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# THE PROTECTION OF HUMAN RIGHTS BY THE JUDICIARY AND OTHER STRUCTURES IN SOUTH AFRICA

*Pius Nkonzo Langa\**

## I. INTRODUCTION

**D**ISTINGUISHED guests, ladies and gentlemen, my topic deals with the protection of human rights in South Africa by the judiciary as well as the other structures that have been established under the new Constitution. I will deal with this in a number of segments and will not go into too much detail. The story of South Africa's trials and tribulations, up to the post apartheid dispensation, is sufficiently well known. It should suffice, for today's purposes, to provide a broad outline and discuss a few salient points.

The starting point will be the nature of the South African state, because that provides the setting, the background, against which the judiciary and the other institutions function. I shall then deal with some of the changes which have come about as a result of the adoption of the new constitutional order: new institutions which support democracy and their role in the protection, promotion, and advancing of human rights; the courts in general; and the Constitutional Court in particular. Finally, I shall deal with some of the jurisprudence of the Constitutional Court and in that context say a word or two about the all important social and economic rights and our experience with regard to their implementation.

## II. THE NATURE OF THE SOUTH AFRICAN STATE

South Africa is now a democracy. For those who have never experienced other forms of governance, the impact, the significance, of this simple statement might be hard to appreciate. But we have been through fifty years of an oppressive system under apartheid, one of the basic features of which was the disenfranchisement and the disempowerment of the great majority of our population. For South Africans, therefore, and I think for mankind generally, the transformation of the South African state into a democracy is cause for celebration. It not only signalled a resounding rejection of a past which was characterized by gross human rights violations, perpetrated by the government and its multifarious

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agencies and institutions, it provided a new setting and an enabling climate for the recognition, protection and advancement of human rights.

Before 1994, precisely because of the undemocratic system of government, the climate was hostile to the notion that human rights should be recognized and protected. The main preoccupation of government was the maintenance of political power, exercised by a white minority and based on race, discrimination, and oppression. What was designed was almost limitless power. Thanks to the doctrine of parliamentary sovereignty that had been adopted, what that unrepresentative parliament decreed could not be challenged before the courts. The judiciary did not have the option to review and reverse unjust laws, rather the courts and all the other institutions had to implement and administer them. In the nature of things, because that power had not been consented to or mandated by the great majority of the people over which it was exercised, rule had to be by force; thus draconian laws and measures were unleashed on the people. There were forced removals of whole communities; detention without trial; solitary confinement; security measures and practices which made people disappear; and many were killed in police custody. There were measures which rendered the security forces, that is the police and the army, largely unaccountable and therefore able to commit the sort of atrocities which we now hear of in the Truth and Reconciliation process.

The doctrine of parliamentary sovereignty was abused by the enactment of laws that violated rights that were taken for granted elsewhere in the civilized world. The courts and other structures that were in existence then were simply powerless to check this abuse and these violations. But, of course, that period had to end.

### III. THE NEW CONSTITUTIONAL ORDER

The new order was officially installed in 1994 with the adoption of a new Constitution. Gone was parliamentary supremacy; the Constitution, with an entrenched Bill of Rights, became supreme. Any "law or conduct inconsistent with it is invalid" and liable to be struck down.<sup>1</sup> The new order is a constitutional democracy. The universal franchise that is a feature of it meant the conferment of political power on every citizen. New structures and new provisions were put in place to ensure that the guaranteed rights are indeed accessible to every person and to ensure that governance is open and accountable and is carried out in accordance with the new value system. For South Africans, therefore, it is a complete break with the past. The Bill of Rights, enshrining all the fundamental rights which had been violated in the past, became a central feature of the new order. The new era of constitutionalism requires that governance should be open and accountable.

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1. S. AFR. CONST., ch. 1, § 2.

#### IV. NEW STRUCTURES SUPPORTING DEMOCRACY

A number of new structures were established by the Constitution to strengthen democracy. We refer to them as Chapter 9 structures or institutions, because they appear, and their functions and powers are set out, in that chapter of the new Constitution. They are "independent and subject only to the Constitution and the law," and are required to be impartial and to "perform their functions without fear, favour or prejudice."<sup>2</sup> The Constitution further requires of other organs of state to "assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness."<sup>3</sup>

The institutions are:

(1) the Public Protector, whose function is to investigate any conduct in state affairs or in public administration in any sphere and to report on such conduct. The Public Protector must be accessible to the public to take their complaints;<sup>4</sup>

(2) the Human Rights Commission, whose duty it is to promote respect for human rights and to monitor and assess observance of human rights;<sup>5</sup>

(3) the Commission for Gender Equality, which aims to promote and protect gender equality and combats unfair discrimination based on gender;<sup>6</sup> and

(4) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,<sup>7</sup> the Auditor-General<sup>8</sup> and the Electoral Commission.<sup>9</sup>

#### V. THE COURTS

Apart from the structures referred to, we have the courts.<sup>10</sup> Before 1994, South Africa had one court structure. There was one Supreme Court of South Africa, comprised of a number of provincial and local divisions and which had as its apex the Appellate Division of the Supreme Court of South Africa (the AD), which was the final court of appeal. The seat of the AD was in Bloemfontein. The provincial divisions, apart from being courts of first instance in serious cases, also exercised appellate jurisdiction in matters from district magistrates and regional courts. This hierarchy did not change with the coming into force of the interim Constitution in 1994. The nomenclature, however, changed with the coming into force of the new Constitution in 1996. The respec-

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2. *Id.* ch. 9, § 181(2).

3. *Id.* § 181(3).

4. *Id.* § 182.

5. *Id.* § 184.

6. *See* S. AFR. CONST., ch. 9, § 187.

7. *See id.* § 185.

8. *See id.* § 188.

9. *See id.* § 190.

10. *See id.* ch. 8, §§ 166-173.

tive provincial and local divisions of the Supreme Court became High Courts, and the AD became the Supreme Court of Appeal.<sup>11</sup> The present position is that magistrates' courts "may not enquire into or rule on the constitutionality of any legislation or any conduct of the President."<sup>12</sup> High Courts and the Supreme Court of Appeal have constitutional jurisdiction, but the Constitutional Court must confirm any order of invalidity made by these courts before that order can have any force.<sup>13</sup>

## VI. THE CONSTITUTIONAL COURT

With the coming into force of the interim Constitution, a new court, with a new jurisdiction, was established. Apart from being the highest court in all constitutional matters,<sup>14</sup> the Constitutional Court stands as a strong symbol of the country's drastic break from the past. Just as the Constitutional Court of the Federal Republic of Germany was created in the aftermath of the sad experiences under Nazi Germany after the Second World War, our Constitutional Court is meant to safeguard this new Constitution and its Bill of Rights. Its jurisdiction is confined to constitutional matters only, "and issues connected with decisions on constitutional matters; and . . . [the court] makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."<sup>15</sup>

## VII. COMPOSITION OF THE CONSTITUTIONAL COURT

The Constitutional Court is composed of eleven judges who serve for a non-renewable term of twelve years or the age 70, whichever comes first.<sup>16</sup> There is a constitutional requirement that the justices must hear each case together and that the composition of the Court should be broadly representative of the South African population in race and gender.<sup>17</sup> The appointment procedure of the judges of the Court was a novel one. With regard to our history and that of the judiciary in South Africa during the apartheid years, the appointees to the Constitutional Court had to meet certain requirements. It was necessary that members of the Court should be able to engender confidence in the Constitutional Court and that they should be broadly acceptable to a sceptical public just emerging from a past of deep divisions, conflict, and gross violations of human rights. A Judicial Service Commission, itself a new and representative body, was established to conduct interviews with candidates for ap-

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11. See *id.* ch. 8, §§ 168-169. Section 168(3) of the Constitution provides that the Supreme Court of Appeal "is the highest court of appeal except in constitutional matters." S. AFR. CONST., ch. 8, § 168(3).

12. *Id.* § 170.

13. See *id.* § 167(5).

14. See *id.* § 167(3)(a).

15. See *id.* § 167(3).

16. See *id.* §§ 167(1), 176(1).

17. See S. AFR. CONST., ch. 8, §§ 167(2), 174(2).

pointment.<sup>18</sup> Eventually what emerged from the process was what, in South African terms, was a more or less balanced court in terms of race, gender and life experience. The first appointees to the Court included sitting Judges of other courts, practicing advocates and law professors.

### VIII. THE JURISDICTION OF THE CONSTITUTIONAL COURT

The profile of the Constitutional Court depends, in part, on how its judgments are received. Many in South Africa had seen and experienced the misuse of the legal system and the court structures by successive apartheid governments. When the new institution came into being, many felt that it should be given all the support possible. The Court is held in very high regard, and we find that where the Court has made a ruling, as it often does, which has far-reaching public consequences, those decisions are respected by everyone concerned.

Certain matters are within the exclusive jurisdiction of the Constitutional Court. Only the Constitutional Court may:

- (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
- (b) decide on the constitutionality of any parliamentary or provincial Bill . . . ;
- (c) decide applications by members of the National Assembly or of a provincial legislature for an order declaring all or part of an Act to be unconstitutional;
- (d) decide on the constitutionality of any amendment to the Constitution;
- (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
- (f) certify a provincial constitution . . . .<sup>19</sup>

Apart from the exclusive jurisdiction referred to above, the Court is also the court of final instance in all constitutional matters. We have dealt with a variety of matters in the exercise of that jurisdiction. The right to a fair trial<sup>20</sup> has accounted for a substantial number of cases before the Court. These come to the Court in a number of ways. We have dealt with reverse onus provisions and made the point that, as in all modern democratic countries, it is for the state to prove the guilt of the accused beyond a reasonable doubt, and not for the accused to prove his/her innocence.<sup>21</sup> In the so-called death penalty case,<sup>22</sup> perhaps the best publicized, we dealt with the right not to be subjected to cruel, inhuman and degrading punishment or treatment, the right to life and the right to

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18. *See id.* § 178.

19. *Id.* § 167(4); *see id.* ch. 4, § 122.

20. *See id.* ch. 2, § 35(3).

21. *See e.g.*, *S v. Bhulwana*; *S v. Gwadiiso* 1996 (1) SALR 388 (CC), 1995(12) BCLR 1579 (SA); *Scagell and Others v. Attorney-General, Western Cape and Others* 1997(2) SA 368 (CC), 1996(11) BCLR 1446 (SA).

22. *See e.g.*, *S v. Makwanyane and Another* 1995(3) SA 391 (SA); 1995(6) BCLR 665 (SA).

dignity. But there have been other cases involving a variety of laws, such as provisions dealing with pornography, free speech and so-on.<sup>23</sup> We have dealt with the right to legal representation,<sup>24</sup> and there have been interesting cases based on equality issues.<sup>25</sup> There were provisions involving gender discrimination, which, for example, placed a cap on what a widow could get by way of insurance payouts while the position with regard to a bereaved male spouse was not affected; provisions which affected claims for loss of support depending on the marriage regime the parties have entered into.<sup>26</sup> There have been claims based on gender or race discrimination by men as well.<sup>27</sup> Examples are numerous. All the cases proved to be interesting and difficult, and we have had to make difficult rulings. The Court has not been spared of its duty to make excruciatingly difficult and unpleasant decisions. The area of socio-economic rights is a case in point. There was the case of the hospital patient with very severe kidney failure, who required treatment with a dialysis machine to prolong his life, with no hope of recovery.<sup>28</sup> Hospital and state resources could only provide for patients who could recover. The Court, weighing the interest of the dying person against the wider interests of the community, was unable to come to Mr. Soobramoney's assistance because of the problem of scarce resources.<sup>29</sup> The debate and controversy that followed the Court's decision challenged ordinary people to look again at the practical problems concerning constitutionally-guaranteed socio-economic rights against the background of scarce resources.

In its role as the guardian of the Constitution and the Bill of Rights, the Court has been required to perform other constitutional functions, apart from resolving conventional constitutional disputes. The certification exercise is perhaps the best example of these, when the Court had to examine the text of the new Constitution minutely to determine whether or not it was consistent with the thirty-four principles which had been

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23. *See e.g.*, *Case and Another v. Minister of Safety and Security and Others*; *Curtis v Minister of Safety and Security and Others* 1996(3) SALR 617(CC), 1996(5) BCLR 609 (SA); *JT Publishing (Pty) Ltd and Another v. Minister of Safety and Security and Others* 1997(3) SALR 514 (CC); 1996(12) BCLR 1599 (SA).

24. *See S v. Vermaas*; *S v. Du Plessis* 1995(3) SALR 292 (CC), 1995(7) BCLR 851 (SA).

25. *See e.g.*, *Harksen v. Lane No. and Others* 1998(1) SALR 300 (CC); 1997(11) BCLR 1489 (SA); *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* 1999(1) SALR 6 (CC); 1998(12) BCLR 1517 (SA).

26. *See Brink v. Kitshoff No.* 1996(4) SALR 197 (CC), 1996(6) BCLR 752 (SA); *Amod v. Multilateral Motor Vehicle Accidents Fund* 1998(4) SALR 753 (CC), 1998(10) BCLR 1207 (SA).

27. *See President of the Republic of South Africa and Another v. Hugo* 1997(4) SALR 1 (CC), 1997(6) BCLR 708 (SA); *Pretoria City Council v. Walker* 1998(2) SA 363 (CC); 1998(3) BCLR 257 (CC).

28. *See Soobramoney v. Minister of Health, KwaZulu-Natal* 1998(1) SALR 765 (CC), 1997(12) BCLR 1696 (SA).

29. *See id.*

agreed upon.<sup>30</sup> The principles covered a wide range of issues, and the Court had to scrutinize the constitutional text to make sure that it had complied with each principle. In the event that the Court found that the text was not strictly in accordance with some of the principles and refused to certify it, it referred it back to the Constitutional Assembly for correction. It was only on the second attempt that the Court was able to certify that the constitutional text, as rectified and resubmitted, complied with the Constitutional Principles.<sup>31</sup> The certification process was a unique exercise, and, as in many other areas of our jurisprudence, the Court had to chart its own path without any precedent from anywhere in the world. As for the Constitutional Principles, they formed an important framework as guidelines on the form and content of the new constitutional text. For example, one such principle concerned with the Bill of Rights provided that the new Constitution must contain all universally accepted fundamental human rights.<sup>32</sup> This not only meant that a Bill of Rights had to be entrenched in the Constitution, it referred pertinently to the subject matter, the content, of the individual rights.

Other functions given to the Constitutional Court by the Constitution include the certification of provincial constitutions to ensure that each one is not in any way inconsistent with the national Constitution.<sup>33</sup> Certain provisions of the Constitution give the Court a measure of legislative and executive control. The President or a provincial premier may, before signing a Bill which has been passed by Parliament or a provincial legislature as the case may be, refer it to the Constitutional Court if he or she has reservations about the constitutionality of its provisions.<sup>34</sup> Similarly, members of the national and provincial parliament may apply for the referral of an Act to the Constitutional Court if they have doubts about the constitutionality of the Act's provision.<sup>35</sup> The Court also has exclusive jurisdiction when it comes to disputes between organs of state at each level of government.<sup>36</sup> A declaration that a law or any of its provisions is unconstitutional must be confirmed by the Constitutional Court before it

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30. See Ex Parte Chairperson of the Constitutional Assembly, *In re Certification of the Constitution of the Republic of South Africa*, 1996 1996(4) SALR 744 (CC), 1996(10) BCLR 1253 (SA); see also S. AFR. CONST. (Constitution Act 1993) Schedule 4.

31. See Ex Parte Chairperson of the National Assembly: *In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997(2) SALR 97 (CC), 1997(1) BCLR 1 (SA).

32. See S. AFR. CONST. (Constitution Act 1993) Schedule 4, Constitutional Principle II.

33. See Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature; *In re Certification of the Constitution of the Province of KwaZulu-Natal*, 1996 1996(4) SALR 1098 (CC), 1996(11) BCLR 1419 (SA); Ex Parte Speaker of the Western Cape Provincial Legislature; *In re Certification of the Constitution of the Western Cape*, 1997 1997(4) SALR 795 (CC); 1997(9) BCLR 1167 (SA); Speaker of the Western Cape Provincial Legislature; *In re Certification of the Amended Text of the Constitution of the Western Cape*, 1997 1998(1) SALR 655 (CC), 1997(12) BCLR 1653 (CC).

34. See S. AFR. CONST., ch. 4, § 79(A); ch. 6, § 121(2).

35. See *id.*, ch. 4, § 80(1); ch. 6, § 121(2).

36. See *id.*, ch. 8, § 167 (4)(a).

can be of any force.<sup>37</sup>

## IX. CONCLUSION

It should be obvious that although the Constitutional Court has an important and distinctive role in the development and maintenance of this emerging democracy, it alone can never achieve this. The biggest resource in South Africa and elsewhere is the vigilance of the people and their commitment to make the democracy work. All the structures required by the Constitution are presently in place. They are functioning more or less at optimum capacity. What will be important is their effectiveness in changing the lives of people. The test of our constitutional dispensation is the accessibility of all these rights and protections to the people who actually need them. That is why we believe that the people must take responsibility for the Constitution which has been created by them.

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37. *See id.* § 172(2).