The Constitutional Court of South Africa

Johann Kriegler

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

Recommended Citation
Available at: http://scholarship.law.cornell.edu/cilj/vol36/iss2/5

This Comment is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
SPEECH

The Constitutional Court
of South Africa

Johann Kriegler

ADDRESS TO CORNELL UNIVERSITY LAW STUDENTS
ON OCTOBER 25, 2002.

In order to understand the role and functioning of the South African Constitutional Court, a brief historical introduction is necessary.

For most of the second half of the 20th century, apartheid South Africa was descending into an ever-increasing morass of violence. The form of government followed was the Westminster system, where the will of Parliament was supreme and the power of judicial review largely limited to manner and form. There was no supreme constitution, no bill of rights, no separation of powers, and no real brake on executive action.

During the sixties, seventies, and eighties the central government resorted to ever more severe forms of repression to maintain its hold on the country in the face of mounting resistance from liberation movements. In doing so, it strictly adhered to a course of formal legalism where each of a litany of draconian measures was carefully and precisely cast in legal precept. Many repressive methods and sanctions were incorporated into the fabric of the criminal law. The law became a tool of oppression and the police an enforcer of government policy.

Meanwhile an important part of the strategy of the African National Congress, through its armed wing, Umkhonto we Sizwe, was to render areas of the country ungovernable. In general, this happened in the densely populated, segregated African ghettos, where it became a badge of distinction to defy the regime and its' laws, all of them. Thus, the law fell into greater disrepute.

When, during the early nineties, South African leaders of all persuasions hammered out a negotiated settlement, achieving a peaceful revolution, there was general agreement that the new South Africa was to be a constitutional democracy with regular multi-party elections, an entrenched and judicially enforceable bill of rights, and a separation and decentralization of powers. A major obstacle they came up against was that the liberation movements insisted that the country's constitution had to be drafted by duly elected, and thus mandated, popular representatives, while the
existing regime was not prepared to relinquish power and give such a constituent assembly carte blanche.

Ironically, the solution was proposed by a tough old-time Stalinist. Taking an analogy from his earlier years of practice as a commercial lawyer and member of the Johannesburg Bar, he suggested that the negotiators draw on common practice in complex corporate mergers, where the agreed principles of the merger are recorded up front but the detail is left to be filled in later. In this context, a set of principles with which the new constitution would have to comply. Thus, the existing regime could build in certain basic provisions, but the ultimate document would have the legitimacy of acceptance by genuine representatives of the people. There was, therefore, to be a transitional period under an interim constitution and followed by the adoption of a final constitution. This proposal met with general approval until someone asked: “And who will decide whether the constitution drafted by the constituent assembly does indeed comply with the stated principles?”

The answer the negotiators came up with was the Constitutional Court. It would be a new, politically untainted and manifestly independent body. The Court would consist of eleven carefully selected and balanced lawyers, sitting en banc, who would not only measure the new draft constitution against the template of the agreed constitutional principles, but would be the ultimate arbiter in all constitutional matters. To ensure the integrity of the selection process, a special multi-disciplinary, multi-party body would be created, chaired by the chief justice, to screen candidates, who would then have to be endorsed by both the legislature and the executive. This Judicial Service Commission was retained in substantially the same form in the final Constitution and now takes care of all superior court judicial appointments.

Because of suspicion about the novelty of a court with the power of substantive review of legislative and executive action, the first incumbents of the Constitutional Court would serve for a limited period of seven years only. The Court was to have constitutional jurisdiction only, with the existing Appellate Division remaining the court of final instance in all non-constitutional matters. Indeed, many believed that the Court should essentially perform the certification exercise and then disappear or be absorbed into the Appellate Division.

An interim constitution was then drafted providing for, among other things: (a) the election by universal adult suffrage of a constituent assembly, doubling as an interim legislature, to draft a final constitution within a limited period; (b) the recording of a template of constitutional principles, and; (c) the interim government of the country and the myriad transitional arrangements that were necessary to unify what had become a confusing Diaspora of apartheid “states”. Two points are of particular relevance in the present context. First, the interim constitution contained a detailed and judicially enforceable Bill of Rights, and second, it prescribed a separation of powers. The country’s first democratic elections were duly held and the constituent assembly got on with its task.
The Constitutional Court was constituted in the latter half of 1994 and started its first official session in February 1995 in temporary accommodations in a commercial office complex in Johannesburg. It will soon move into its own building, constructed on a symbolic site redolent with the country's troubled history. Some justices had previously served as high court judges, some came directly from the bar, others from law faculties. The presiding justice, Arthur Chaskalson—an honorary member of the New York Bar—had for years been the country's most distinguished public interest lawyer. Two of the justices were women, four were African and one was of Asian extraction.

From the outset, in the absence of South African constitutional law precedent, the Court leaned heavily on North American and German jurisprudence. Canada had previously followed the course from parliamentary supremacy, through an interim arrangement, to a final system of a fully justiciable charter of rights. Moreover, its general pattern of a charter containing enumerated fundamental rights and freedoms subject to a general limitation clause, was followed in South Africa. Therefore, judgments of the Canadian courts relating to their Charter were particularly helpful in dealing with cases concerning the new South African Bill of Rights. In principle the Court conducts a two-staged inquiry. First whether constitutionally challenged legislation or executive action limits a constitutionally protected right; and if it does, whether such limitation is justifiable in an open and democratic society.

The first judgment handed down by the Court dealt with a reverse onus provision in the Criminal Procedure Act relating to the admissibility of confessions. The Court found the provision infringed the presumption of innocence contained in the interim constitution's Bill of Rights and struck it down as not being justifiable in an open and democratic society. Since then a whole series of reverse onus/presumption provisions have been struck down on the same basis. One enactment, relating to persons found in possession of goods reasonably suspected of having been stolen, was found to limit the presumption of innocence. The Court, however found the enactment to be justifiable in combating crime and therefore saved the provision. Likewise, statutory limitations on the right to bail were held to be justifiable.

The Court also has dealt with a challenge to the constitutionality of the death penalty; its first really contentious case under the interim constitution. Although the African National Congress was openly opposed to the retention of capital punishment, the previous regime had adopted a much more equivocal attitude, not openly favoring abolition but not carrying out any death sentences since the latter eighties. The draft constitution consequently resorted to what came to be known as "constructive ambiguity", or, in other words "fudge it and leave it to the Constitutional Court to work out". This the Court duly did. In a magistral main judgment by Justice Chaskalson, supported by ten concurring judgments, the Court not only struck down capital punishment, but also articulated a number of principles of constitutional adjudication which have since become trite. The anal-
ysis of the process of determining justification actually formed the basis of
the reformulation of the corresponding provisions in the final constitution.

The draft constitution produced by the constituent assembly was duly
submitted for scrutiny by the Constitutional Court and, if found consistent
with the constitutional principles, certification. This was clearly the most
onerous task the Court had to undertake, bringing it into potential conflict
with the democratically elected representatives of the people. An open invi-
tation was extended to all interested persons or institutions to submit writ-
ten summaries of their contentions. These were screened and submissions
of apparent substance were then invited in writing. Ultimately oral represen-
tations were heard from a wide range of persons and bodies, including
political parties, the government, and the constituent assembly itself. This
consultative process proved invaluable, not only for the transparency and
consequent legitimacy of the certification process, but also in resolving the
numerous knotty issues that arose. After much deliberation, the draft was
found to be inconsistent with the constitutional principles in a limited
number of respects and referred back for reconsideration. The redraft sub-
sequently passed muster with relatively little debate and, on 4 February
1997, the (final) Constitution came into force.

Apparently the first appointees to the Constitutional Court established
their trustworthiness to the satisfaction of the political role players as,
under the final Constitution, the term of office of Court’s judges was
extended to twelve years. The dichotomy between its exclusively constitu-
tional jurisdiction and the jurisdiction of the existing judicial hierarchy
was potentially contentious but ultimately came to be resolved in a spirit of
comity. In terms of the Constitution, every court, whether interpreting a
statute or developing the common law, must have regard to the spirit, pur-
port, and objects of the Bill of Rights. Also, the ultimate decision as to
whether a particular issue is or is not a constitutional issue, rests with the
Court. From these two provisions lawyers will readily perceive that the
Court was and soon came to be recognized as the pinnacle court. Recent
amendments to the Constitution have made this plain. Justice Chaskalson
is now the Chief Justice of South Africa and the term of office of Constitu-
tional Court justices has been extended to fifteen years or age seventy-five.

The Court has been painfully aware of its role as a constitutional trail-
blazer and has sought to give the broadest and clearest possible guidance to
other courts. It generally strives to find consensus; though it has, at times,
deliberately mentioned divergent views to stimulate future discourse. It
has on occasion, as in the death penalty case, skirted on the fringes of
obiter in order to illuminate the way and has been impatient with procedu-
ral technicalities, trying to get to grips with substance rather than form.

The Court has also introduced the practice of allowing amicus briefs
to be filed and not infrequently has granted amici the right to submit oral
argument. Class actions are also permitted. Unlike other appellate courts
in South Africa, extensive written arguments are invited and judicial notice
is more readily taken of notorious or non-contentious material. Hearings
with eleven judges are not easy, not for counsel nor for the judges, and the
Court uncomfortably felt its way at the outset. By the same token, judicial conferences with eleven participants are problematic and were it not for the wisdom of Justice Chaskalson and the wonders of electronic communication, the task may well have proved uncontrollable.

The cases the Court has dealt with have presented a rich kaleidoscope of legal and socio-political issues, ranging from gay rights, freedom of religion and expression, fair trial rights, the right to education, state medical care, and public housing. At times it has upheld government and oft-times it has knocked government back. The first time this happened it involved a proclamation by the freshly installed President Mandela and entailed the considerable bother and expense of reconvening the national legislature urgently. Within an hour of the judgment being handed down, the President went on national TV to express his regret at the outcome but proclaiming his immediate and unqualified acceptance of its dispositive force. Relations between the Court and government have maintained this spirit of mutual respect. Separation of powers is alive and well in South Africa, but always polite.

In the adjudication of disputes relating to the enforcement of socio-economic rights, the potential for conflict between the judiciary and the executive is obvious. Thus, in a fairly recent case concerning the government's policy in relation to the supply of anti-retroviral drugs to combat mother-to-child transmission of Aids, a major contention on behalf of government was that judicial intervention would constitute interference in matters of policy and would infringe the separation of powers. The Court, as it had done previously, explained that a challenge to the constitutionality of government policy raised legitimate constitutional issues which could not be avoided by a resort to the separation doctrine. If government infringes individual constitutional rights by acting unreasonably in performing its constitutional duty to provide guaranteed socio-economic rights, it is the duty of the courts to hold there is such an infringement, and where necessary to grant appropriate ancillary relief.

Political commentators and disgruntled litigants have on occasion detected political motives in decisions of the Court. On one celebrated occasion, a public figure involved in review litigation against the then President, moved for the recusal of a number of the justices on the basis that they were former members of the African National Congress and/or personal friends of President Mandela. The judgment dismissing the call for recusal has since been cited by the House of Lords in England, among others and represents, I believe, as clear an exposition of the topic of a judicial officer's duty to recuse as you might wish to find anywhere. It also dealt any suggestion of political or other bias on the part of the justices concerned a body blow.

The Court's constitutional role inevitably necessitates its entering politically contentious terrain and it would be foolish to deny that its task often involves making value judgments, especially when deciding whether or not an infringement of the Bill of Rights can be justified. It would be no less foolish to expect judges worth their salt to come to such issues with no
views; moral, political, ideological or otherwise. But at no stage have I ever sensed that a colleague’s attitude was motivated by reasons other than his or her genuine perception of the law and the facts.

By and large, I believe the South African Constitutional Court has served its country well.