The Judicial Role in the Development of Human Rights: With Particular Reference to Judges Under the New South African Constitution

Justice A Chaskalson

The Struggle for Simplicity

Legal Research Foundation
Auckland, 4 April 1997
The Judicial Role in the Development of Human Rights: With Particular Reference to Judges Under the New South African Constitution

It is almost four years since I had the pleasure of visiting New Zealand for the first time. I had been asked to speak about law and politics in South Africa at the 1993 triennial meeting of the New Zealand Law Society. Unfortunately Lord Cooke took ill shortly before the meeting and we met only a year or so later when he came to South Africa to participate in a colloquium on the domestic application of human rights norms. Our paths have crossed on two occasions since then, once in Canada and once in India. But I feel I know Lord Cooke much better than three meetings would allow. Due largely to my first meeting with Lord Cooke, I made sure that the New Zealand Law Reports were acquired for the library of our new Constitutional Court. I turn to them frequently to find out what Lord Cooke and his colleagues have said about an issue that is troubling us. Lord Cooke’s judgments reveal more than the law; they reveal much about the man himself - his clarity of mind, his command of language, his humour, his sense of fairness and above all his humanity. No doubt out of a sense of national modesty, the organisers of this conference have called it “a conference to mark Lord Cooke’s contribution to New Zealand law”; his contribution to law, however, goes far beyond the shores of New Zealand and the presence here of persons from so many parts of the world offers tribute to that. It is a privilege to have been asked to participate in this conference.
The New Legal Order In South Africa

The title chosen for my address by the organisers of the conference, "the judicial role in the development of human rights," is for me a practical rather than a philosophical question.

At the time of my previous visit to New Zealand, political leaders in South Africa were engaged in negotiations to bring to an end three centuries of white domination, and to establish a new democratic order in place of apartheid. By then it had become clear that the new legal order that was contemplated, would be one based on universal franchise and a respect for fundamental human rights, to be entrenched in a written Constitution. I talked then about our history, about the impact of apartheid on the lives of South Africans, about the role of the courts and the legal profession under apartheid and about what the future might hold. I concluded by saying this:

Apartheid, the ways in which it was enforced, and the ways in which the struggle against it was pursued, have taken a heavy toll on the country. The distribution of wealth and power in favour of whites has put them in a privileged position; on the other hand blacks have suffered the consequences of disempowerment and discrimination – poverty, landlessness, poor education, a lack of skills, and unemployment. The economy has been severely damaged, attitudes have polarised, there is little respect for law, and a wave of violence has swept the country. It is crucial that the negotiations be brought to a speedy conclusion so that attempts can be made to rebuild the country before it plunges into chaos, which it will surely do if the negotiations fail.

My last words were directed to the bill of rights that was being negotiated and they were that:

... the Constitution and the bill of rights ought to be seen as instruments for
protecting rights and limiting state power, and not as devices for perpetuating the status quo. The new government needs to be able to complete the revolution against apartheid by lawful means, and this can only be done if it is able through legitimate state action to dismantle apartheid in substance as well as in form. The Constitution and the bill of rights are there to protect freedom, not privilege. The successful conclusion of the negotiations, and the achievement of a substantial national consensus, depends on agreement being reached on this issue.

The Constitutional negotiations were successfully concluded and an interim Constitution was adopted to establish a framework for the transition from apartheid to democracy.\(^1\) It made provision for democratic elections to be held for national, provincial and local legislatures, and for a government of national unity to be established.\(^2\) It also provided that a new Constitution, which would replace the interim Constitution, would be drawn up by a Constitutional Assembly.\(^3\) That has been done and the new Constitution came

---

1 The interim Constitution was agreed upon in the Negotiating Council and then formally adopted by the existing racially based parliament as Act 200 of 1993. It came into force on the 27th April 1994, which is the day on which the election for the first democratic parliament of South Africa was held.

2 Section 88 of the interim Constitution permitted any party with more than 5% of the seats in the National Assembly to a seat or seats in the cabinet on a proportionate basis with other parties holding more than 5% of the seats. The President would allocate the portfolios and the party leaders would nominate the member or members to be appointed. In terms of item 9(2) of schedule 6 to the new Constitution this arrangement will continue until 30 April 1999. From that date a coalition government will be a voluntary arrangement and not a requirement of the Constitution.

3 Section 73 of the interim Constitution required the new Constitutional text to be approved by a majority of at least two thirds of the members of the Constitutional Assembly. The Constitutional Assembly was given two years within which to adopt a new Constitution, failing which deadlock breaking procedures would be brought into operation. These included a referendum and if needs be the dissolution of parliament and the holding of elections for a new parliament and a new Constitutional Assembly. The new Constitution had to comply with 34 agreed Constitutional principles set out in a schedule to the interim Constitution. Section 71(2) of the interim Constitution provided that: “The new Constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force or effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional principles ...”. The Constitutional Assembly adopted a new Constitution on 8 May 1996 by the prescribed majority (86% of the members of the Constitutional Assembly voted for it) but the Constitutional Court declined to certify the Constitution, holding that it did not comply in all respects with the Constitutional principles, *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification Of The Constitution Of The Republic Of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC). As a result the text was amended and in December
into force in February of this year.

The interim Constitution made provision for the separation of powers between the legislature, the executive and the judiciary, and defined the competences of the national and provincial legislatures and how conflicts between national and provincial legislation were to be resolved. It also included an extensive bill of rights and the courts were vested with the power of enforcing its provisions. The Constitutional Court was established as the court of final instance in respect of all Constitutional matters, but there were no other changes to court structures; the existing courts remained in place and the existing judicial officers retained their positions. These provisions have been retained in substantially the same form in the new Constitution, though the Bill of Rights has been expanded to include certain socio-economic rights which were not in the interim Constitution.

Both the interim Constitution and the new Constitution stipulate that the Constitution is the supreme law of the land and lay down that any law or act inconsistent with its provisions is invalid.\(^4\) It is difficult to describe in a few words the consequences that this has had for the role of the judiciary in South Africa. The courts, which had been required to uphold apartheid laws, including the draconian security legislation through which those laws were enforced, were given the task of establishing a new legal order in a

\(^{4}\) Section 4 of the interim Constitution; section 2 of the new Constitution.
Constitutional state committed to the protection of fundamental rights, the separation of powers, and the creation of "an open and democratic society based on freedom and equality".  

The change in the legal order went beyond the application of the bill of rights and Constitutional provisions for separation of powers; according to section 35(3) of the interim Constitution:

[i]n the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of [the bill of rights].

The new Constitution is even more explicit on this score. It requires courts, when interpreting legislation and developing the common law, to "promote the spirit, purport and objects of the bill of rights", and it extends the application of the bill of rights, which under the interim Constitution was in general binding only on organs of state, by providing that the bill of rights also binds "a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty

---

6 The preamble to the interim Constitution records that "... there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a democratic Constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms." Section 35(1) of the interim Constitution provided that in interpreting the provisions of the bill of rights Courts were required to promote the values which underlie an open and democratic society based on freedom and equality.

7 This was a much disputed issue which was resolved by the Constitutional Court in Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC). The Court held that the Bill of Rights was directly applicable to and bound all organs of state at all levels of government, but in general was only indirectly applicable to other relationships, through its impact on the development of the common law.
imposed by the right”.$^{8}$

In doing this, courts “must apply, or if necessary develop, the common law”, and “may develop rules of the common law to limit the right”.$^{9}$

It is too early to tell what the impact of these provision will be on South African law, but legal positivism which has strongly influenced the development of South African law may well lose its dominance. Although the Constitution ordains the approach, it is a value laden approach that has to be followed, and the clear message of the Constitution is that “the spirit, purport and objects” of the bill of rights should, where possible, be made to prevail.

**Interpreting the Constitution**

This does not mean that when a court interprets legislation and develops the law, the language of Constitutional or statutory provisions or settled principles of the common law can now be ignored. The Constitutional Court has observed that “if the language used by the law giver is ignored in favour of a general resort to values the result is not interpretation but divination.”$^{10}$

---

$^{8}$ Section 8(2) of the new Constitution.

$^{9}$ Section 8(3) of the new Constitution. The limitation must be in accordance with the “limitations clause” of the new Constitution which is discussed at page -- below.

$^{10}$ *S v Zuma and Others* 1995 (4) BCLR 401 (CC) at para 18.
Its approach to the interpretation of the Constitution has been to endorse a purposive rather than a formal or legalistic approach; where it is possible to do so the generous approach to the interpretation and application of a bill of rights propounded by Lord Wilberforce\(^\text{11}\) should ordinarily be followed.\(^\text{12}\) Statutes should where possible be read to be consistent with the Constitution, or read down to secure such consistency. If this is not possible the provision in question should be declared to be invalid.\(^\text{13}\)

The interim Constitution provided that courts should

> where applicable, have regard to public international law applicable to the protection of the rights entrenched in [the bill of rights], and may have regard to comparable foreign case law.\(^\text{14}\)

In interpreting and applying the bill of rights courts have had regard to the way in which comparable rights have been developed in other democracies. This has been and will continue to be valuable, particularly in the early stages of the development of a South African human rights jurisprudence. But conditions differ from country to country and ultimately the meaning to be given to the provisions of the South African bill of rights depends on the language of our Constitution, construed in the light of our own history and

---


12 *S v Zuma* 1995 (4) BCLR 401 (CC) at paras 13 to 15. See also: *S v Makwanyane and another* 1995 (6) BCLR 665 (CC) at para 9.


14 Section 35(1) of the interim Constitution; section 39(1) of the new Constitution provides that in interpreting the bill of rights courts must consider international law and may consider foreign law.
conditions existing in South Africa.15

Powers of the Courts

When the interim Constitution came into force existing laws remained valid subject only to the provisions of the Constitution.16 These laws had been drafted at a time when parliament was supreme and its laws could not be challenged in the courts. Many such laws would not have withstood Constitutional challenge. Instead of delaying the coming into force of the bill of rights to allow parliament time to adapt its laws to the Constitution, the interim Constitution vested extensive powers in the Constitutional Court to condition declarations of invalidity in the interests of justice and good government. The Court had the power to make declarations of invalidity with retrospective or prospective effect, and to allow a law inconsistent with the Constitution to remain in force pending correction of the law by parliament within a time specified by the court.17 Similar powers were vested in the court in respect of executive action declared by it to be inconsistent with the Constitution.18 The new Constitution also gives wide powers to the courts to regulate the impact of declarations of invalidity by providing that when it decides that a law or conduct is inconsistent with the Constitution it must declare it to be invalid to the extent of such inconsistency, and

15  *S v Makwanyane* 1995 (6) BCLR 665 (CC) at paras 10 and 37.

16  Section 229 of the interim Constitution.

17  Sections 97(5) and (6) of the interim Constitution.

18  Section 97(7) of the interim Constitution.
may make any order that is just and equitable, including –
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.¹⁹

These powers enable the courts to

Control the consequences of a declaration of invalidity of ... legislation where the result of invalidating everything done under such legislation is disproportional to the harm which would result from giving the legislation temporary validity.²⁰

These far reaching powers enable the courts to avoid the dilemma of having to invalidate all acts performed in good faith in terms of legislation found to be inconsistent with the Constitution.

The Common Law

As far as the common law is concerned the effect of section 35(3) of the interim Constitution is to “[ensure] that the values embodied in (the bill of rights) will permeate the common law in all its aspects, including private litigation.”²¹

There is much of value in the common law of South Africa that is consistent with the

---

¹⁹ Section 172(1) of the new Constitution.

²⁰ Executive Council of the Western Cape Legislature v The President of the Republic of South Africa 1995 (10) BCLR 1289 (CC) at para 107.

²¹ Du Plessis v de Klerk 1996 (5) BCLR 658 (CC) at para 60. This has been endorsed by section 8(3) of the new Constitution which requires courts to develop the common law, if it is necessary to do so, in order to give effect to a right entrenched in the bill of rights.
Constitutional values. It seems unlikely that there will be a radical reformulation of all aspects of the common law. There will, however, be occasion for refining the common law in particular cases and in some instances the reformulation may prove to be substantial.

As yet the Constitutional Court has dealt with only one case which called for the development of the common law. The case concerned a claim for privilege by the prosecuting authority for all the documents in the prosecutor’s brief. South African courts had previously treated statements taken by the police for the purposes of a prosecution as being privileged, and had extended that privilege to include:

- the notes made by a state witness; statements taken by the police in contemplation of a prosecution even if such witnesses were not being used by the prosecution and were in fact made available to the accused and even though the relevant witness had refreshed his memory outside of the court proceedings; notes made by the investigating officer and the advice and instructions of a “checking officer”; in some circumstances the pocket book of police officers, and all accompanying communications and notes for the purpose of litigation as being “part of the litigation brief”. All such privileged statements were protected forever on the basis of the principle “once privileged always privileged”[22]

The Constitutional Court had to decide whether this extensive privilege was consistent with the right to a fair trial which formed part of the provisions of the bill of rights.[23]

In 1992 the Appellate Division had dismissed an argument that an indigent accused

[22] Shabalala and others v Attorney-General, Transvaal and Another 1995 (12) BCLR 1593 (CC) at para 15; and see the summary of the of the pre-Constitutional law at para 29.

[23] Section 25(3) of the interim Constitution.
person facing a serious and difficult case would not receive a fair trial unless he or she was provided with legal representation, if necessary at the expense of the state. In commenting on remarks made by a provincial judge in coming to a different conclusion, it said:

The Court of Appeal does not enquire whether the trial was fair in accordance with “notions of basic fairness and justice”, or with “the ideas underlying ... the concept of justice which are the basis of all civilised systems of criminal administration”. The enquiry is whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.

The Constitutional Court held that the Constitutional right to a fair trial imported into criminal trials “notions of fairness and justice” which previously had not been fully acknowledged by the rules and principles of criminal procedure. Fairness and justice required that an accused person should ordinarily be entitled to have access to documents in the police docket which were relevant to the trial. Circumstances might, however, exist in which the prosecutor could justify the withholding of particular documents on the grounds that their disclosure would be prejudicial to the ends of justice. This might be the case if, for instance, the disclosure were to reveal the identity of an informer, or reveal state secrets, or raise a real risk of intimidation of state witnesses. In such circumstances the trial judge would have to balance the potential prejudice to the accused against the

---

24 *S v Rudman and another* 1992 (1) SA 343 (A).

25 at 377B–C.

26 *S v Zuma* 1995 (4) BCLR 401 (CC) at para 16; *Shabalala and others v Attorney-General of the Transvaal and Another* 1995 (12) BCLR 1593 (CC) at para 29.
potential harm to the ends of justice and decide whether or not the withholding of the
document was justifiable.  

This case did not raise issues that are likely to trouble the courts in dealing with private
law cases where each side might be able to look to the bill of rights for some protection.
This is what has happened in suits for defamation. In a few cases which have come before
provincial divisions of what is now referred to as the High Court  it has been contended
that the law of defamation as previously developed by the South African courts is
inconsistent with our new Constitutional values.

The common law, as developed by the Appellate Division prior to the coming into force
of the interim Constitution, did not recognise a general public policy defense protecting
the publication of a defamatory statement which had been made in good faith and in the
public interest; if the publication was not made on a privileged occasion, the defendant
could only escape liability by proving that the statement was true.  The onus of proving
truth or privilege was on the defendant. In various cases that have been heard since the
Constitution came into force it has been argued both on behalf of the media and private

\[27\] *Shabalala v Attorney-General of the Transvaal* 1995 (12) BCLR 1593 (CC) at para 72.

\[28\] South Africa has a unitary court system consisting of the Constitutional Court which is at the apex of the
system, but whose jurisdiction is confined to “Constitutional matters and issues connected with decisions on
Constitutional matters”, the Supreme Court of Appeal (formerly known as the Appellate Division) which has
jurisdiction in Constitutional and non-Constitutional matters, and is the highest court in respect of decisions
on non-Constitutional matters, High Courts (formerly known as provincial divisions of the Supreme Court)
which are courts of first instance and also have an appellate jurisdiction, Magistrates Courts and Customary
Courts.

\[29\] *Neethling v du Preez and Others* 1994 (1) SA 708 (A).
individuals that the existing law of defamation is inconsistent with the Constitutional
guarantee of freedom of expression\textsuperscript{30} and that the law should be developed to bring it into
line with Constitutional values. The plaintiffs have countered by contending that a
fundamental Constitutional value is respect for and protection of human dignity,\textsuperscript{31} and if
this is taken into account, the existing law cannot be said to be inconsistent with
Constitutional values. It has been held by different courts (a) that the existing law of
defamation is not inconsistent with the values of the Constitution;\textsuperscript{32} (b) that the common
law should be modified to require a plaintiff in a defamation action to satisfy the court
that his or her right to reputation should be given precedence over the defendant’s right
to free expression, and that this requires a plaintiff to show that the defamatory statement
is false, not in the public interest, and not protected by privilege; and (c) that “the
common law rule [which] ... gives primacy to the value of reputation, over that of
freedom of speech and expression, [is] difficult to reconcile with the importance the
Constitution’s structures and values attach to freedom of speech.” According to the last
mentioned view the common law should be developed as the High Court of Australia has
done in the Theophanous case,\textsuperscript{33} to hold that “a defamatory statement which relates to
‘free and fair political activity is Constitutionally protected, even if false, unless the

\textsuperscript{30} Section 15(1) of the interim Constitution provided that: “every person shall have the right to free speech
and expression which shall include freedom of the press and other media, and the freedom of artistic creativity
and scientific research”.

\textsuperscript{31} This is guaranteed by section 10 of the interim Constitution.

\textsuperscript{32} Bogoshi \textit{v National Media Ltd and Others} 1996 (3) SA 78 (W); Potgieter \textit{en ‘n Ander v Kilian} 1996
(2) SA 276 (N) at 318F–319B.

\textsuperscript{33} Theophanous \textit{v Herald & Weekly Times Ltd. And Another} (1994) 124 ALR 1 (HC).
plaintiff shows that, in all the circumstances of its publication, it was unreasonably made". 34

The Role Of The South African Judiciary

It is not yet clear how the courts will develop the common law and customary law to "promote the spirit, purport and objects" of the bill of rights. All that can be said is that the Constitution allows ample space for the judicial development of human rights, both through the development of the common law and through the interpretation and application of a wide ranging bill of rights.

The judiciary has been told to bring all aspects of our law into line with our new Constitutional values and has been given extensive powers to do so. This allows the courts an unusual latitude within which to develop the law. It also entails a heavy responsibility. How this responsibility is discharged has important implications for the society that will emerge out of the ashes of apartheid.

For the first time in our history we have a democratically elected parliament and a democratic government. The doctrine of parliamentary sovereignty which used to hold sway in South Africa has been abolished. We now have a Constitution which places constraints upon the power of parliament and a court that has the power to declare

34 Holomisa v Argus Newspapers Ltd 1996 (2) SA 588 (W) at 611D and 618E.
legislation enacted by that parliament to be invalid.\textsuperscript{35} In the conditions existing in South Africa the vesting of this power in a court might be considered by some people to be problematic. Two arguments are commonly advanced by those opposed to the judicial review of legislation under a bill of rights. First, that it draws courts into the political process and undermines their role as interpreters of the law and independent arbiters of disputes. Secondly, that it is inconsistent with democracy and denies the political majority the power to govern freely. This contention is formulated lucidly by Professor John Ely, \\
\[\text{“when a court invalidates an act of the political branches on Constitutional grounds ... it is overruling their judgment, and normally doing so in a way that is not subject to “correction” by the ordinary law making process. Thus the central problem of judicial review; a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like.”}\textsuperscript{36}

\textsuperscript{35} The two Boer Republics which were established prior to the founding of the Union of South Africa both had written Constitutions. These Constitutions recognised only whites as citizens and neither Constitution made specific provision for judicial review. Apparently judicial review of legislation was accepted in the Orange Free State. According to Dugard, \textit{Human Rights and the South African Legal Order}, Princeton, 1978 “(t)he power was exercised on only one occasion, namely, in the case of Cassim and Solomon v. The State, in which the court rejected the argument that a law of 1890 prohibiting Asians from settling in the Free State was contrary to equality before the law” (page 19). In the Transvaal the judges claimed a testing right and struck down legislation on the grounds that it was inconsistent with the Constitution. This led to a confrontation with parliament and the passing of a law “denying the Constitutional competence of the judiciary to exercise the testing right and empowering the President to dismiss any judge who failed to assure him” that he would not do so. (Dugard, page 22). The Chief Justice refused to give such an assurance and was dismissed. In the 1950s the Appellate Division declared that legislation removing coloured voters from the voters roll was invalid. \textit{Harris and Others v Minister of the Interior and Another} 1952 (2) SA 428 (A). See also \textit{Minister of the Interior and Another v Harris and Others} 1952 (4) SA 769 (A) and \textit{Collins v Minister of the Interior and Another} 1957 (1) SA 552 (A). The decisions turned on the meaning of parliament in the provisions of the South Africa Act which prescribed special procedures and special majorities for amending the rights of coloured voters. See: Dugard, pages 28 – 32.

\textsuperscript{36} \textit{Democracy And Distrust: A Theory of Judicial Review}, Harvard University Press, 1980, pages 4 – 5. Professor Ely is not opposed to judicial review. He supports it but is concerned with the development of “implied rights” not specifically mentioned in the US Constitution. He argues that the overwhelming concerns of the Constitution are procedural fairness and ensuring broad participation in the process and distributions of government (page 87). According to his theory, development of the “open ended” provisions of the Constitution should be concerned “only with questions of participation and not with the substantive merits of the political choice under attack”. (page 181).
As one who has seen and experienced the extremes to which the doctrine of parliamentary sovereignty can be taken I find a Constitutional order that places constraints upon the absolute power of parliament far more acceptable than one that does not. Nevertheless, when courts are called upon to assert their power under the Constitution they should in my view have an understanding of and be sensitive to the implications of these arguments.

The Limitation Of Rights

The South African Bill of Rights, like the Canadian Charter, has a general limitations clause which recognises that rights are not absolute but places constraints upon legislative attempts to limit them. Tension between parliament and the courts is most likely to arise in the application of this clause. According to the interim Constitution the entrenched rights can be limited by law of general application, provided that such limitation:

(a) shall be permissible only to the extent that it is -
   (i) reasonable; and
   (ii) justifiable in an open and democratic society based on freedom and equality; and
(b) shall not negate the essential content of the right in question.37

The limitations clause provided further that for certain specified rights the limitation, in addition to being reasonable, should also be necessary.

---

37 Section 33(1)(a) of the interim Constitution.
This clause was formulated somewhat differently from the comparable clause in the Canadian Charter. Section 1 of the Charter permits “only ... such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

The Canadian Courts have sought to establish objective criteria for determining whether or not a limitation of a Charter right is reasonable and justifiable. In the *Oakes* case decided in 1986 Chief Justice Dickson put the test as follows:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”. 38

This test is still applied but has been refined by later decisions of the Supreme Court of Canada. In 1989 Dickson CJC apparently felt constrained to issue the caution that courts “must be mindful of the legislature’s representative function” 39 and in a judgment in the following year the majority of the Court agreed that in striking a balance between the claims of different groups “the role of this Court is not to second-guess the wisdom of policy choices made by ... legislators”. 40 In 1991 the Court said that the means should

---

38 *R v Oakes* (1986) 19 CRR 308 at 337.
40 This was said by Lamer J *In Reference re Sections 193 and 195(1)(c) of the Criminal Code (Manitoba)* (1990) 48 CRR 1 at 62, and approved by the majority of the Court in *R v Chaulk* (1991) 1 CRR (2d) 1 at 61.
impair the right "as little as is reasonably possible",41 and in the same year it explained42 that where choices have to be made between "differing reasonable policy options" the courts would allow the government the deference due to legislators, but [would] not give them an unrestricted licence to disregard an individual's Charter rights. Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down.

The Constitutional Court of South Africa has taken an approach to this problem that is more subjective than the Canadian approach. Its starting point is that the determination of what limitation would be reasonable and justifiable in an open and democratic society based on freedom and equality involves the weighing up of competing values and ultimately an assessment based on proportionality. Proportionality calls for the balancing of different interests which can best be done in the context of the particular case. In the balancing process

the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.43

The new Constitution has incorporated the gist of the Constitutional Court's test into the

41 R v Chaulk (1991) 1 CRR (2d) 1 at 30.
43 S v Makwanyane and another 1995 (6) BCLR 665 (CC) at para 104.
limitations clause, and now provides that a limitation must be
reasonable and justifiable in an open and democratic society based on
human dignity, equality and freedom, taking into account all relevant
factors, including –
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

It seems likely, therefore, that the South African Courts will continue to deal with the
limitation of rights by balancing ends and means with due regard to the nature of the
right, the extent of the limitation, and the policy considerations being pursued – a
procedure which is possibly more consistent with the jurisprudence of continental
Constitutional courts than the Canadian Court.

This balancing act calls more overtly than the Canadian test does for the making of
substantive value judgments in the decision of cases. This is not an unusual task for
judges. Indeed, it is something that they are accustomed to doing, and in many instances
cannot avoid doing. An obvious example is the adjudication of disputes dealing with
administrative law. Lord Cooke, with his eye for simplicity, has suggested that “the
principles of administrative law can be stated in ten words ... [t]he administrator must act
fairly, reasonably and according to law.” The law may constitute an objective standard,

44 Section 36 of the new Constitution.
45 Section 36(1) of the new Constitution.
46 “Empowerment And Accountability: The Quest For Administrative Justice”, an unpublished paper
though this is not always so, but substantive value judgments are implicit in the
determination of what is fair and reasonable.

The minimum impairment test favoured by the Canadian Courts may be somewhat stricter
than the South African test. But conditions in Canada are vastly different from those that
exist in South Africa, where affirmative action and redistribution of land are imperatives,
where resources are strained and cost benefit calculations are likely to be more pressing
than they are in Canada. If outcomes are different this is more likely to be due to
differences in social, economic and political conditions than to the more subjective
approach adopted by the South African courts to the limitation of rights.

In most cases, however, the more subjective approach of the South African courts to the
limitation of rights will not lead to outcomes materially different to those which would
be reached according to the more objective Canadian approach. The Constitutional Court
has, for instance, declared the following provisions in Acts of parliament to be invalid:
the death sentence for murder;47 the administration of corporal punishment to juveniles
convicted of a criminal offence;48 the placing of the onus on an accused person to prove
that a confession made in writing to a magistrate was not freely and voluntarily made;49
a provision that answers given by a witness under a compulsion to answer questions at

---

47 S v Makwanyane and another 1995 (6) BCLR 665 (CC).
48 S v Williams and Others 1995 (7) BCLR 861 (CC).
49 S v Zuma and Two Others 1995 (4) BCLR 401 (CC).
an insolvency enquiry, can be used against the witness in a criminal prosecution;\textsuperscript{50} a provision requiring legal proceedings to be instituted against the Minister of Defense within six months of the cause of action having arisen\textsuperscript{51}, a provision making it an offence to be in possession of pornographic material under legislation found to be overbroad,\textsuperscript{52} a provision of the Insurance Act which, upon the insolvency of their husbands, deprived married women of benefits under insurance policies taken out by their husbands,\textsuperscript{53} a provision of the Child Care Act which permitted an unmarried mother to place her child in adoption without the knowledge or consent of the child’s father,\textsuperscript{54} a provision permitting a convicted prisoner serving a gaol sentence to appear before the High Court to argue his or her appeal in person, only if a judge has certified that there are reasonable grounds for an appeal,\textsuperscript{55} a presumption that a person found in possession of more than 115 gm of dagga (marijuana) is a dealer in dagga\textsuperscript{56}; and various other presumptions which placed an onus of proof on an accused person.\textsuperscript{57}

\begin{itemize}
\item \textit{Ferreira v Levin NO and Others} 1996 (1) BCLR 1 (CC).
\item \textit{Mohlomi v Minister of Defense} 1996 (12) BCLR 1559 (CC).
\item \textit{Case and Another v Minister of Safety and Security} 1996 (4) BCLR 581 (CC).
\item \textit{Brink v Kitshoff NO} 1996 (6) BCLR 752 (CC).
\item \textit{Fraser v The Children’s Court and Others} 1997 (2) BCLR 153 (CC).
\item \textit{S v Ntuli} 1996 (1) SA 1207 (CC).
\item \textit{S v Bhulwana} 1995 (12) BCLR 1579 (CC).
\item \textit{S v Mbatha: S v Prinsloo} 1996 (2) SA 464 (CC).
\end{itemize}
The Importance of History

What may be considered reasonable or necessary in South Africa cannot be divorced from our own history. The unequal distribution of resources, a consequence of history, is specifically identified in the Constitution as a relevant factor. The achievement of equality is specified as one of the founding values of the new Constitution\(^{58}\) and the equality clause in the bill of rights provides that

> equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.\(^{59}\)

In similar vein the bill of rights which authorises the expropriation of property by the state in the public interest provides that “the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources”.\(^{60}\)

And provision is made in the Constitution for the enactment of legislation under which persons or communities who were dispossessed of property, or whose tenure of land is legally insecure, as a result of past discriminatory laws or practices, will be entitled either to secure restitution of such land or security of tenure, or to be accorded equitable redress

---

\(^{58}\) Section 1 of the new Constitution.

\(^{59}\) Section 9(2) of the new Constitution. A similar, though differently worded provision, was contained in section 8(3) of the interim Constitution.

\(^{60}\) Section 25(4)(a) of the new Constitution. In this context property is not limited to land (section 25(4)(b)).
for such past discrimination.61

Another consequence of our history, the scarcity of resources, has been identified by the Constitutional Court as a factor relevant to the application of the Bill of Rights. In choosing to follow the more flexible approach favoured by some Canadian judges to the admissibility of derivative evidence, to the more rigid rule applied by the Courts in the USA, it has been said that

Although no statistical or other material was placed before us, it is quite apparent that the United States has vastly greater resources, in all respects and at all levels, than this country when it comes to the investigation and prosecution of crime, more particularly when regard is had to the particularly high crime rate ... prevailing in South Africa. This ... gives added weight to the considerations of efficiency, economy of time and the most prudent use of scarce resources, highlighted by La Forest J in Thomson Newspapers62 ... and supporting the adoption of a flexible approach in dealing with derivative evidence.63

The Constitutional Court has been functioning for little more than two years. The really difficult cases dealing with language and culture, property rights, the equality clause, and affirmative action, have not yet come before it.64 The Court is aware of the trust placed in it by the Constitution and is moving slowly to establish a framework for the new jurisprudence, trying as far as possible to say no more than is necessary for the decision

61 These provisions form part of the property clause which is section 25 of the new Constitution.

62 A decision of the Supreme Court of Canada reported in (1990) 48 CRR 1; the passage referred to from the judgment of La Forest J is at page 259.

63 Ferreira v Levin NO and Others 1996 (1) BCLR 1 (CC) at para 152.

64 A provincial Court has invalidated appointments made by the Minister of Justice pursuant to the Department's affirmative action policy, on the grounds that such appointments were contrary to the public service regulations and discriminated against whites.
of the case before it. It will come as no surprise to you to be told that there have been lapses from this, but on the whole the principle has been adhered to, at least in those judgments which have had the support of the majority of the court. Its purpose in moving slowly is to attempt to build a principled jurisprudence to provide the framework for the adjudication of Constitutional issues.

Establishing a Culture of Rights

In the light of our history the divisions and disparities that exist in our society, the role of the South African courts in upholding the Constitution and developing the law in conformity with its provisions is particularly sensitive. There are still vast disparities of wealth and power in South Africa and significant cultural, language and ethnic differences. There is an urgent need to reconstruct our society, to heal the divisions of the past, to eliminate racism, and to improve the quality of life of the vast majority of South Africans who were marginalised under apartheid. The judiciary has been given a central role in the shaping of the new society and the way in which they carry out their duties is likely to have important consequences for our emerging democracy. The epilogue to the interim Constitution described it as

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The government and parliament have shown respect for the provisions of the Constitution and the decisions of the courts. On every occasion on which the Constitutional Court has,
declared laws or executive action to be inconsistent with the Constitution and accordingly invalid, the decision has been accepted without hostile comment from the government or parliament. A significant instance of this commitment was the acceptance of the decision of the Constitutional Court declaring that the initial draft of the new Constitution, which was adopted by the Constitutional Assembly and submitted to the Constitutional Court for certification, did not comply in all respects with the Constitutional principles.65

The new constitution is now in place. The founding values of the Constitution, set out in section 1, are:

The Republic of South Africa is one, sovereign, democratic state founded on the following values;
(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.

Under the Constitution judges have an important role to play in developing human rights. There are, however, limits to what judges can do. The founding values, important as they are, surely have little meaning for those who are without work, homeless, and compelled to live in squalid conditions. There are millions of people in that condition in South Africa – far too many to permit us to say that we have succeeded in restoring human dignity and human rights to all South Africans. Our society remains an unequal society

65 See n 3 above. The response of government spokespersons to this decision was that it would enhance the legitimacy of the Constitution that would ultimately be adopted.
in which past distributions affect the day to day living conditions of a great majority of the people of the country. The challenge facing us as a nation is to develop our country and its human and material resources so that we may one day be able to say that the foundational values of our constitution have in fact been realised. We have started the process. But we have a long way to go.

A. Chaskalson
March 1997.