The First Years of the South African Constitutional Court

Richard J. Goldstone

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By their nature, constitutions are more or less transformational. Some have provided the bridge from colonial rule to independence; others provide the bridge from oppression to freedom. The extent to which the Canadian Charter of Rights and Freedoms\(^1\) was intended to transform Canadian society remains a topic of controversy among Canadian lawyers. There can be no doubt that South Africa’s Constitution was intended to and has achieved a wholesale transformation of our society. It was self-consciously designed to transform our nation from oppression and racism to freedom and democracy.

One of the demands made by the leaders of the “black” majority was a new apex court, the Constitutional Court. We followed the German model by situating that court above the existing courts. In order not to upset the members of the then highest court, the Supreme Court of Appeal (as it is now called), the jurisdiction of the Constitutional Court was limited to “constitutional issues” and matters related to them. The determination of what constitutes a constitutional issue is left by the Constitution for the Constitutional Court to determine. In *Pharmaceutical Manufacturers Assn. of SA and Another In Re the Ex Parte Application of the President of the Republic of South Africa and Others*\(^2\) it was held that the control of public power by the courts through judicial review is and always has been a constitutional matter. The Court said that:

The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law.

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\(^1\) Judge of the Constitutional Court of South Africa, July 1994 to October 2003.


\(^1\) 2000 (2) SA 674 (South Africa CC).
... Judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. 3

In effect this made all violations of the rule of law “constitutional issues”. This included administrative law decisions.

In 1990, when it was decided by South Africa’s white leadership to abandon Apartheid and usher in a new democratic form of government, there was a seemingly irresoluble difference at the fundamental level of how a new constitution should be fashioned.

The “white” leaders, led by then President, F.W. de Klerk, were not prepared to give a blank cheque to the “black” majority. They were nervous of the close association of the African National Congress and the South African Communist Party as well as the powerful trade union movement that was also an integral part of the alliance. There was white fear that, if left to its own devices, the majority would write a socialist-style document and that it would not protect the property that had been acquired over the centuries of white rule. On the other side, the “black” leaders, led by Nelson Mandela, insisted that the constitution be drafted by way of a democratic process and that the minority should not have a veto in that process.

This apparently intractable difference was resolved in a highly unusual way. It was agreed that there would a two-part process. An interim constitution would usher in the democracy with the first one person, one vote national election. The duly elected representatives of all of the people would constitute a constitutional assembly and draft the final constitution. That met the demands of Nelson Mandela. To meet the demands of de Klerk, it was agreed that the interim constitution would contain the skeleton of the final constitution. That was achieved by way of a schedule containing 34 articles that came to be known as the 34 constitutional principles. The final constitution was required to comply fully with each of the principles contained in the 34 articles.

The obvious question was how and by whom it would be decided that the final constitution complied with the 34 constitutional principles. It was decided that that should be the task of the Constitutional Court. This was a huge responsibility and in effect meant the 11 unelected justices would have to determine the constitutionality of the constitution! We were obliged by the interim constitution to hear oral argument on behalf of the Constitutional Assembly that consisted of the members of

3 Id., at paras. 45 and 51.
both House of Parliament, and on behalf of all political parties represented in Parliament. In the exercise of our discretion we invited members of the public to make written representations reserving the right to determine which of them would be entitled, in addition, to appear and make oral representations. In the result we received representations from five political parties and 84 private parties. In July 1996, we heard argument on behalf of the Constitutional Assembly, five political parties and 27 other bodies or persons. In deciding whom to invite to present oral argument, we were guided by the nature, novelty, cogency and importance of the points raised in the written submissions.

After many conferences we unanimously held that the final constitution failed to comply with the 34 constitutional principles in respect of 12 areas. The Interim Constitution anticipated that there might be such a result and allowed the Constitutional Assembly to amend the constitution in order to bring it in line with the decision of the Court. In that context we issued a detailed judgment explaining as clearly as possible our decision. The Constitutional Assembly amended the constitution in order to meet the problems and referred it back for a consideration by the Court. Again, we heard many representations and in the end result certified that the whole constitution now complied with the 34 constitutional principles. Fortunately we were again unanimous in our decision.

What we call “the final Constitution” became effective in February 1997.

I hardly need to add that it was a huge responsibility and, at the same time, an unusual privilege, to have had the opportunity of sitting on our first Constitutional Court. It was also an exciting and joyful experience to be a member of a highly collegial court and finding that we all shared a common understanding of the role we were called upon to play.

Save for the death penalty, the representatives of all political parties reached rapid accord on the provisions of the Bill of Rights. Broadly speaking, the white leaders were in favour of retaining capital punishment while the black leaders wished to abolish it. It was decided to leave this issue for determination by the Constitutional Court. That issue was to be the first case heard by the new Court.

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The reason for agreement on the Bill of Rights is not difficult to locate. The anti-Apartheid movement, both within South Africa and internationally, was essentially a human rights movement. The black leaders always assumed that a democratic South Africa would be governed by an egalitarian constitution reflecting all internationally recognized human rights. This was demonstrated by the 1956 Freedom Charter adopted at a mass meeting outside Johannesburg. The Freedom Charter called for a democratic South Africa founded on non-racism and non-sexism. It declared that the land belonged to its entire people regardless of colour. It was a document well in advance of its times and clearly influenced by the Universal Declaration of Human Rights. No other freedom movement, whether on the African or any other continent, could claim to be or to have been a human rights movement.

The majority of white South Africans had spurned human rights and accepted the benefits that came from the racist oppression of the Apartheid state. When white South Africans saw the writing on the wall and realized that they were to be governed by a majority of all South Africans, they became instant converts to protection by a Bill of Rights. Both sides welcomed wide-reaching protections against untrammeled rule by the majority.

I return to the Constitutional Court. It is a quirk of history that the first time the 11 members of the new Court met was not in South Africa. The German Ambassador to South Africa suggested to the President of the German Constitutional Court that having regard to the similar reasons for the establishment of both courts, she should invite the members of our Court to a joint seminar with the members of the German Constitutional Court on issues that might be useful for us. We eagerly accepted an invitation to spend a week in Karlsruhe. This, I am sure, is another unique feature of the early years of our Court.

The first 11 judges of our Court consisted of seven white and four black members. Two were women. The new members of the Court were all aware of the transformational nature of the new Constitution and the heavy responsibilities that we had assumed in sitting on our new democracy’s highest court.

It was after the visit to Germany that we held our first business meeting. We had to decide on the manner in which we would conduct our business and even the appearance of the Court and its members. We wanted to demonstrate to the people of South Africa that we were not another South African court continuing in the tradition of the old. The
new values were in stark contrast to the old. The founding values are well stated in the first section of the final Constitution to be:

a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.

b. Non-racialism and non-sexism.

c. Supremacy of the constitution and the rule of law.

d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

We were conscious that these new values should be reflected in everything the new Court would do in the course of its business. Some of the issues we decided included:

(a) How we would robe. We did not wish to look like the existing judges who were identified by the majority of South Africans with the discredited Apartheid judicial system. South African judges had always worn black robes in the tradition we inherited from England. We decided that we would wear green gowns with the colours of our new flag on the sleeves of unisex robes.

(b) We would not be addressed as “Milord” or worse “Milady” but as “Justice”.

(c) We wanted the bench in the new Court (initially in a converted office building) to be raised minimally so that we could have comfortable eye contact with counsel — both for their benefit and to avoid the appearance of our being perceived to be remote from the people who visited court.

(d) Obviously we would not take into account the seniority of the judges who had been appointed during the Apartheid era (of whom there were six). We decided, after much debate, to abandon seniority. The Chief Justice would preside and have the Deputy Chief Justice on his right and the other judges would sit in different seats during each of the four terms. Those would be determined by the Chief Justice by drawing names from a “hat”. We would walk in and out of court in the order in which we were seated. Opinions would be signed in alphabetical order.

(e) We would establish a media committee, the work of which was to assist journalists in gaining effective access to the work of the Court, its decisions and documents. We also agreed to prepare a media release to accompany all opinions, explaining, in lay terms, the gist
of the decisions. We were also determined to have a user-friendly website.

None of the members of the new Court had received any formal training in either constitutional law or human rights law. This presented an enjoyable and interesting challenge. I need hardly add that the use of foreign law played a crucial role in this regard. This, too, was anticipated by the drafters of the Constitution. Section 39(1) of the Bill of Rights provides that:

When interpreting the Bill of Rights, a court, tribunal or forum

a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
b. must consider international law; and
c. may consider foreign law.

And, section 233 of the Constitution provides that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Furthermore, one finds repeated references in the Constitution to “what is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. One of the most important is to be found in section 36, which governs the permissible extent to which rights enshrined in the Bill of Rights may be limited by legislation. These words are familiar to this audience and were clearly inspired by section 1 of the Canadian Charter.

From the beginning, our Constitution and our Court’s jurisprudence were influenced by the Canadian experience. The Canadian Charter was an obvious source of inspiration. It was a comparatively new comer and leading Canadian constitutional lawyers assisted with the drafting process for our Interim Constitution and especially the Bill of Rights.

The first judgment issued by the Court required a provision of the Bill of Rights to be interpreted. The following dictum of Dickson J. (as he then was) in R. v. Big M Drug Mart Ltd. was cited with approval:

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the

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character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.  

That purposive approach to the interpretation of our Constitution has consistently been followed by the Court.

In the same case, the Canadian approach to statutory reverse onus provisions was also found to provide guidance to a court having no precedents of its own. It was Dickson C.J.C. in *R. v. Oakes*\(^8\) and *R. v. Whyte*\(^9\) and Cory J. in *R. v. Downey*\(^10\) who provided the beacons.

A major Canadian import into our Constitution is the approach to limitations of rights. The scrutiny thresholds adopted by the United States Supreme Court had little appeal. At the threshold level we have incorporated the equivalent of section 1 of the Charter and, as is to be expected, we have learnt much from your jurisprudence — from the *Oakes* approach to more recent decisions.

A third area in respect of which we learned from the Canadian approach relates to equality. The first equality decision of our Court was *Hugo*,\(^11\) in which I followed the important dictum of L’Heureux-Dubé J. in *Egan v. Canada*\(^12\) to the effect that the recognition of human dignity is situated at the heart of the equality provision.

Finally, I would refer to the Canadian approach to extradition and the death sentence. We were faced with this issue in *Mohamed and Another v. President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another)*,\(^13\) a case arising from the Al Qaeda bombing of the U.S. embassies in Kinshasa and Dar es Salaam. The South African authorities had decided that Khalfan Khamis Mohamed, a Tanzanian citizen, had waived his rights to formal extradition and handed him over to U.S. officials for transfer to New York, where he faced the death penalty. We followed the

\(^7\) *S. v. Zuma and Others*, 1995 (2) SA 642, at para. 15 (South Africa CC).


\(^11\) *President of the Republic of South Africa and another v. Hugo*, 1997 (4) SA 1 (South Africa CC).


\(^13\) 2001 (3) SA 893 (South Africa CC).
approach in the then recent *Burns* decision\(^\text{14}\) to the effect that there is no obligation to extradite or deport any person without an assurance from the receiving state that the person will not face a death sentence. Needless to say, we have found valuable guidance in the jurisprudence of other democracies including the U.S., Germany, India and Namibia, to name but a few.

In relation to the implementation of social and economic rights the Court has comprehensively considered the constitutionality and propriety of issuing structural orders. In the *TAC* case\(^\text{15}\) it was held that such orders are in no way inconsistent with the separation of powers and that our courts are empowered to make such orders in appropriate cases. However, it was also held that as the government had consistently implemented decisions of the courts it was not appropriate to issue a structural injunction. The Court did order the government forthwith to distribute the antiretroviral drug, Nevirapine, for the prevention of mother-to-child transmission of the HIV virus. The Court compelled the government to act in a manner that was anathema to the Minister of Health. She nonetheless complied with the order. One thinks, too, of the decision compelling the government to provide social welfare benefits to permanent residents as well as citizens — at a cost of many millions of rands.\(^\text{16}\)

I propose to end with a brief reference to two areas where our Constitutional Court has struck out in new directions. The first relates to the necessity for legislatures to hold reasonable public consultation prior to passing controversial legislation. The Constitutional Court in effect held that, properly construed, our Constitution creates not only a representative democracy but also a “participative” democracy. It is not sufficient for the people to be consulted only every five years through the ballot box but continuously with regard to the making of legislation. In *Doctors for Life International v. Speaker of the National Assembly and Others*,\(^\text{17}\) the Court held that:

> Under our Constitution, therefore, the obligation to facilitate public involvement is a requirement of the law-making process.\(^\text{18}\)

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\(^{16}\) 2004 (6) BCLR 569 (South Africa CC).

\(^{17}\) 2006 (6) SA 416 (South Africa CC).

\(^{18}\) *Id.*, at para. 207.
Its decision was that a statute relating to the regulation of abortions was a matter of intense public interest and that there had not been reasonable public consultation in the legislative process. The statute, on that ground, was held to be unconstitutional.

Then, earlier this year in Occupiers of 51 Olivia Road Berea Township v. City of Johannesburg and Others, the City of Johannesburg sought to evict the residents of derelict buildings in the city centre as part of a regeneration program. The residents claimed that the provision of suitable alternative accommodation was a precondition for an eviction order. After hearing oral argument, the Constitutional Court ordered the parties to “meaningfully engage” with each other to find a mutually satisfactory solution to the problem. They were ordered further to report back to the Court on the engagement within 30 days. This unusual order worked and the parties did settle their differences. The City agreed to make the existing buildings safe and habitable until appropriate alternative accommodation was made available. The Court then issued a general order obliging parties in such cases to “meaningfully engage” prior to seeking relief from a court.

There are the usual problems faced by the judiciary in many democracies — at the moment draft legislation taking away control of the budgets of the courts from the Chief Justice and placing it in the hands of the Minister of Justice. These problems aside, however, having regard to where we stood at the death of Apartheid in 1994, I would suggest that we have made remarkable progress. It has also been a matter of personal pride that the South African Constitutional Court, in its short life, has built a positive reputation that is recognized throughout the democratic world. I would emphasize its contribution in the area of social and economic rights.

South Africa has good reason to feel indebted to Canada for the advances we have made on the often difficult road from oppression to freedom and democracy.

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19 2008 (3) SA 208 (South Africa CC).