has regrettably been absent in most cases before the courts. The attitude and approach of government representatives have ordinarily been over-technical, wholly defensive and seeking mainly to avoid their obligations and showing no real sympathy for the desperate people bringing these cases.

It is appropriate, before saying something about the property clause, to discuss an aspect of the housing provision in the Constitution that is inextricably interwoven with and has had a dramatic impact on the common law of property in our country. Before Constitutional protection, our law of property permitted occupiers to be evicted from their homes if they did not satisfy an onus placed upon every occupier to establish, on a balance of probabilities, a right of occupation as against the owner. In other words, if a court, at end of the case, was unable to tell whether the occupier had a right of occupation, the eviction of the occupier and his or her family would follow as a matter of course, regardless of considerations of fairness or any other circumstance.

The Constitution now provides that no person may be evicted from their homes arbitrarily and without the order of a competent court, made after taking into account *all* the relevant circumstances.[18] Legislation passed to give effect to this provision of the Constitution [19] makes it impossible for an occupier, even an unlawful occupier, to be evicted from their homes unless it is just and equitable to do so. People can no longer be evicted from their homes where the court is in doubt about whether the occupier has the right to occupy as against the owner! Courts in general, and the Constitutional Court in particular have given effect to this provision, typically imposing on the owner the obligation to wait until a poverty-stricken unlawful occupier is provided with at least temporary shelter before the eviction order takes effect.[20] Property now also serves a public purpose beyond serving its owner alone.

Property

The appropriateness and reconstructive potential of the property clause in the Constitution[21] remains an issue of grave controversy. In my view, however, this clause and the implementation of legislation promulgated to give effect to it,[22] though subject to criticism, have yielded some results and have improved access to land for farm workers and some land restitution or appropriate redress where restitution has proved not to be feasible.

A problem in relation to land restitution must be mentioned. The Constitution spares nothing to facilitate fair land restitution in a way that does not render the process too expensive to the state. It does this specifically by departing from the 'market value' basis of compensation that had been employed in apartheid era legislation. The Constitution provides a different basis of compensation[23] for land that has to be expropriated for a public purpose or in the public interest: the compensation payable in these circumstances is 'just and equitable' compensation, taking into account all relevant circumstances including five factors of which market value is but one. It is anathema to me that during these twenty years the expropriation legislation [24] has continued to provide for market value compensation and, what is more, the state has unashamedly continued to pay market value for land expropriated to effect restitution. This is inexplicable and deliberate

non-compliance with the Constitution, an omission that has probably resulted in unduly expensive and slow restitution.

The requirement of rationality

The last way in which the implementation of the Constitution by a court has resulted in important changes in the legal environment is the imposition of the requirement of rationality as a prerequisite for the validity of all legislation, all decisions and all other conduct of government. All provisions in legislation, all government conduct and decisions must be rationally related to a legitimate government purpose, otherwise they are invalid. The Constitutional Court has regarded this limitation on the power of all governmental institutions as an inevitable and necessary consequence of the rule of law. In a recent application of this principle[25]—an application that has somewhat surprisingly not proved to have been controversial, the Constitutional Court upheld a decision of the Supreme Court of Appeal setting aside the appointment by the President of a National Director of Public Prosecutions. This was done broadly on the basis that the Constitution required the National Director to be a fit and proper person, that the Act passed to give effect to this provision rightly required the National Director to be a person of integrity, and that dishonesty was inconsistent with integrity. On this basis, the court took into account the fact that serious questions had been raised about the honesty of the incumbent by the nature of his evidence before, and the credibility findings made against the incumbent by a Presidential Commission of Enquiry, and concluded that the President had erred in not investigating the credibility of the incumbent further and appointing the incumbent without more. This, the court judged, was irrational.

Government conduct

This contribution cannot be concluded without pointing briefly to the inappropriate and dilatory government conduct that has occurred from time to time – conduct that has impeded the realisation of a Constitutional order. I have already referred to the regrettable attitude and approach of government in socio-economic rights litigation. Court orders have often not been obeyed in their full spirit. Time-limits set for the legislature to correct defects in legislation identified by the court in rendering particular legislative provisions unconstitutional have often not been kept. I hope I am wrong, but sense a subtext that reflects a tendency to interpret court orders restrictively so as to comply with them in a minimalist fashion. This arguably often displays reluctance to carry out the order. The approach described here, might in appropriate circumstances, amount to unconstitutional conduct.[26]

Then there are complaints by or on behalf of the executive clothed with apparent authority, made from time to time in response to orders against an organ of state, that the court has usurped the doctrine of the separation of powers and invaded the executive or legislative domain. All of us will do well to remember that the Constitution has nowhere conferred on the executive branch of government the authority or power to decide whether the doctrine of the separation of powers has been infringed.

It must never be forgotten that the Constitution squarely confers the power to resolve complex and sensitive questions about where the line is to be legitimately drawn between the territories of the executive and the legislature on the one hand, and the judiciary on the other, on the courts *and the courts alone*. The Constitutional Court makes the final decision about that line, and the executive, as an organ of state is required to respect and protect decisions of this kind which are quintessentially concerned with the functioning of the courts.[27]

Conclusion

In my view, the legal system has changed at its core in the respects referred to here. Moreover, these shifts in emphasis, approach and interpretation have gone some way towards achieving a constitutional order. The development is indeed appropriate and welcome. Yet we have a long way to go. There is much in our common and customary law that remains unfair and unduly supportive of existing skewed power relations. I would suggest for example, that the law of contract requires much revision. And this can happen if appropriate constitutional issues are raised before a court in the first instance, and not raised for the first time to relieve the shoe-pinch when the cases reaches the Constitutional Court. The complete constitutionalisation of the legal order in South Africa lies far ahead.

But the decisions of courts cannot by themselves achieve a truly constitutional order in our country. Regrettably, there remains what might be termed a disconnect between the values of the Constitution and those fervently embraced by the majority of the members of society at large. Much work is necessary to ensure that all the people in our country understand, internalise, propagate and truly live the values of the Constitution. The next twenty will hopefully make more progress in this essential respect than the first. A

Endnotes

1 Section 2 of The Constitution.
2 Sections 167/172 of the Constitution.
3 Section 7 of the Constitution.
4 1996 (4) SA 744 (CC).
5 ???
6 Section 74 (2) of the Constitution.
7 This declaration does not apply to the crime of treason.
8 1995 (3) SA 391 (CC).
9 Section 9 of the Constitution.
10 1998 (12) BCLR 1517 (CC).
11 2006 (3) BCLR 355 (CC).
12 2005 (1) BCLR 1 (CC).
13 2009 (2)FA 66 (CC).
14 2004 (11) BCLR 1125 (CC).
15 Sections 26 and 27 of the Constitution.
16 Legal development in new directions can ordinarily be measured or evaluated in much larger increments.
17 See for example: 1997 (12) BCLR 1696 (CC); 2001 (1) SA 1169 (CC); 2002 (5) SA 721 (CC); 2004 (12) BCLR 1268 (CC) 2005 (1) BCLR 78 (CC).
18 Section 23 of the Constitution.
19 Act 19 of 1998.
20 See for eg 2012 (2) SA 104 (CC).
21 Section 25 of the Constitution.
22 Act 22 of 1994; Act 3 of 1996; Act 62 of 1997.
23 Section 25 9 (2) and (3) of the Constitution.
24 Act 63 of 1975.
25 CCT 122/11 delivered on 5 October 2012.
26 Section 165 (4) and (5) of the Constitution.
27 Section 165 (4) of the Constitution.