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The Helen Suzman Memorial Lecture

2011

Reflections on the role and work
of the Constitutional Court



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Vision

Promoting liberal constitutional democracy in South Africa.

Mission

To create a platform for public debate and dialogue – through publications, roundtable discussions, conferences, and by developing a research profile through an internship programme – with the aim of enhancing public service delivery in all its constituent parts. The work of the Helen Suzman Foundation will be driven by the principles that informed Helen Suzman’s public life.

These principles are:

- Reasoned discourse;
- Fairness and equity;
- The protection of human rights.

The Foundation is not aligned to any political party and will actively work with a range of people and organisations to have a constructive influence on the country’s emerging democracy.

“I stand for simple justice, equal opportunity and human rights; the indispensable elements in a democratic society – and well worth fighting for.” — Helen Suzman

Photography: Caroline Suzman

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Certain public figures have recently made comments about the appropriateness of the Constitution as a framework for our democracy. Some have gone as far as to suggest that the judiciary, or at least some judges, are “counter-revolutionary” and, more recently, that South Africa is in danger of becoming a “judicial dictatorship”. Against this backdrop, Judge Kate O’Regan delivered the Helen Suzman Memorial Lecture in which she stressed the importance of the rule of law to a functioning democracy and highlighted the importance of an independent judiciary as the most effective way to limit the abuse of power. Central to these arguments is the doctrine of the separation of powers.

What follows is an edited version of Judge Kate O’Regan’s Helen Suzman Memorial Lecture. Ms O’Regan was a Judge of the Constitutional Court from 1994 – 2009. A full version of the lecture can be found at www.hsf.org.za

Francis Antonie
Director



A Forum for Reason: Reflections on the role and work of the Constitutional Court



Judge Kate O'Regan

The seriousness of purpose that underlay Helen Suzman's approach to her work was exemplary. It recognised that the work of governance and politics is a serious business which needs to be undertaken with vigour, dedication and integrity.

Comments by ruling party politicians have been critical of the role of the courts in our constitutional democracy. Two of the most important were made by the President. In July 2011, at the Access to Justice Conference, President Zuma stated that *"political disputes resulting from the exercise of powers that*

have been constitutionally conferred on the ruling party through a popular vote must not be subverted, simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel other arms of the State are avenues to help them co-govern the country. This interferes with the independence of the judiciary. Political battles must be fought on political platforms". In a speech to Parliament to bid farewell to Chief Justice Ngcobo and welcome Chief Justice Mogoeng, the President repeated this concern.

The two themes underlying the President's remarks are that the courts interfere with the power of government to "make policy", and that those who disagree with the ruling party use the courts to "co-govern" the country. The relationship between the judiciary, executive and legislature in a constitutional democracy is often tense, for the very reason that the relationship is structured to ensure that the power of each is checked by another. This is the "separation of powers", and it protects the individual from the abuse of power by the state. As the contours of the doctrine are uncertain, we should not immediately be alarmed over debates about the proper ambit of judicial power.



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The Constitution sets the parameters for the exercise of public and private power

The current nature of the South African state places the Constitutional Court as the final court of appeal in the interpretation or enforcement of constitutional provisions. The Bill of Rights includes more than traditionally recognised civil and political rights – it also seeks to give expression to environmental rights, just administrative action, access to information, and socio-economic rights. As such, any law or conduct inconsistent with the Constitution is invalid. Obligations imposed by the Constitution must

be fulfilled. The Constitution sets the parameters for the exercise of public and private power. Thus, the corollary of constitutional supremacy is judicial review which permits courts to determine which conduct is constitutional.

Logically, a court must declare law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency. Only the Constitutional Court is able to declare legislation and Presidential conduct invalid. This form of judicial review cannot be seen as thwarting or frustrating the democratic arms of government – instead it must be seen as holding those who exercise public power accountable to the people.



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Since its inception the Court has handed down 422 judgments. This is not a prodigious judicial output, but needs to be assessed on three considerations. The Court has eleven members - all sit in every case. This is valuable, but slows down the process of decision-making. A quorum is eight. In addition, the Court receives more applications than it enrolls for hearing by a ratio of more than 3:1. Each judge considers each application, unlike other appellate courts. Some of the issues determined have also been the most difficult considered by courts anywhere.

Amongst the difficult issues considered by the Court are:

- The abolition of the death penalty (*S v Makwanyane and Mchunu*). This case set the parameters, the function and the scope of the new Bill of Rights, which put South African law firmly beyond its oppressive and discriminatory past;
- *Alexkor Ltd and Another v Richtersveld Community and Others*, which drew the line under forced removals and discriminatory land dispossession;
- *The Government of the Republic of South Africa v Grootboom and The Minister of Health v Treatment Action Campaign* judgments which demonstrated the extent of legal intervention in relation to the state's socio-economic obligations.

These are just some examples of the Court's interpretation and protection of socio-economic rights, interpretation of the constitutional structure, and interpretation of other provisions of the Constitution.

In 147 cases the Court has been required to determine whether a provision in an Act is inconsistent with the Constitution. Ninety were found to be inconsistent. There have been thirteen successful challenges to provisions regulating "constitutional structure" – issues such as the powers of the President, Parliament, provincial and local government. The Court has only had to consider the constitutional validity of the conduct of the Office of the President seven times. Under President Zuma there has been one successful challenge - the purported extension of the term of Chief Justice Ngcobo.

... all policy must comply with the constitutional constraints of legality, rationality and compliance with the Bill of Rights.

The Bill of Rights stipulates that "the development and implementation of national policy" is a task for the executive. The Constitution does not define "policy". The Shorter Oxford English Dictionary defines policy as "a course of action adopted and pursued



by a government.” Different legal tools can be used to implement policy – legislation, regulations, executive instructions, or the conduct of officials. Each tool has different constitutional and legal implications. The Court does not prescribe to the Executive or Parliament which tools they should make use of to implement policy, but only that all policy must comply with the constitutional constraints of legality, rationality and compliance with the Bill of Rights.

... the principle of legality is based on the rule of law – a founding principle in our democracy.

LEGALITY

Where policy is pursued through “administrative action”, there are two additional requirements to be determined:

- What constitutes administrative action?
- What do procedural fairness and reasonableness require?

Government conduct must have a legal foundation in the Constitution or in legislation. Thus, the principle of legality is based on the rule of law – a founding principle in our democracy.

In *Justice Alliance of South Africa v President, RSA* the Court rejected section 8(1) of the Judges’ Remuneration and



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Conditions of Employment Act, 2001. This section purported to confer a power upon the President to request a Chief Justice, who is eligible for discharge, to continue to perform active service “for a period determined by the President”. The Court held that *“this kind of open-ended discretion may raise a reasonable apprehension that the independence of the Chief Justice, and by corollary the judiciary, may be undermined by external interference from the executive. The truth may be different, but it matters not. What matters is that the judiciary is seen to be free from external interference.”* Without an independent judiciary, government policy which may be detrimental to sections of society cannot be held accountable to a standard. Under these circumstances everyone is worse off.

RATIONALITY

Rationality requires that there be some link between the purpose of the action or legislation, and the terms of the legislation or character of the conduct. This is the “some rhyme or reason” rule – if there is some degree of rationality to what the legislature or executive seeks to do it will probably pass the rationality test.

In the *Pharmaceutical Manufacturers* case, new legislation was enacted regulating the manufacture, sale and possession of medicines. When it was brought into force, the regulations necessary to make the Act effective had not been created. Although the new Act repealed the old Act, the latter was virtually ineffective

without regulations. This defect was held *“explicable only on the grounds of error”*.

Only the Bill of Rights significantly constrains the government in making policy.

THE BILL OF RIGHTS

Only the Bill of Rights significantly constrains the government in making policy. Yet even the rights in the Bill are not absolute; they do not always take precedence over other concerns. Where important public interests require the limitation of rights, the Bill permits this.

Any challenge must address the following two questions:

- Does the legislation limit a right entrenched in the Bill and,
- Is the limitation “reasonable and justifiable” in an open and democratic society based on human dignity, equality and freedom?

This is a proportionality analysis. Here the government has the opportunity to set out its reasons for the limitation, and for the legitimacy of its purpose and method.

... our new order establishes a “culture of justification” in which ... every exercise of power is expected to be justified;



In Etienne Mureinik's celebrated formulation, our new order establishes a "culture of justification" in which "... every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion."

Section 2 of the Constitution states: "This constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Read together, it is clear that the government is obligated to justify its

exercise of public power and that citizens have the right to hold those in power accountable for their decisions.

The most difficult jurisprudential aspect of socio-economic rights is determining the extent of the positive obligation such rights impose upon government to act to achieve the right. The state must take reasonable legislative and other measures, within its available resources, progressively to achieve the realisation of these rights.

Overcoming this difficulty is highlighted in two cases:

- In the *Grootboom* case, where the Court held that the government's housing policy was in breach of



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section 26 of the Constitution, in that it failed to “*provide for any form of relief to those desperately in need of access to housing*”, and ordered the government to amend its programme;

- In the *Treatment Action Campaign* case, where the Court held that the policy that Nevirapine be administered to pregnant mothers living with HIV at only two clinics per province, was in breach of section 27 of the Constitution. The government’s positive obligation was to take reasonable steps, within its available resources, to progressively achieve the right of access to health care. The policy had to be expanded to all clinics that could administer Nevirapine.

Some may argue that it is precisely these

judgments by the Court which have undermined the government’s ability to govern and have allowed those who are not democratically elected, to co-govern through the courts.

Is this the case? Have the courts permitted “co-governance”?

Section 34 of the Constitution guarantees the right of access to courts when the applicant believes that policy adopted by government infringes rights. If the policy does not infringe rights, then litigation will fail; if the policy does, then an order of invalidity will be the result. The right to approach the courts is as much a constitutional right as are the powers vested in the President to govern. These are the only grounds for challenging government’s actions. They



“a jurisprudence of accountability” ... ensures that the responsibility for government remains the legislature and executive’s, but insists they account, if challenged, through the courts.

do not diminish government’s capacity to govern nor entitle citizens to co-govern.

South Africa remains a society deeply scarred by its history. There is a great burden on government, in particular, to address our historic legacy. Courts need to be modest about the judicial role in addressing this legacy. The

legislature is democratically elected, the vote is precious and the principle of democracy dear. Courts acknowledge this. South African courts have avoided the “jurisprudence of exasperation” - decisions that express judges’ exasperation with the state of affairs in the country.

Instead, we should insist on “a jurisprudence of accountability” that ensures that the responsibility for government remains the legislature and executive’s, but insists they account, if challenged, through the courts. Disagreement with court decisions must not deter the courts from performing their constitutional mandate, and Courts must carry out their constitutional role with integrity and with seriousness of purpose.

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