CONSTITUTING DEMOCRACY

Law, Globalism and South Africa's
CHAPTER 7

THE CONSTITUTIONAL COURT AND THE INSTITUTIONAL DYNAMICS OF CONSTITUTIONALISM

Introducing a supreme Constitution has fundamentally changed the place of the judiciary in South Africa’s constitutional and political order. Analysis of the judicial role, and the Constitutional Court in particular, has in consequence focused on developing an understanding of how the Court will go about its task of applying and interpreting the Constitution, and the Bill of Rights in particular. This approach relies, it has been argued, upon comparative constitutionalism to trace the history of ‘ideological and jurisprudential struggle on the part of the judiciary to develop a coherent set of constitutional values which emanate clearly from a Bill of Rights and which can act as reliable signposts en route to a
periods of its history failed to uphold the rights of citizens against...
the Court would be a purely technical, legal, body – and were thus ‘destined for an unpleasant surprise’, the Constitutional Court has, after only four years, become a central institution in the new South Africa. Despite popular attacks on some of its decisions – including the outlawing of the death penalty – and a unique political attack calling on five justices to resign themselves on the grounds that they were personal friends of and courts must decide which institution – judicial, legislative or market – is best suited to resolve a particular social problem. The second involves the court’s assumption of the role of the institution which is the ultimate and final source of constitutional understanding and decision-making, in which the court of last instance assumes the right to decide who decides on the correct interpretation of the constitution and the consti.
AJ suggests that, while clear public opinion 'could not be entirely ignored', the Court 'would be abdicating from [its] ... constitutional function' if it were 'simply to defer to public opinion'.60 Kentridge AJ then proceeds to discount any evidence of public opinion on the grounds that there had been no referendum or recent legislation67 and instead he suggests that the reduction in executions after 1990 and the reports of the Technical Committees to the Multi-Party Negotiating Process as the 'equivalent of the travaux préparatoires relied upon by the international tribunals', to provide evidence of context for the interpretation of the Constitution.54 The Court, however, limited the scope of its reliance on these materials to the specific context of this and similarly situated cases 'where the background material is clear, is not in dispute.'
However, it is important to remember here that despite what might have been regarded as public support of the death penalty, here the Court was as much concerned with the need for a degree of direct representation at the local level so as to bring government closer to the people.
Mandela by ‘allowing the President to make laws in its place’. On appeal, the Constitutional Court was faced with resolving a crisis that by early September 1995 was threatening to prevent the holding of nation-wide local government elections and to halt the very process of democratic transition away from apartheid. Deflecting the potentially explosive issue of provincial autonomy and avoiding the politically sensitive issue of local government demarcation, the Constitutional Court raised the constitutionality of the legislature’s delegation of amending powers to the executive, calling into question the constitutionality of section 16A of the Act, which was the legal basis upon which President Mandela had acted.

In reversing the lower court and striking down Mandela’s proclamations and Parliament’s amendment of the LGTA, the Constitutional Court was hailed by opponents of the government as defenders of the Constitution, for standing up to the ANC-dominated executive and legislature, and for fulfilling the promise of judicial review. However, when President Mandela publicly praised the Constitutional Court’s decision, stating that ‘this judgment is not the first, nor will it be the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance’, it became clear that the Court had effectively traversed the ‘fundamental questions of constitutional law’ and ‘matters of grave public concern’ which Chaskalson J had raised in the opening paragraphs of the Court’s decision.

The sting of the ruling against the legislature was removed, in part, by the remedy granted – giving the legislature a period of time to correct the defect in the Act – and executive concern was addressed by the Court’s tacit support for the powers of central government over the provinces in controlling the restructuring and regulation of local government. To be sure, the Constitutional Court had, for the first time, struck down intensely politicized legislation passed by a democratically elected Parliament and a highly popular President, but closer examination of the Court’s handling of the division of powers – particularly the and third, on the argument that the national government’s action encroached upon the geographical, functional and institutional integrity of the province as guaranteed in Constitutional Principle XXII contained in Schedule 4 of the 1993 Constitution. Instead of finding for the Western Cape on issues of provincial autonomy, which would have played directly into the continuing and growing conflict between the ANC-dominated national government and the two provinces – Western Cape and KwaZulu-Natal, controlled by non-ANC governments – the Court determined that there was a larger, prior question that required it to declare the President’s actions in the Western Cape unconstitutional. Simultaneously, however, the Court made it clear that control over local government is constitutionally assigned to the National Parliament. While the Western Cape won the case, it not only failed to achieve the degree of provincial autonomy it was seeking, but also established a precedent denying it that autonomy.

While the case focused on the constitutionality of s 16A of the LGTA and whether the President’s proclamations could nevertheless be saved from constitutional attack by reliance upon the President’s transitional powers, the case effectively introduced a constitutional scheme guiding the exercise of Presidential authority under the transitional sections of the Constitution and determining the allocation of powers between national and provincial government. Rejecting the President’s argument that, despite the unconstitutionality of his amending powers, his actions were saved by the transitional powers granted to the executive in the Constitution, the Court carefully detailed the scope of Presidential power in terms of the transitional sections of the Constitution. Preserving the bulk of Presidential actions in the transition, the Court carefully crafted a clearer basis upon which the President could continue to act to facilitate the democratic transition.

The crafting of these powers illustrates the way in which the Court asserted its power to decide who decides while creating the opportunity...
of the President's powers to amend such laws in terms of s 235(8). While there seems to be agreement among the justices that the exercise of presidential authority under s 235(8) was limited to the degree an amendment was necessary for the efficient carrying out of the assignment, there were differing opinions as to the extent of amendment allowed once this jurisdictional fact entitling the President to amend or adapt had been satisfied. Fundamental rights and the striking down of law and practice that was closely associated with the violations and inequalities of the apartheid era. The demarcation case involved the allocation of powers between levels of government under an Act negotiated by all parties as part of the transition to democracy. The salience of this difference lies in the distinction between a court's role in the adjudication of rights and in the allocation
given to determine whether a new ‘final’ Constitution, once sanctioned by at least two-thirds of the members of the democratically-elected Constitutional Assembly, was substantively in accordance with the Principles contained in Schedule 4 of the interim Constitution. While these delegations of constitutional authority reflected both a postponement of conflicts among the framers of the interim Constitution as well as their faith in judicial processes, it also reflected a failure to understand the delicate institutional role the Court would find itself in. Poised as the lightning rod for claims of right and struggles to transform the country, the repeated concern of the Constitutional Court to address its counter-majoritarian dilemma is understandable.

While the exercise of constitutional review in *Western Cape* may be viewed as an example of the Court mediating a conflict between differ-
purposive and teleological application that gives 'expression to the commitment to “create a new order” based on a “sovereign and democratic constitutional state” in which “all citizens” are “able to enjoy and exercise their fundamental rights and freedoms”. It also asserted that the Court was not concerned with the merits of the choices made by the Constitutional Assembly. In fact, the Court emphasized the scope of the Constitutional Assembly’s latitude by arguing that, while the new text “may not transgress the fundamental discipline of the CPs ... within the space created by those CPs, interpreted purposively, the issue as to which of several permissible models should be adopted is not an issue for adjudication by this Court. That is a matter for the political judgment of the CA, and therefore properly falling within its discretion ...”

In contrast, however, the Court took a robust view of its judicial role of establishing legal precedent. Faced with the dilemma of alternative constructions in which one interpretation could be held to be in violation of the Constitutional Principles, the Court adopted the traditional judicial strategy of upholding that interpretation which would avoid a declaration of unconstitutionality. This raised the spectre of a future Court revisiting the issue and adopting an interpretation which would have been in violation of the Constitutional Principles. In this 'judicial' context the Court claimed the power to bind the future, holding that a 'future court should approach the meaning of the relevant provision of the NT on the basis that the meaning assigned ... in the certification process ... should not be departed from save in the most compelling circumstances'.

The Court took a similarly robust attitude to its judicial role in its second certification judgment, when it finally certified the final Constitution. 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 certifi-

ication 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 - 'found ing 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'. 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 National Council of Provinces (NCOP) had tipped the balance. 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.

Thrust into this 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, numer-

ous matters, including important changes within the established legal...
principles by which a future draft Constitution could be judged. Significantly, however, the basic framework of Principles, tracing their heritage from the ANC's Constitutional Principles of 1990, the Harare Declaration, and the Freedom Charter, is not without internal contradictions and tensions between the different coexisting jurisdictions — without becoming the target of overwhelming political conflict, which creates the space in which the power of judicial review may be institutionally consolidated. Of