CONSTITUTING DEMOCRACY

Law, Globalism and South Africa's Political Reconstruction

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for the management of irreconcilable political conflicts. Unlike the executive and legislature, which are viewed as dominated by particular, even if frequently changing, political interests, an independent constitutional court may provide a forum in which to seek goals or protections that are at least temporarily otherwise politically unattainable. This process requires, however, the applicants to mould their positions so that their claims will resonate with the social and normative commitments enshrined in the Constitution. Furthermore, the incremental approach taken by courts – deciding only what is absolutely necessary to dispose of each case – and the increasing application of or reliance on ‘universal’ values, makes it a prime site for the moulding of local initiatives with international or global prerogatives. The effect is to allow the contestants to continue to imagine their own preferred social options as constitutionally sustainable, while simultaneously requiring them to reshape and mould their visions into a tapestry of internationally recognised rights.
of particular provisions' of Chapter 3. Significantly, the admonition in s 35 of the 1993 Constitution, requiring the courts to 'have regard to public international law applicable to the protection of the rights entrenched' was strengthened in s 39 of the 1996 Constitution to read that, when interpreting the Bill of Rights, the Court 'must consider international law', so that the Court is now required to address the interpretation of rights given in international documents and by international fora. Caution is urged, however, in respect to the use of comparative bill of rights jurisprudence and foreign case law. The Court notes that these sources 'will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law', but 'will not necessarily offer a safe guide to the

the death penalty 'is clearly in conflict with the Constitution generally and runs counter to the concept of ubuntu'. This notion of ubuntu as a general ethos giving an indigenous content to the humanitarian principles underlying the new Constitution is repeated by Mahomed J, and by Mokgoro J, who describes ubuntu as translatable as 'humaneness', a 'shared value and ideal which runs like a golden thread across cultural lines'. In this way, there seems to be an attempt to define the spirit of ubuntu as providing a connection between indigenous value systems and universal human rights embodied in international law and comparative constitutional jurisprudence.

This search for connection is tied, however, to a recognition that ubuntu may also provide the reverse, a unique connection between South Africa's new commitment to constitutionalism and the possibility of con-
'western law' and is worried that the majority of South Africans, who understand being part of a community as producing both duties and rights, 'will become alienated from rights unless interpretation gives a collective, communal meaning to rights'.

Justice Langa's concern about the importance of indigenous law and questions about the sense that nationalist mobilization in the South African context. Attempts by the British colonial administration to anglicize the Afrikaners after the Anglo-Boer War and the Apartheid regime's attempt to impose Afrikaans as a medium of instruction on black schools which sparked the student

unrest in Soweto in 1976 where several thousand took to the soul of
which the black pupils had applied for admission, this negated the school’s argument that it was full, despite having a long waiting list of students for the Afrikaans-medium classes. The Court noted in this regard that the school was actively bussing white students from a previously white primary school to the Laerskool Potgietersrus so that the Zebediela private institutions through which the possibility of cultural preservation in the restricted form imagined by the governing board of Laerskool Potgietersrus could be sustained. The Court, presided over by an Afrikaans-speaking judge, also implied a new imagined alternative – the establishment of separate English and Afrikaans schools which would not
discriminating against black students attempting to gain access to formerly 'whites only' institutions through the administration of strict language tests. On the other hand, this approach prevented the state from constraining those not satisfied from leaving the system and establishing their own self-funded institutions outside of direct state control. The Court notes that this approach recognizes that the Constitutional guarantee of a right 'to establish, where practicable, educational institutions based on common culture, language or religion' is a freedom entrenched in response to South Africa's particular history, in which the state perpetrated exclusivity the scope to continue to imagine the achievement of their own particular aims but within the limits of both locally and internationally endorsed values and principles. In October 1996, the Northern Province government agreed to register a private 'volk' school established and financed by those parents wishing to maintain the cultural purity they felt was threatened by changes at Potgietersrus Laerskool.

Regionalism, Local Autonomy and Traditional Authority
In the process of negotiating the 1993 Constitution there were significant changes in the positions of the three main players as well as impor.
allocating enumerated powers to the provinces. This allocation of regional powers – according to a set of criteria incorporated into the Constitutional Guidelines and in those sections of the Constitution dealing with the legislative powers of the provinces – was, however, rejected by the IFP on the grounds that the Constitution failed to guarantee the autonomy of the provinces.

Despite the ANC's protestations that the provincial powers guaranteed by the Constitution could not be withdrawn, the IFP pointed to the fact that the allocated powers were only concurrent powers and that the national legislature could supersede local legislation through the establishment of a national legislative framework covering any subject matter. 

This tension between provincial autonomy and the ANC's assertion of which the Court was called upon to help shape the boundary between contending claims of constitutional authority to govern, unresolved by the negotiated settlement. While two of the cases directly implicated actions of the KwaZulu-Natal legislature and its attempts to assert authority within the province – in one case over traditional leaders and in the other the constitution-making powers of the province – the first case involved a dispute over the National Education Policy Bill,\textsuperscript{22} which was then before the National Assembly.

Objections to the National Education Policy Bill focused on the claim that the 'Bill imposed national education policy on the provinces' and thereby 'encroached upon the autonomy of the provinces and their executive authority.' The IFP made the further
National Education Policy Bill deals with matters in respect of which provincial laws would have paramountcy, it could not for that reason alone be declared to be unconstitutional.  

While the Constitutional Court’s approach clearly aimed to reduce the tensions inherent in the continuing conflict between provincial and national governments, particularly in relation to the continuing violent tensions in KwaZulu-Natal, it also took the opportunity explicitly to preclude an alternative interpretation. Focusing on argument before the Court which relied upon the United States Supreme Court’s decision in New York v. United States 80, the Court made the point that it was like their  

Faced with intractable political conflicts between the IFP and ANC in KwaZulu-Natal, the Court reasserted its duty to interpret legislation narrowly so as to avoid constitutional conflicts and upheld the legislative competence of the KwaZulu-Natal legislature and the constitutionality of the two bills. In effect the Court allowed the KwaZulu-Natal legislature to continue to imagine its own authority in this area, merely postponing clear questions of conflict between the national and provincial legislation to a later date. 

The outer limits of the Court’s tolerance for alternative constitutional visions was not explored in the third case in which the Court was
constitutional framework implicitly silences options that cannot be just.