



Francois Venter: Ten Years of Constitutional Jurisprudence in South Africa

Constituting the end point of a path of reforms in constitutional law which began in 1990, South Africa's current constitutional dispensation has been in existence for thirteen years now. At this point, it is worthwhile to take a closer look not only at the changes effected by constitutional jurisdiction but also at the way South Africans experienced it.

The first principle of constitutional law demands 'the establishment of one sovereign state, a common South African citizenship and a democratic system of government' while the fourth principle determines that the judiciary 'shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights'.

According to Art. 165, the courts are 'independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'. As a judicial function, interpreting the law is not a purely mechanical process, especially as there is a great deal of discussion about legal hermeneutics, and with good reason. Throughout the last decades, the Constitutional Court was confronted by several applications for recusal of one of its judges. The Court's attitude towards applications for recusal includes several aspects, such as the insight that judges are human beings, which is why it cannot be avoided that their obligations as judges are influenced by their own experience of life, and that the impartiality of judges is absolutely basic to any civilised system of jurisdiction to function.

It is to be welcomed that the Court has drawn up clear guidelines about how to deal with applications for recusal. What political line of thought the judges actually followed, however, became clear when in their verdict in the SACCAWU case, the judges voiced their opinion that anybody who wanted to be appointed judge on the Constitutional Court practically had to be a member of the former opposition movement, as the core values of today's constitution stood in contrast to those of the old system.

After 1994, the courts had to deal with political disputes several times, which also related to questions of constitutionalism and democracy. The constitution calls the Republic of South Africa a 'democratic state', declaring that 'a multi-party system of democratic government' is a value on which the state relies. Thus, democracy is one of the most important standards by which the constitution, the law, and governmental actions can be judged. According to its preamble, the constitution aims, inter alia, to create 'a society based on democratic values' and to '[b]uild a united and democratic South Africa'. 'The Bill of Rights is a cornerstone of democracy', including human dignity, liberty, and equality.

In their interpretation of these basic laws, the courts are bound to 'promote the values that underlie an open and democratic society based on human dignity, equality, and freedom'. The constitution states that minority parties are to participate 'in the proceedings of the Assembly and its committees [...] in a manner consistent with democracy'. As further elements of democracy, the constitution lists

universal adult franchise, a uniform electoral roll, elections held at regular intervals, and a democratic multi-party system. The catalogue of 'political' rights grants citizens the right to free political decisions, the right to free elections held on a regular basis, and the right to vote itself. In addition, the constitution provides for a minimum voting age of 18 and a system of proportional representation at the national and provincial level.

In fact, the new constitution quite often refers to democracy and its individual elements which, throughout the last few decades, also appeared in a large number of constitutional disputes associated with the development of the new democracy in South Africa. A glance at some of the verdicts the court delivered throughout the last few years shows its position on democracy quite well.

On freedom of speech and immunity in the legislative: In 2003, the Court had to concern itself with freeing town councillors of liability for their statements in local parliaments. The case revolved around an appeal against a decision of the High Court, according to which town councillors were to bear the costs of litigation arising from their behaviour in majority decisions. The Court decided that the legal immunity of a city councillor precludes any personal liability for his own actions.

On inter-governmental relations, i.e. the vertical separation of powers between the national, provincial and local level: In 1995, the Court declared a parliamentary amendment to the Local Government Transition Act, which revolved around local elections and authorised the president to add further amendments to the Act by decree, as non-conformable with the constitution. However, parliament was given an opportunity to correct this regulation. At the end of the same year, the Court overruled an objection against certain amendments to the constitution, by which the power to determine how to compensate the prime ministers of the provinces and members of the executive was transferred from the provincial parliaments to the president. When a dispute arose in 1999 between two provincial governments and the national government about the powers of the provinces in local legislation, diverse provisions of the Local Government Transition Act were annulled by the Court.

Testing the validity of legislation: In 1996, the Court established that the Gauteng Education Bill, which ruled out linguistic competence tests as a prerequisite for admission to state schools and laid down guidelines for religious policy at such schools, was consistent with the constitution of 1996. In the same year, the Court rejected a complaint by ANC MPs in the parliament of KwaZulu-Natal about a law which granted the king and other traditional Zulu leaders the right to accept emoluments only within the framework of the law. In 2002, the Court confirmed the already existing constitutional prohibition against floor-crossing, which had been contested by the UDM, declaring it to be not conformable with the constitution.

Resolution of electoral disputes: In 1999, the Court decided that prison inmates do have the right to vote and that, therefore, they are to be granted access to elections. In the same year, the Court supported the prime minister of the Western Cape province who had lodged a complaint against a decision of the independent electoral commission which, contrary to the provisions of the provincial constitution, intended to reduce the number of provincial parliamentarians from 42 to 39.

On the constitutionality of executive actions: When the president appealed to the Court in 1999 for the annulment of a medication act he himself had previously signed into law, the Court declared itself competent, provided that evidence for the unconstitutionality of the measure could be furnished.

The Constitutional Court also commented on the separation of powers. In 1996, it addressed the

question whether the constitution fulfilled the principle of the separation of powers, declaring that a complete separation of powers could not be realised in any constitutional scheme and that, therefore, such separation could only be partial in any case. In 2002, the Court demanded that the South African model to be developed should establish a balance between the need to control the government by separating its powers and the danger of splitting its authority, which would prevent it from taking steps for the benefit of the public.

Exploring the limits: The Constitutional Court is also endeavouring to determine the limits of jurisprudence in the field of socio-economic rights. Thus, it declared that constitutional rights are not part of the general basic rights; nor did it share the view that it would constitute a violation of the principle of separation of powers if the exercise of these rights affected the budget of the government. Having examined the policy on housing destitute persons in 2001, the Court detected serious defects at all three levels. In 2002, it criticised the government which intended to make a certain antiretroviral drug accessible only to mothers and children in those hospitals in which it was being tested. The Court demanded a comprehensive programme which would enable pregnant women to receive medical treatment to combat the transmission of the HIV virus from the mother to the child.

The Court is aware of the consequences its verdicts on socio-economic questions could have for the separation of powers. When the Court demands that the state take steps to perform its constitutional duties, reserving at the same time the right to check whether the government's actions are adequate, this certainly is not a sign of submissiveness. Rather, it is apparent that the Court feels entitled to determine what is consistent with the constitution and what not.

The verdicts South Africa's Constitutional Court has delivered so far have significantly promoted the development of constitutional law and politics in the country. Although the validity of some of the verdicts may be in dispute, and although the tenor and the aim of the verdicts may change as the composition of the Senate changes in the future, the Court has set standards. What is certain is that all verdicts were justified and thoroughly considered, and that many of them echoed throughout the world. The contribution made by South Africa's Constitutional Court towards consolidating a functional constitutional democracy cannot be overestimated.