South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid

HEINZ KLUG

INTRODUCTION

South Africa's Constitutional Court is a product of the country's democratic transition away from Apartheid in the early 1990s. The democratic transition was achieved through a two-stage process of constitutional change. In the first stage an 'interim' constitution was adopted and a democratic election held to both elect a new government as well as legislative body whose two houses met jointly to form a Constitutional Assembly that produced a 'final' Constitution for post-apartheid South Africa. This two-stage process was facilitated by an agreement to adopt a set of Constitutional Principles that would be attached as a schedule to the negotiated 'interim' Constitution providing the framework within which the democratically-elected Constitutional Assembly would formulate a 'final' Constitution. While the new constitutions both introduced extensive bills of rights as a response to the country's history of colonialism and apartheid, the Constitutional Principles promised those who would loose power in a democratic election that their fundamental concerns would still be addressed in the final constitutional dispensation. It was in order to guarantee this outcome that the negotiating parties agreed that there would be a Constitutional Court and that it would serve the unique function of certifying whether the 'final' constitution produced by the Constitutional Assembly was in conformity with the parameters set by the Constitutional Principles.

The Constitutional Court's power is based on both the Constitution's proclamation that it is the supreme law of the land and its explicit grant of authority declaring the Court the final arbiter of the meaning of the Constitution. As a direct product of the political negotiations that ended apartheid, the Constitutional Court, provided for in the 1993 'interim' Constitution, was established in the first half of 1995, about a year after South Africa's first democratic election, with the appointment of 11 justices to the Court. The Court was formally opened in October 1995. Empowered to exercise both concrete and abstract review, as well as to take direct applications and to serve as a court of final review, the Constitutional Court has had a broad scope of authority within which to establish its role. On average the Court decided about 25 cases per year during its first decade and ruled against the government in about 40 percent of cases. Of the cases that the Court

decided approximately 60 percent were based on claims of violations of rights, 30 percent arose out of criminal cases and about 78 percent of all cases were decided by a unanimous Court.

In order to appreciate the emergence of the South African Constitutional Court and its contribution to constitutional law in South Africa and around the globe, this article will first discuss the origins of the Court and the role it played in the transition to a constitutional democracy in South Africa. Second, it will consider how the Court's early rights jurisprudence provided the institution with a high degree of legitimacy while the Court adopted a strategic approach to its own role, both as an interpreter of the Constitution and arbiter of power between the different regional and institutional locations of power in the new South Africa. Finally, the paper considers how the Court has begun to address issues that touch on the fundamental relations of power in South African society – effecting gender, land and traditional authorities – while also becoming increasingly embroiled in the complex and high stakes power struggles that have roiled the government and ruling party, from the corruption trials of the ANC President to the problems of judicial independence.

ORIGINS AND CREATION OF THE CONSTITUTIONAL COURT

Rejection of tyranny and the embrace of rights is a logical reaction to their systematic violation, yet it does not explain why a particular society would choose to turn to the judiciary as the ultimate protectors of such rights. This is particularly so when the judiciary and the law in general was intimately associated with the construction and maintenance of a prior oppressive regime. In South Africa judicial review of legislative authority had historically been explicitly rejected, and in the period just prior to the democratic transition all the major parties remained committed to notions of democracy which assumed that a democratic South Africa would continue to embrace parliamentary sovereignty. In fact, the struggle against apartheid was always understood as a struggle against racial oppression and minority rule, and conversely, as a struggle for majoritarian democracy. This history makes the empowerment of judges in a democratic South Africa not just unnecessary to the goals of democratization, but a rather unexpected outcome of the democratic transition.[1]

Despite this legacy, the origins of the Constitutional Court as well as the legitimacy of the justices appointed by a newly elected President Nelson Mandela, brought an extraordinary degree of legitimacy to this new institution. Prior to the 1994 Constitution the South African high court system was composed of a Supreme Court, the architecture of which provided for a number of provincial and local divisions exercising both original and review jurisdiction with a final appeal to an Appellate Division. The judiciary was appointed by the executive and as a matter of custom its members were drawn from the ranks of senior Advocates, the equivalent of barristers, in South Africa's divided bar. As a result of both the reluctance of a number of senior advocates who considered the apartheid judiciary to be tainted as well as the increasing tendency of the Apartheid regime to appoint judges sympathetic to its world view, the integrity of some justices, particularly Chief Justice Rabie, was increasingly called into question. FW De Klerk's appointment of

[1] See, Klug, H (2000) *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, Cambridge University Press.

the more liberal Justice Corbett at the beginning of the democratic transition seemed to acknowledge the importance of shoring up the legitimacy of the judiciary in this period. At the same time the liberation movement was suggesting that there needed to be a complete replacement or at least vetting of Apartheid judges.

As attention shifted to the negotiation of a new constitution a debate began over the role of the judiciary in a new South Africa. While there was early agreement in the negotiations on the principle that there should be a competent, independent and impartial judiciary that should have the 'power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights',[2] the parties remained far apart in their proposals for the structure and functioning of a new court. While there seemed at first to be agreement that the appointment of new judges more representative of the population would be an important benefit of establishing a new constitutional court, a number of other issues continued to separate the parties, including: whether a constitutional jurisdiction would be a parallel system of courts or integrated into the existing court system; whether the judges who would exercise this jurisdiction had to be senior judges from within the existing judiciary or possibly new appointees with little or no judicial experience; whether it would be a court of appeal or have first and final jurisdiction over the validity of laws; whether it would have sole jurisdiction or serve as the court of final appeal in a system of review that was integrated into the jurisdiction of the existing courts; and finally, would the Chief Justice in an integrated court or the Constitutional Court itself, as a separate body, decide whether a particular matter was constitutional in nature or not, and hence who would have the power to exercise jurisdiction in the particular case.[3]

Responding to the South African Law Commission's earlier proposal that a specialist Constitutional Court be created to uphold a Bill of Rights, the apartheid government argued that such a court should not be a separate institution but rather a special chamber within the existing Appellate Division of the Supreme Court. This position was strongly supported by the newly appointed Chief Justice Corbett who felt that a separate Constitutional Court would undercut the prestige and authority of the Appellate Division. He was also concerned that a separate Court would be considered political and thus would undermine the 'evolution of a human rights culture in South Africa and the legitimacy of the Constitution as the Supreme Law'.[4] Another concern was expressed by Etienne Murenik, who as advisor to the opposition Democratic Party, supported the creation of a separate Constitutional Court but argued that 'the values of the Bill of Rights [should] permeate every corner of our law', building a 'culture of justification … in which every lawmaker and every official can be called upon to justify his or her actions in terms of the values for which the bill of rights stands'.[5] Despite these arguments the Technical Committee's Report was adopted by the two major parties accepting the creation of a separate Constitutional Court with final jurisdiction over constitutional matters.

2 Third Report to the Negotiating Council, Kempton Park, May 28, 1993, p2.

3 See, Spitz, R and Chaskalson M, *The Politics of Transition: a hidden history of South Africa's negotiated settlement*, Hart Publishing, 2000, pp.191-198.

4 Id at 194.

5 Id 194-195.

JURISDICTION AND RELATIONSHIP TO THE COURTS OF GENERAL JURISDICTION

Despite distrust of the old judicial order, the idea of superimposing a constitutional court as the final interpreter of a new constitution gained early acceptance among participants in the political transition while the exact parameters of its power was left to subsequent negotiation. In fact, the Constitutional Court first created under the 1993 'interim' Constitution was initially placed in a co-equal position with the old Appellate Division of the Supreme Court of South Africa which retained final jurisdiction over all non-constitutional matters but had no jurisdiction at all over constitutional questions. The 1996 'final' Constitution retained this basic jurisdictional division, but integrated the courts into a new hierarchy: the Constitutional Court is now the highest Court, retaining original jurisdiction over direct constitutional applications[6] and serving as the final court of appeal on the Constitution.[7] The Supreme Court of Appeals, which hears appeals from the High Courts, now has appellate jurisdiction over all matters, including constitutional issues,[8] but since constitutional jurisdiction is very far reaching, including not only all government related activity[9] but also certain private activity,[10] as well as the duty to develop the common law and indigenous law in conformity with the requirements of the Bill of Rights,[11] the Constitutional Court increasingly serves as a final Court of appeal on most important questions.

When it comes to direct access however the Constitutional Court has in practice applied rather strict criteria to those seeking direct access,[12] preferring to allow a case to be argued up through the lower courts so as to get as full a development as possible of the facts and legal arguments before the case reaches the Court. While the lower courts (including the Supreme Court of Appeals) may hear constitutional challenges to law and actions under the law, including legislative and executive acts, there is an express limit to their power in this regard. Any lower court decision declaring National Legislation or an act of the President in violation of the Constitution must be forwarded to the Constitutional Court for confirmation before it can take effect. As a result all challenges to acts of the President or national legislation are considered by the Constitutional Court. In addition to these cases the Constitutional Court is also the final court of appeal on all other constitutional matters, including the question of whether an issue is a constitutional issue or not.

APPOINTMENTS TO THE CONSTITUTIONAL COURT

Initially, little attention was paid to the proposal by the technical committee to the Multi-Party Negotiating Process that Constitutional Court Judges be nominated by an all-party parliamentary committee and be appointed by a 75 percent majority of both houses of

[6] S. Afr. Const. (1996) section 167(6)
[7] S. Afr. Const. (1996) sections 167(3)-(5)
[8] S. Afr. Const. (1996) section 168(3)
[9] S. Afr. Const. (1996) section 8(1)
[10] S. Afr. Const. (1996) section 8(2)-(3)
[11] S. Afr. Const. (1996) section 39(2)
[12] See, Dugard, J 'Court of First Instance? Towards a Pro-Poor Jurisdiction for the South Afircan Constitutional Court', 22 *South African Journal of Human Rights* 261 (2006).

parliament. However, as the significance of the Constitutional Court became increasingly clear, a major political conflict exploded.[13] In fact conflict over this process brought the multi-party negotiations, once again, perilously close to deadlock. Despite this inauspicious beginning, the resolution of this conflict was with minor changes retained in the 'final' constitution. The resolution involved an elaborate compromise in which the newly elected President was required to follow three distinct processes in appointing members of the Constitutional Court for a non-renewable period of seven years.[14] First, the President appointed a president of the Constitutional Court in consultation with the Cabinet and Chief Justice.[15] Second, four members of the court were appointed from among the existing judges of the Supreme Court after consultation between the President, Cabinet and the Chief Justice.[16] Finally, the President, in consultation with the Cabinet and the President of the Constitutional Court, appointed six members from a list submitted by the Judicial Service Commission (JSC),[17] a newly created body dominated two-to-one by lawyers.[18]

The final Constitution extended the period of non-renewable appointment from 7 to 12 years but also imposed a mandatory retirement age of 70 years. A subsequent constitutional amendment provides that the term of an individual justice may be extended by an Act of Parliament.[19] Appointments to the court are made by the President, either in consultation with the JSC and the leaders of the political parties represented in the National Assembly — in the case of the Chief Justice and the Deputy-Chief Justice — or for the remaining positions on the court, from a list of nominees prepared by the JSC after the President consults with the Chief Justice and the leaders of political parties. The JSC is required to provide three more nominees than the number of appointments to be made and the President may refuse to appoint any of these by giving reasons to the JSC why the nominees are unacceptable — requiring the JSC to provide a supplemental list. The President's power of appointment is further restricted by the requirement that 'at all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed'.[20] The President is required to remove a judge from office if the JSC 'finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct' and the National Assembly votes by a two-thirds majority for that judge's removal.

Appointment to the Constitutional Court is also determined by the requirement that the person must be a South African citizen and that consideration must be given to the '[n]eed for the judiciary to reflect broadly the racial and gender composition of South Africa'.[21] In practice the Constitutional Court has, despite its young age, experienced a regular change in the composition of its panel. This has occurred as a result of a number of developments, including: the transfer of the first Deputy-President of the Court to become

[13] See, Mureinik, E 'Rescued from illegitimacy?' *Weekly Mail & Guardian, Review/Law*, Supplement, Vol. 1, No. 5, Dec. 1993 at 1; and Haysom, N 'An expedient package deal?' *Weekly Mail & Guardian, Review/Law*, Supplement, Vol. 1, No. 5, Dec. 1993 at 1.

[14] S. Afr. Const. 1993, section 99(1)

[15] S. Afr. Const. 1993, section 97(2)(a)

[16] S. Afr. Const. 1993, section 99(3)

[17] S. Afr. Const. 1993, section 99(3)

[18] S. Afr. Const. 1993, section 105(1)

[19] S. Afr. Const. 1996, section 176(1).

[20] 1996 Constitution, section 174(5).

[21] 1996 Constitution, section 174(1) and (2).

Chief Justice (then head of the Supreme Court of Appeal exercising final appeal jurisdiction over non-constitutional matters); the death of Justice Didcott, numerous retirements and the fairly frequent use of acting Justices when permanent members were either seconded to international organizations or on leave. The *Judges Renumeration and Conditions of Employment Act of 2001* now provides that although it is a single 12 year term of office, justices may continue until they have completed fifteen years of total judicial service or reached the age of 75, which ever comes first, in order to ensure that those who have not previously held judicial office may still retire from the Court with a full judicial pension. While the first appointments to the Constitutional Court were dominated by lawyers, judges and legal academics who had gained high stature during the struggle against apartheid or whose integrity was recognized nationally and internationally, concern for the need to achieve or maintain racial and ethnic representivity on the panel seems to have determined more recent appointments. Ten years after its inauguration the Justices of the Constitutional Court reflect the diversity of South Africa with two female, four white, six African, one Indian and two physically-disabled justices on the eleven person panel.

EARLY DECISIONS AND THE TRIUMPH OF RIGHTS

In its first politically important and publicly controversial holding the South African Constitutional Court struck down the death penalty.[22] Although there had been a moratorium placed on executions from the end of 1989, as part of the initial moves towards a negotiated transition, as many as 400 persons were awaiting execution at the time of the Court's ruling. In declaring capital punishment unconstitutional the Court emphasized that the transitional constitution established a new order in South Africa, in which human rights and democracy are entrenched and in which the Constitution is supreme. The court's declaration of a new order based on constitutional rights was forcefully carried through in the adoption of a generous and purposive approach to the interpretation of the fundamental rights enshrined in the Constitution.

The unanimous opinion of the court, authored by the President of the Constitutional Court Justice Arthur Chaskalson, was however, judiciously tailored. Finding that the death penalty amounted to cruel and unusual punishment under most circumstances Chaskalson's opinion declined to engage in a determinative interpretation of other sections of the bill of rights that may also have impacted upon the death penalty, such as the right to life, dignity and equality. The individual concurring opinions of the remaining ten justices were not as restrained. Despite their concurrence in Justice Chaskalson's opinion each of the remaining ten members of the court went far beyond the majority opinion in their interpretation of other rights and in their prescriptions on the future trajectory of the courts jurisprudence.

All ten justices joined Constitutional Court President Chaskalson in giving explicit and great weight to the introduction of constitutional review. They emphasized that the court 'must not shrink from its task' of review,[23] otherwise South Africa would be back to parliamentary sovereignty and by implication back to the unrestrained violation of

22 *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) [hereinafter *Makwanyane*].

23 *Makwanyane* at para. 22, quoting the South African Law Commission *Interim Report on Group and Human Rights Project* 58 (August 1991) para 7.33.

rights so common under previous parliaments.[24] Even the recognition that public opinion seemed to favor the retention of the death penalty was met with a clear statement that the Court would 'not allow itself to be diverted from its duty to act as an independent arbiter of the Constitution',[25] and that public opinion in itself is 'no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour'.[26] If public opinion were to be decisive, Chaskalson argued, 'there would be no need for constitutional adjudication'.[27]

A similarly strong stand was taken by the court in its early cases striking down legislation in violation of the equality clause, although the ability of the court to move beyond formal equality and to fulfill the transformative promise of substantive equality remains in question.[28] The Court also took up numerous criminal cases involving both procedural and substantive rules that the Court found in violation of the Bill of Rights. In its first year over 64% of the Court's case load involved criminal matters although this dropped to around one-third in the following two years. In considering the willingness of this new court to strike down legislation and reverse official decisions it is important to note that the vast bulk of legislation struck down in this early period as well as official decisions and acts that were reversed were based on laws and regulations inherited from the Apartheid era. While the old regime had insisted on legal continuity – the idea that all laws would remain in place until either reversed by new legislation or found to be inconsistent with the new constitution by the Court – the outcome of this approach was to indirectly empower the new Constitutional Court as it proceeded to strike down old laws and regulations without any resistance from the new democratic government. What might under other circumstances have been perceived as a counter-majoritarian and hence anti-democratic power was instead embraced as the triumph of human rights standards over the legacies of apartheid.

INTERNATIONAL RECOGNITION AND THE COURT'S INNOVATIVE JURISPRUDENCE

It was the same boldness in the upholding of rights that brought international attention to the new Court. From the moment the Court struck down the death penalty it was being held up around the world as a shining model, a new and progressive institution arising out of the ashes of apartheid. When it first reversed a decision made by President Mandela, he welcomed the decision and publically thanked the Court for doing its duty. By the time the court was faced with making decisions at odds with the policies of the new government, it had garnered a significant amount of international support and recognition as well as local respect, which ensured that its opinions would not face overwhelming resistance in the new order. International interest in the Constitutional Court's jurisprudence has been particularly acute in relation to the Constitution's guarantee of socio-economic rights as well as opinions in which the Court has addressed cases involving religious and

24 *Makwanyane* at para 88.
25 *Makwanyane* at para 89.
26 *Makwanyane* at para 88.
27 Ibid.
28 See, Albertyn, C 'Substantive Equality and Transformation in South Africa', 23 *South African Journal on Human Rights* 253 (2007).

cultural conflict through its particular articulation of the relationship between these forms of individual and collective identity and how these interact with the Constitution in the 'rainbow' nation.

The inclusion of justiciable socio-economic rights in the 1996 Constitution has been heralded as a mark of the Constitution's extraordinary status and has raised questions about how these provisions would be interpreted in a situation of vast socio-economic inequalities and limited governmental capacity. Responding to concerns about the justiciability of these rights in the *First Certification* case the Constitutional Court rejected the rigid distinction between different types of rights and instead argued that '[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion'.[29] In the now famous case addressing the scope of socio-economic rights — *Grootboom*[30] — the Court was called upon to define both the negative and positive obligations that the constitutional right to housing imposed on the government. In this case the Court reviewed a local government's action in evicting squatters from private land that was to be used for low income housing. In the process of eviction the homes the squatters had erected were destroyed and much of their personal possessions and building material had also been deliberately destroyed.

While the Constitutional Court upheld the claimant's argument that the municipality's action violated the negative obligation – the duty not to deprive them of shelter – owed to them under section 26(1) of the Constitution, the Court proceeded to extrapolate on the positive duties placed on the state. Although the government was able to present a well documented national housing policy which met the obligation to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right',[31] the Court found that the failure to have a policy to address the needs for emergency shelter meant that the policy failed 'to respond to the needs of those most desperate' and was thus unreasonable.[32] At the same time however the Court emphasized that '[t]he precise contours and content of the measures to be adopted are primarily a matter for the legislature and executive' and stated that the Court 'will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent'.[33]

Applying these arguments to the area of health, and HIV/AIDS in particular, posed a major problem for the Constitutional Court. In the *Treatment Action Campaign*[34] case the Court was asked to require the government to provide a particular treatment — the antiretroviral drug Nevirapine to HIV-positive women in childbirth and their newborn babies — and not merely to have a reasonable policy to address the overwhelming HIV/AIDS pandemic within the confines of the state's resources. The Court's decision to require the provision of Nevirapine marked an important extension of the principle's laid out in *Grootboom* and an extraordinary reversal in the Court's approach to health rights

[29] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC) [hereinafter First Certification case]

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

[31] South African Constitution, 1996, Section 26(2).

[32] Grootboom para 44.

[33] Grootboom para. 41.

[34] 2002 (5) SA 721 (CC).

which only a short time earlier in a case involving access to renal dialysis[35] had seemed to be frozen by a combination of medical prerogatives and resource scarcity. Relying on the constitutional guarantee of a right to the progressive realization of access to health care services, the Constitutional Court argued in *TAC* that under the circumstances, in which the cost of Nevirapine and the provision of appropriate testing and counseling to mothers was less burdensome to the state then the failure to provide the drug, the government had a constitutional duty to expand its program beyond the test sites already planned. While a subsequent case in which non-citizen permanent residents challenged the denial of social welfare benefits[36] was decided by the Court through an analysis of intersecting rights that brought together the courts concerns for equality and access to social resources, thus again progressively extending the protection of socio-economic rights, the Court's reliance on a form of reasonableness review in this area continues to draw concern.[37]

THE OLD FORT, CONSTITUTIONAL PATRIOTISM, AND THE COURT'S LEGITIMACY

Adding to the symbolic stature of the new Constitutional Court has been the project of renovating and transforming the site of a cluster of prisons, known as the 'Old Fort' which is located in the center of Johannesburg. While the Constitutional Court was first housed in a Johannesburg business park, the building of the new Court building in the center of the site of the Old Fort along with the renovation of the Old Fort and related prison buildings into historical monuments to the history of the 'lawful' violation of rights, has placed the Constitutional Court in the midst of a project to build what has been termed in the German context 'constitutional patriotism'. This 'project', pursued more vigorously by some Justices in particular, seems to be aimed at solidifying the historic role of the Court in the building of a new South Africa. Despite the continuing social inequalities and what at times is a blatant disrespect for rights by some government officials, there is a consistent public assertion by government of the notion that South Africa is building a culture of rights based on the new Constitution. As long as the political leadership in all branches of government continue to assert that the Constitution is South Africa's highest achievement in the transition away from Apartheid, then the Court will be able to pursue its public promotion of a culture of rights and constitutional supremacy, both through its decisions and the articulation of a project of constitutional patriotism.

There can be little doubt that the Constitutional Court is one of the most successful institutions to emerge in post-apartheid South Africa. Not only is it the guardian of the political transitions most explicit symbol – the 'final' Constitution – but unlike all other branches of government it began its life as a brand new institution, its personnel largely untainted by apartheid, and its most explicit task is to uphold the promise of rights that embody the hopes and aspirations of those who struggled against apartheid. These attributes do not however guarantee power or authority given the inherent institutional limits of an apex Court. Instead the Court has used its symbolic authority to publically

35 *Soobramoney v Minister of Health* (KwaZulu-Natal) 1998 (1) SA 765 (CC).

36 *Khosa v Minister of Social development; Mahlaule v Minister of Social development* 2004 (6) SA 505 (CC).

37 See, Davis, D 'Adjudicating the Socio-Economic Rights in the South African Constitution: Towards "Deference Lite"?' 22 *South African Journal on Human Rights* 301 (2006).

engage in what has been termed a 'post-liberal' or 'transformative constitutionalism'[38] – a rejection of the negative past, a generous interpretation of rights and a commitment to 'inducing large-scale social change through nonviolent political processes grounded in law'.[39] At the same time however the Court has always wielded this power with a strategic eye to its own role, in what may be paradoxically viewed as a form of judicial pragmatism rather than the symbolic judicial activism that the Court's rights jurisprudence has led most international observers to applaud.

STRATEGIC ENGAGEMENT OR JUDICIAL PRAGMATISM

Asserting a constitutional patriotism and declaring a culture of rights is all very well, but at the same time the Court has always been concerned about its own role in the new political order. Aware of their unique status within the new constitutional order, the justices of the Constitutional Court have been careful to define its role as upholding the law and have denied claims that they might be substituting their own political decisions in their role as interpreters of the Constitution. The Court has in fact had to manage a number of quite explicit challenges to its role, including the demand in one case that all the justices recuse themselves because they were appointed by President Mandela, but at the same time it has been quite conscious of the different ways in which it is responsible for ensuring the transition to democracy. As a result, the Constitutional Court of South Africa has managed to become a central institution in the management of conflict in post-apartheid South Africa, whether between regions of the country, among branches of government, or between the government and civil society.

CERTIFICATION JUDGMENTS

Thrust into the unique role of arbiter in the second and final phase of the constitution-making process, the Constitutional Court was faced with a number of distinct pressures. First, the democratically-elected Constitutional Assembly represented the pinnacle of the country's new democratic institutions empowered with the task of producing the country's final constitution – the end product of the formal transition. Given a history of Parliamentary sovereignty and the failure of the courts to check the anti-democratic actions of the executive in the dark days of Apartheid and during the States of Emergency, how was a newly appointed Constitutional Court going to stand up against the first truly democratic constitution-making body in South African history?

Second, the credibility of the Constitutional Court was at stake. As the court heard argument on the Certification of the Constitution, numerous sectors, including important elements within the established legal profession, openly speculated whether the Court had sufficient independence to stand up to the Constitutional Assembly, particularly over the key issue of the entrenchment of the Bill of Rights. Failure to refuse certification on at least this ground would in this view have amounted to a failure of the certification function and proof that the Court lacked the necessary independence.

[38] See, Klare, K 'Legal Culture and Transformative Constitutionalism', 14 South African Journal on Human Rights 146 (1998).
[39] Id. p. 150.

Third, the Constitutional Court's certification powers were not only unique but were to be exercised on the basis of a set of Constitutional Principles negotiated in the pre-election transition. The Principles had, in the dying days of the multi-party negotiations become the focus of unresolved demands leading to the incorporation of a number of contradictory Principles designed more to keep the contending participants within the process than to establish a coherent set of Constitutional Principles by which a future draft Constitution could be judged.

Fourth, many of the grounds upon which the Court declined to certify the text had institutional implications for the Court. For example, the Court's demand to strengthen the procedures and threshold for amendment of the Bill of Rights and its striking down of attempts to insulate the labour clause from judicial review, both indicated a profound concern with securing the role of the Court, as guardian of a constitutional democracy, based on the explicit foundations of constitutional supremacy.

Despite this imperative, refusing to certify the final constitution, even after it's adoption by 86% of the democratically-elected Constitutional Assembly, was on its face a bold assertion of judicial power. At the same time the Constitutional Court was careful to point out in its unanimous, unattributed, opinion, that 'in general and in respect of the overwhelming majority of its provisions', the Constitutional Assembly had met the predetermined requirements of the Constitutional Principles. In effect then, this was a very limited and circumscribed ruling. The Court itself was careful to point out that the Constitutional Assembly had a large degree of latitude in its interpretation of the principles and that the role of the Constitutional Court was a judicial and not a political role. This approach had the effect of limiting the political response to the decision as the major political parties rejected any attempt to use the denial of certification as a tool to reopen constitutional debates and instead the Constitutional Assembly focused solely on the issues raised by the Constitutional Court.[40]

The Court took a similarly robust attitude to its judicial role in its second certification judgment when the Court eventually certified the 'final' Constitution.[41] In this case the Court was faced with attempts by political parties and other interested groups to reopen issues which had not been identified as the basis for the Court's refusal to certify in the first round of the certification process. While accepting these challenges the Court noted the 'sound jurisprudential basis for the policy that a court should adhere to its previous decisions unless they are clearly wrong . . . . [and that] having regard to the need for finality in the certification process and in view of the virtual identical composition of the Court that considered the questions barely three months ago, that policy is all the more desirable here'.[42] As a result the Court made it clear that a party wishing to extend the Court's review beyond those aspects identified in the first certification judgment would have a 'formidable task'. Through this reliance on a classic judicial strategy of deference to past decisions, the Court was able to significantly limit the scope of its role in the final certification judgment. It was this change in posture towards the certification process and the fact that the Constitutional Assembly fully addressed all but one of the Court's

[40] Madlala, C 'Final fitting for the cloth of nationhood', *Sunday Times*, Oct. 13, 1996, at p.4. col. 2.

[41] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996, 1997 (2) SA 97 (CC) [hereinafter Second Certification Judgment].

[42] *Second Certification Judgment* at para. 8.

concerns that ensured a swift certification on the second round. Significantly, the Court now relied less on the specifics of the Constitutional Principles and instead emphasized the fundamental elements of constitutionalism contained in the text – 'founding values which include human dignity, the achievement of equality, the recognition and advancement of human rights and freedoms, the supremacy of the Constitution and the rule of law'.[43] While the Court still had to recognize that the powers and functions of the provinces - the most contentious issue in the whole constitution-making process - remained in dispute between the parties, the Court held in essence that the removal of the presumption of constitutional validity of bills passed by the NCOP had tipped the balance.[44] Thus despite the recognition that provincial powers and functions in the Amended Text remained less than or inferior to those accorded to the provinces in terms of the Interim Constitution, this was not substantially so and therefore no longer a basis for denying certification.[45]

CONSTITUTIONAL STRUCTURE AND THE PROBLEM OF POWER

The Constitutional Court's assertion of its constitutional powers in rights cases stands in marked contrast to the Court's dramatic shift in approach to the use of its authority when addressing the allocation of powers, particularly regional or provincial powers. Tensions between the central ANC government and non-ANC controlled provinces soon brought cases to the Constitutional Court in which it was called upon to define the parameters of cooperative government. Although wide-ranging in scope these early cases have addressed three issues central to the question of legislative authority under the 1996 Constitution. First, the Court was called upon to define the constitutional allocation of legislative power in a case in which a Province claimed implied legislative powers to define the structure of its own civil service. Second, the Court was required to determine the scope of residual national legislative power in a case where the national government claimed concurrent authority over the establishment of municipal governments despite the Constitution's simultaneous allocation in this field of specific functions to different institutions and spheres of government. Finally, an attempt by the national government to extensively regulate liquor production, sale and consumption, a field in which the regions were granted at least some exclusive powers under the Constitution, required the Court to define the specific content of the exclusive legislative powers of the provinces.

One of the first such cases involved a challenge to national legislation which sought to define the structure of the public service including all provincial public services. The Western Cape argued that the legislation infringed 'the executive power vested in the provinces by the Constitution and detracts from the legitimate autonomy of the provinces recognised in the Constitution'.[46] The Court however pointed to the fact that not only did the national Constitution provide that the public service is to be structured in accordance with national legislation, but also that the Western Cape Constitution required the Western

43 *Second Certification Judgment* at para. 25.
44 *Second Certification Judgment* at paras 153-157.
45 *Second Certification Judgment* at para. 204(e).
46 *The Premier of the Province of the Western Cape v The President of the Republic of South Africa and the Minister of Public Service*, CCT 26/98 (1999), 1999 (12) BCLR 1360 (CC) para. 4.

Cape government to implement legislation in accordance with the provisions of the national constitution.[47]

Describing national framework legislation as a feature of the system of cooperative government provided for by the Constitution, the Court noted that such legislation is especially required to ensure sound fiscal planning, procurement and related matters.[48] While the Court agreed that provincial governments are empowered to 'employ, promote, transfer and dismiss' personnel in the provincial administrations of the public service', it rejected the idea of an implied provincial power depriving the national government of its 'competence to make laws for the structure and functioning of the civil service as a whole', which is expressly retained in section 197(1) of the Constitution.[49] Turning to the national government's structuring of the public service and whether this encroached on the 'geographical, functional or institutional integrity' of the provincial government, the Court focused on the provisions of Chapter 3 of the Constitution dealing with cooperative government. The Court's interpretation of these provisions emphasized the description of all spheres of government being 'distinctive, inter-dependent and inter-related', yet went on to point out that the 'national legislature is more powerful than other legislatures, having a legislative competence in respect of any matter', and that the 'national government is also given overall responsibility for ensuring that other spheres of government carry out their obligations under the Constitution'.[50]

While the Court accepted that the Constitution prevents one sphere of government from using its power to undermine other spheres of government it concluded that the section 'is concerned with the way power is exercised, not whether or not a power exists'.[51] The relevant question before the Court in this case however was whether the national government had the constitutional power to structure the public service.[52] Finding that indeed the power vests in the national sphere of government, the Court emphasized that the Constitutional Principles 'contemplated that the national government would have powers that transcend provincial boundaries and competences' and that 'legitimate provincial autonomy does not mean that the provinces can ignore [the constitutional] framework or demand to be insulated from the exercise of such power'.[53] The Court did however strike down a clause in the law empowering the national minister to direct a provincial official to transfer particular functions to another department (provincial or national) because such power encroached on the ability of the provinces to carry out the functions entrusted to them by the Constitution.

Although the Court seemed to come down strongly in favor of national legislative authority, at least when it is explicitly granted in the Constitution, the question of the allocation of legislative authority soon arose again, this time in the context of a dispute between the national government and the regional governments of the Western Cape and KwaZulu-Natal.[54] The provincial governments in this case challenged provisions of the

47 *Public Service Case*, Para 8.
48 *Public Service Case*, Para 9 .
49 *Public Service Case*, Para 11.
50 *Public Service Case,* Para 18 and 19.
51 *Public Service Case*, Para 23.
52 *Public Service Case*, Para 23 and 24.
53 *Public Service Case*, Para 25.
54 *The Executive Council of the Province of the Western Cape v The Minister for Provincial Affairs and Constitutional*

Local Government: Municipal Structures Act 117 of 1998 in which the national government claimed residual concurrent powers to determine the structure of local government, despite the provisions of the local government Chapter of the Constitution which set out a comprehensive scheme for the allocation of powers between the national, provincial and local levels of government. Considering this allocation of power, the Court recognized that the Constitution left residual legislative powers to the national sphere. But the Court also determined that section 155 of the Constitution — which controls the establishment of local governments — allocates powers and functions between different spheres of government and the independent demarcation board so that:

> (a) the role of the national government is limited to establishing criteria for determining different categories of municipality, establishing criteria and procedures for determining municipal boundaries, defining different types of municipalities that may be established within each category, and making provision for how powers and functions are to be divided between municipalities with shared powers; (b) the power to determine municipal boundaries vests solely in the Demarcation Board; and (c) the role of the provincial government is limited to determining the types of municipalities that may be established within the province, and establishing municipalities 'in a manner consistent with the [national] legislation enacted in terms of subsections (2) and (3).[55]

Applying this scheme to the challenged legislation the court found unconstitutional the attempt in section 13 of the Municipal Structures Act to tell the provinces how they must set about exercising a power in respect of a matter falling outside of the competence of the national government. Despite claims by the national government that the provincial official was only obliged to take the guidelines into account and not to implement them, the Court argued that what mattered was that the national government legislated on a matter falling outside its competence.[56] Thus, despite the Court's earlier recognition of the predominance of the national sphere of government in the scheme of co-operative government, here it drew the line and clarified that there was a constitutional limit to the legislative power of the national government.

Although these early cases seem on the whole to have rejected the autonomy claims of the provincial governments by recognizing the commanding role of the national legislature, the Court was soon given the opportunity to explore the arena of exclusive provincial power after the national parliament passed legislation which sought to regulate the production, distribution and sale of liquor through a nationally defined licensing scheme.[57] Referred to the Constitutional Court by President Mandela, who had refused to sign the Bill on the ground that he had reservations about its constitutionality, the law sought in part to control the manufacture, wholesale distribution and retail sale of liquor, functions which at least with respect to licensing are expressly included as exclusive

---

Development of the Republic of South Africa; Executive Council of KwaZulu-Natal v the President of the Republic of South Africa and Others, 1999 (12) BCLR 1360 (CC).

55 *Municipal Structures Case*, Para 14.

56 *Municipal Structures Case*, Para 20 and 21.

57 *Ex Parte the President of the Republic of South Africa, In Re: Constitutionality of the Liquor Bill*, CCT 12/99, 11 November 1999, 2000 (1) BCLR 1 (CC).

legislative powers of the provinces in Schedule 5 of the Constitution. Citing a 'history of overt racism in the control of the manufacturing, distribution and sale of liquor', the national government contended that the 'provisions of the Bill constitute a permissible exercise by Parliament of its legislative powers'.[58] The Western Cape complained however that the 'Bill exhaustively regulates the activities of persons involved in the manufacture, wholesale distribution and retail sale of liquor; and that even in the retail sphere the structures the Bill seeks to create reduce the provinces, in an area in which they would (subject to section 44(2)) have exclusive legislative and executive competence, to the role of funders and administrators'.[59]

Responding to the province's claim, the Court argued that cooperative governance includes the duty 'not [to] assume any power or function except those conferred on them in terms of the Constitution' and that the Constitution's 'distribution of legislative power between the various spheres of government' and its itemization of functional areas of concurrent and exclusive legislative competence, must be read in this light.[60] Accepting that the national government enjoys the power to regulate the liquor trade in all respects because of the industry's impact on the 'determination of national economic policies, the promotion of inter-provincial commerce and the protection of the common market in respect of goods, services, capital and labour mobility', the Court went on to conclude that the structure of the Constitution precluded the national government's regulation of liquor licensing.[61] The Court came to this conclusion by carefully defining three distinct objectives of the proposed law and distinguishing those functions which would apply predominantly to intra-provincial regulation as opposed to those aspects of the liquor business requiring national regulation because of their extra-provincial and even international impact.

Having defined an aspect of the Bill which focused primarily on the provincial level, the Court then proceeded to define the primary purpose of granting exclusive competencies to the provinces as implying power over the regulation of activities 'that take place within or can be regulated in a manner that has a direct effect upon the inhabitants of the province alone'. In relation to 'liquor licences', it is obvious, the Court argued, 'that the retail sale of liquor will, except for a probably negligible minority of sales that are effected across provincial borders, occur solely within the province'. Given this fact the Court concluded that the heart of the exclusive competence granted to the regions in the Constitution, must in this arena 'lie in the licensing of retail sale of liquor'.[62] Having failed to justify the necessity of national regulation in 'regard to retail sales of liquor, whether by retailers or by manufacturers, nor for micro-manufacturers whose operations are essentially provincial', the national Parliament did not have the competence, the Court held, to enact the Liquor Bill and the Bill was therefore unconstitutional.[63]

[58] *Liquor Licensing Case*, Para 33.
[59] *Liquor Licensing Case*, Para 37.
[60] *Liquor Licensing Case*, Para 41.
[61] *Liquor Licensing Case*, Para 58.
[62] *Liquor Licensing Case*, Para 71.
[63] *Liquor Licensing Case*, Para 87.

While the Constitutional Court has made many important decisions there has been concern that it was yet to address a range of difficult issues affecting the majority of ordinary South Africans and which hold the potential of confronting some of the more ingrained aspects of inequality and conflict which continue to pervade post-apartheid society. Most recently the Court has decided a group of cases which hold profound consequences for the hopes and aspirations of the majority of South Africans. These cases include challenges to the 'customary' laws of succession on grounds of gender discrimination;[64] the KwaZulu-Natal Pound Ordinance on the grounds that it denied cattle owners rights of equality and access to the courts;[65] and the Land Claims Court's decision that a community claiming land under the Restitution of Land Rights Act had failed to prove that their dispossession was the result of discriminatory laws or practices.[66] In each of these cases the decision of the Court would hold important consequences for the relations of power: between men and women living under indigenous law; between land owners (usually white) and landless or land hungry stock owners (usually black); as well as between land owners and land claiming communities whose claims did not self-evidently fall within the terms of the Restitution of Land Rights Act.

In both the *Bhe* and *Richtersveld* cases the majority of the Court acknowledged the constitutional status of indigenous law. In the first instance the Court struck down a rule of customary law which discriminated on the basis of gender while in the second instance the Court held that 'indigenous law is an independent source of norms within the legal system', but like all other 'law is subject to the Constitution and has to be interpreted in light of its values'.[67] The result in *Bhe* was for the Court to directly strike down – at least with respect to intestate succession – the 'customary' rule of primogeniture held by many traditionalists and others to be a key element of the customary legal system. In effect, the Court's decision will profoundly impact the rights of wives and daughters who until now relied upon the system of extended-family obligation historically inherent in indigenous law but long since disrupted by social and economic change. On the other side, the Court's decision in *Richtersveld* recognized indigenous law as a source of land rights thus strengthening the claims of those who have argued that their land rights – including rights to natural resources – were not automatically extinguished by the extension of colonial sovereignty over their territories. Their dispossession, through means other then the direct application of specific, discriminatory, apartheid land laws, will thus also be recognized for the purpose of claiming restitution of their land rights. Even if not as broad in its impact, the symbolic value of this recognition of indigenous land rights makes an important contribution to legitimizing the new constitutional order among ordinary South Africans.

Finally, the Zondi case involved a challenge to a set of legal provisions that formed a central plank of the system of control and dispossession in the rural areas of apartheid

[64] *Bhe et al v Magistrate, Khayelitsha et al*, CCT 49/03, decided 15 October 2004 [hereinafter *Bhe*].

[65] *Xolisile Zondi v Member of the Traditional Council for Traditional and Local Government Affairs et al*, CCT 73/03 [hereinafter *Zondi*].

[66] *Alexkor Ltd et al v The Richtersveld Community and Others, CCT 19/03*, decided on 14 October 2003 [hereinafter R*ichtersveld*].

[67] *Richtersveld,* para 51.

South Africa. Under the Pound Ordinance land owners were historically empowered to seize and impound animals trespassing on their land without notice to the livestock owner, unless the owner was a neighboring land owner. Subsequently the livestock would be sold in execution if the owners could not afford the impounding fees and damages claimed by the land owner or could not be readily identified. Without notice requirements or judicial process the effect was that white landowners used these rules to exert power over rural communities who lived on the land as sharecroppers, labor tenants or wage laborers and held what little wealth or economic security they had in livestock. In effect, these rules, while not racially-based, interacted with the racially-based landownership rules to both structure rural social relations and to perpetuate a continuing process of dispossession as the ownership of livestock continually shifted at below market prices from black to white farmers.

Facially race-neutral the Pound Ordinance survived the dismantling of apartheid laws but nevertheless continues to have a predominantly racial effect because rural land ownership remains, even a decade after apartheid, largely in white hands. On the other side, as Justice Ngcobo noted in his opinion, are people such as 'Mrs Zondi, who belongs to a group of persons historically discriminated against by their government . . . which still affects their ability to protect themselves under the laws of the new order'.[68] With respect to the question of notice, the Court noted that the statute did not even require anyone to tell the livestock owner of the impending sale and Justice Ngcobo pointed out that even a general public notice in government publications or newspapers is likely to be insufficient 'where a large portion of the population . . . is illiterate and otherwise socially disadvantaged. Mrs Zondi is indeed illiterate. The thumbprint mark she affixed to her founding affidavit bears testimony to this'.[69] Furthermore, the statute permitted the landowner to 'bypass the courts and recover damages through an execution process carried out by a private businessperson or an official of a municipality without any court intervention'.[70] Holding the statutory scheme unconstitutional, among other reasons because its effect is to limit the right of access to the court's, Justice Ngcobo noted that the scheme removes 'from the court's scrutiny one of the sharpest and most divisive conflicts of our society. The problem of cattle trespassing on farm land . . is not merely the ordinary agrarian irritation it must be in many societies. It is a constant and bitter reminder of the process of colonial dispossession and exclusion'.[71]

ENFORCING RIGHTS, REMEDIES AND JUDICIAL AUTHORITY

While the Constitutional Court has been held in high regard and the government has repeatedly acknowledged its authority and accepted its decisions,[72] a period of heightening political tensions has seen the law increasingly used as a weapon in internecine conflict among government officials and within political parties. Along with this atmosphere

[68] Zondi para 51.
[69] Ibid.
[70] Zondi para 75.
[71] Zondi para 76.
[72] See, *Minister of Health v Treatment Action Campaign* (No 2), 2002 (5) SA 721 (CC), in which the Court stated that, "The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case," para 129.

of legal conflict has come increasing tension over the work of the judiciary, individual judges, and the process of judicial appointments itself. While the Ministry of Justice has proposed statutory reforms and constitutional amendments designed to improve the functioning of the courts and the administration of justice, these have raised fears that government is undermining the independence of the judiciary. Even as the government was forced to withdraw some of these proposals, the Judicial Service Commission publically acknowledged that it was unable to attract sufficient numbers of highly qualified individuals, acceptable to the members of the JSC, as candidates for judicial appointment. It is in this context then that the courts, and the Constitutional Court in particular, are having to confront a growing concern at the failure of government officials to effectively implement court orders requiring public officials to resolve systemic problems of public administration and corruption, especially at the local level.

The failure of government to effectively protect the rights: of welfare recipients;[73] property owners;[74] indigenous land-claiming communities;[75] women in the context of intestate succession in indigenous law;[76] or to adequately protect newborns against the mother-to-child transmission of HIV;[77] or to recognize the marital rights of same-sex couples,[78] have all led to extraordinary decisions by the courts and created intense debates about the types of remedies the courts should provide.[79] Although there has been a constant clamoring for bolder judicial action – demands that the courts award mandatory relief and retain supervisory jurisdiction – the Constitutional Court in particular has been very careful to frame its orders in ways that encourage compliance but also attempt to bring the democratic organs of government into the decision-making process. While the Court has asserted its right to provide appropriate relief, including mandatory orders and structural relief, it has also used its ability to suspend declarations of invalidity so as to give the legislature or executive the time and the flexibility to formulate constitutional alternatives.[80] In this way the Court has effectively engaged in a 'dialogue' with the other branches of the government in its attempt to both assert its power but also preserve and protect its own institutional authority against potential popular and political backlashes.

CONCLUSION

The creation and legitimation of a Constitutional Court in South Africa provided a unique institutional site within which the process of mediation between alternative constitutional imaginations could be sustained. It created the possibility that the judiciary in its role as primary interpreter of the Constitution would be able to sustain and civilize the tensions inherent in the repeated referral and contestation of political differences in the post-apartheid era. However, there has been growing concern among non-government

[73] *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

[74] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*, 2005 (5) SA 3 (CC).

[75] *Alexkor Ltd v The Richtersveld Community*, 2004 (5) SA 460 (CC).

[76] *Bhe et al v Magistrate, Khayelitsha et al*, 2005 (1) SA 563 (CC).

[77] *Minister of Health v Treatment Action Campaign* (2), 2002 (5) SA 721 (CC).

[78] *Minister of Home Affairs and Another v Fourie et. al.,* 2006 (1) SA 524 (CC).

[79] See, Roach, K and Budlender, G 'Mandatory Relief and Supervisory Jurisdiction: When is it appropriate, Just and Equitable?' 122 (2) *South African Law Journal* 325.

[80] Id.

organizations and human rights bodies that the social crisis in the country — including the continuing disparities in wealth and its racial character as well as the levels of violence and criminal activity – may put pressure on government to sidestep and hence erode some of the exemplary human rights gains of the democratic transition. In this sense, debates over the funding of the independent constitutional institutions such as the Independent Electoral Commission, the Human Rights Commission and the Commission on Gender Equality – constitutionally mandated bodies designed to protect and further democracy – have focussed on the relationship between their fiscal dependence and a potential threat to their autonomy from the ruling party and government. Those concerned with the autonomy of these institutions have expressed their concerns in terms of both the continuing need to implement the Constitution's human rights guarantees as well as a broader concern about the future of democracy itself. Others, including most notably the ruling ANC, argue that it is the very socio-economic disparities and their continuing racial character that need to be addressed if the future of democracy and human rights are to be secured.

While the Constitutional Court has played a distinct role in enabling the democratic transition in South Africa, the conditions of its emergence as well as the strategies of the justices have enabled the institution to play a number of other roles, from promoter and symbol of a transformed justice to the more traditional role of conflict resolution and absorber or deflector of intense inter-regional political conflict. While the initial conditions of its creation and the caliber of its justices enabled the Court to build significant legitimacy among a range of constituencies, from the bar to government officials and the ruling party, the changing conditions of the country have begun to reshape the terrain upon which the Court functions. At first it was the persistence of inequality and the tragic HIV/AIDS pandemic that saw the court increasingly confront the government and more recently it has been the political struggle within the ruling party that has created a political vortex into which an increasing array of constitutional and public institutions, from the Public Protector to the National Prosecuting Authority and its investigative arm, the Directorate of Special Operations (Scorpions) have been sucked. While their dominant motivations in the past may have been to enhance the power and legitimacy of the institution, today the justices of the Constitutional Court are themselves, as a body, defending their own integrity in publically announcing a complaint of interference against a senior Judge of the High Court who is publically aligned with Jacob Zuma, the presumptive future President of South Africa.

While South Africa's experiment in constitutionalism is very young, the conditions which gave rise to the new constitutional order as well as the continuing problems of a post-colonial society, facing the dual challenges of extreme inequality and a devastating HIV/AIDS pandemic, has brought domestic tension as well as global interest to the work of the Constitutional Court. Caught in the cross-hairs of struggles for the realization of the extensive promise of rights entrenched in the Constitution and the limitations of governmental capacity and resources, the Court has thus far treaded a careful path, avoiding the easy declaration of rights yet continuing to question government failings. At the same time, the courts themselves are undergoing transformation and tensions over this process continue to simmer within the courts and between the courts, government

and the legal profession.[81] The challenge facing the Court, as its composition changes and it becomes increasingly part of a 'normal society' will be whether it is able to continue to strike a balance between the need to address the legacy of apartheid, including the historic exclusion of the indigenous legal systems, and continue to uphold the claims of individual freedom and dignity which have become the hallmark of its first decade and a half.

81 See, 'National Judges Symposium,' *The South African Law Journal*, Vol. 120(4) pp. 647-718, 2003. This is a report, including many of the speeches given, to the first plenary meeting of South African judges in seventy years and took place against a background of public controversy between senior judges and politicians.