

FINDING THE CONSTITUTIONAL COURT'S PLACE IN SOUTH AFRICA'S DEMOCRACY: THE INTERACTION OF PRINCIPLE AND INSTITUTIONAL PRAGMATISM IN THE COURT'S DECISION MAKING

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1 Introduction

Ever since its establishment in 1995, the South African Constitutional Court has been called upon to address issues and to face challenges that would be considered extraordinary for any judiciary. From the task of certifying whether the Constitutional Assembly had remained faithful to the constitutional principles in the 1993 interim Constitution¹ to the ruling of a High Court accepting the allegation by the Judge President of the Western Cape High Court that the justices of the Constitutional Court had violated his rights by publicly accusing him of improperly attempting to influence the outcome of a case before them,² the Court has been repeatedly buffeted by the strong winds of political conflict. The Court has also faced direct challenges to its legitimacy, as was the case when the newly appointed justices were asked to recuse themselves from a case against President Nelson Mandela on the grounds that he had appointed them.³ At the same time, the Court has received positive global attention for its rights jurisprudence while facing domestic criticism for its unwillingness to

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¹ See *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); and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 2 SA 97 (CC).

² See *Mandlakayisa John Hlophe v Constitutional Court of South Africa & Others*, High Court of South Africa (Witwatersrand Local Division) Case 08/22932, 25 September 2008.

³ See *President of the Republic of South Africa v South African Rugby Football Union - Judgment on Recusal Application* 1999 4 SA 147 (CC).

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be more assertive – either in defining a minimum core in socio-economic rights cases,⁴ or by being more willing to institute either structural remedies,⁵ or making more determinative rights decisions, instead of using its ability to send issues back to the legislature for corrective action.⁶ While verbal attacks on the Court by political actors and attempts by the executive to assert greater control over the administration of justice have been publicly decried as a threat to judicial independence⁷ and largely warded off by the Court, the departure of the last justices of the founding generation and continuing political tension in the country – often played out in the courts – has led some commentators to fear that the Constitutional Court will fall short of its promise as a principled defender of the Constitution. By exploring the interaction, in the Court's decisions, between 'principled argument' and 'institutional pragmatism', this paper argues that, when considered within the broader context of apex courts in democratic societies, the story of the Constitutional Court is perhaps less dramatic. In managing this tension between legal principles and institutional pragmatism within its decisions the Court has thus far avoided the dangers posed by political 'lawfare',⁸ on the one hand, and the 'utopian' or 'principled' declaration of rights, on the other, and has instead sought to find its place as a constitutional court in a young and turbulent democracy.

Recently, there have been major studies published on the expansion of judicial power⁹ and the question of judicial independence in democratic societies.¹⁰ In my own work, I have been interested in the role the Constitutional Court played in enabling and

⁴ See D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007).

⁵ See K Roach & G Budlender, 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *South African Law Journal* 325.

⁶ See D Davis & M le Roux *Precedent and possibility: The (ab)use of law in South Africa* (2009) 182-183, contrasting these approaches to resolving the question of gay marriage.

⁷ P de Vos 'Key institutions affecting democracy in South Africa' in N Misra-Dexter & J February (eds) *Testing democracy: Which way is South Africa going?* (2010) 106-109.

⁸ I use 'lawfare' here as a reference to its use in 2001 by US Air Force Colonel Charles Dunlap, referring to the use of law - in the form of accusations of war crimes, etc – as an aspect of asymmetrical warfare; see C Dunlap 'Law and military interventions: Preserving humanitarian values in 21st century conflicts', paper prepared for the Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, Washington DC, 29 November 2001, rather than its use by John Comaroff to refer to the use of law by colonial authorities in Africa; see J Comaroff 'Colonialism, culture and the law: A foreword' (2001) 26 *Law and Social Inquiry* 305-314, although there is an obvious relationship between the two.

⁹ See R Hirschl *Towards juristocracy: the origins and consequences of the new constitutionalism* (2004); see also C Neal Tate & T Vallinder (eds) *The global expansion of judicial power* (1995).

¹⁰ See PH Russell & DM O'Brien *Judicial independence in the age of democracy: Critical perspectives from around the world* (2001).

securing the democratic transition from apartheid¹¹ and have recently focused on three different dimensions of the Constitutional Court's history and case load in order to better understand the evolution of the Constitutional Court and its place in the governance of the country. These three dimensions are (i) the sources of judicial authority; (ii) the practice of the judiciary in exercising this authority; and (iii) the challenges faced by the Court as it is confronted with increasingly difficult cases, rooted in seemingly intractable socio-economic and political conditions. I have used these three dimensions to explore the ways in which the Constitutional Court and its justices have entered into national political life, and discussed the difference their participation has made in the construction of a constitutional democracy in South Africa.¹² In this work, I have characterised the Court as having developed both a strategic mode of engagement with the political branches as well as a judicial pragmatism in navigating the difficult challenges posed by cases brought before it.

Historically, studies of courts and judges have focused on four broad substantive research questions: judicial selection and retention; access to courts; limitations on judicial power; and judicial decision making.¹³ In addition, more traditional legal scholarship has focused on the question of interpretation, and especially the role of judges and legal argumentation in exercising the power of 'judicial' or 'constitutional' review. While this branch of scholarship has produced valuable analyses of the Constitutional Court's decisions and challenged the Court when its decisions have not produced the clarity of principled justification upon which the legitimacy of its work depends within the legal community,¹⁴ there is little recognition of the institutional concerns that may be an animating factor for the Court.¹⁵ If traditionally there have been concerns about whether judges have, on the one hand, been 'strict and legalistic' or, on the other hand, too 'activist',¹⁶ the recent publication of Justice Albie Sachs's extraordinary reflections on judicial decision making, from the perspective of a recently retired member of the Constitutional Court, provides both insight into the role of the judge but also notes that, while he wished he 'could have spoken about the wonderful debates

¹¹ See H Klug *Constituting democracy* (2000).

¹² See H Klug 'Constitutional authority and judicial pragmatism: Politics and law in the evolution of South Africa's Constitutional Court' in G Silverstein *et al* (eds) *How courts evolve: Judicial roles in comparative perspective* (forthcoming). See, generally, H Klug *The Constitution of South Africa: A contextual analysis* (2010).

¹³ See L Epstein & J Knight 'Courts and judges' in A Sarat (ed) *The Blackwell companion to law and society* (2004) 170-194.

¹⁴ See, eg, S Woolman 'The amazing, vanishing Bill of Rights' (2007) 123 *South African Law Journal* 762.

¹⁵ See T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2008) 7 *International Journal of Constitutional Law* 106, identifying sources of legitimacy the Court should take into account.

¹⁶ See M Kirby *Judicial activism: Authority, principle and policy in judicial method: The Hamlyn Lectures* (2004).

we had around the conference table ... I could not violate the confidentiality which lies at the heart of our collegial enterprise'.¹⁷ It is the implicit reference in this statement to a joint enterprise, what I think of as an 'institutional enterprise', which the Court takes into account in making its decisions, that is the focus of this paper. Although I am certain that many of these debates among the justices involved issues of interpretation, it is also certain that the Court is concerned about its place as an institution within the constitutional and political system that has been evolving since the first democratic elections in 1994.

This paper tries to fill this gap by suggesting that, in addition to the dimensions of the Court's role I have previously explored, there is a key distinction that needs to be teased out, within the Court's decision-making process, between what might broadly be characterised as the 'internal' and 'external' dimensions of the Court's role as guardian of the Constitution. This internal/external distinction is implicit in legal reasoning and defines the 'internal structure of the legal system, and a theory of the relationship between its elements'.¹⁸ It achieves this by maintaining a distinction between legal rules, principles, concepts and decisions, which provide an internal consistency within the legal system, and ways of establishing consistency in the system's external relationships by ensuring that there is a reliable distinction between the legal and the non-legal (for example, by distinguishing legal rules from moral rules, judicial decisions from political decisions, and so on).¹⁹ While Cotterrell argues that the jurisprudence of both Hart and Dworkin implicitly rely on this internal/external distinction to distinguish between legal insiders and 'those who cannot or will not reason with rules', or between legal professionals who are participants in the interpretive exercise and outsiders, respectively, Cotterrell himself takes a broader approach to these dimensions.²⁰ For my purposes, I will argue that this distinction exists as well in the tension between legal principle and an institutional pragmatism within the Court's decisions and reflects, in part, the divide between an effort to maintain internal consistency within legal doctrine and the institutional place of the Constitutional Court in the constitutional and political system.

Another way to appreciate this particular lens through which to view the Court's decisions is to recall Bickel's description of what he termed the 'Lincolntian tension', described as the coexistence of

¹⁷ See A Sachs *The strange alchemy of life and law* (2009).

¹⁸ R Cotterrell *The politics of jurisprudence: A critical introduction to legal philosophy* (1989) 10.

¹⁹ Cotterrell (n 18 above) 9-11.

²⁰ Cotterrell (n 18 above) 11.

principle and expediency.²¹ While President Lincoln was prepared to live with the Missouri compromise, which accepted the continuation of slavery but denied its extension to other parts of the United States, he was prepared to go to war against the notion, endorsed by the Supreme Court of the United States in the *Dred Scott* case,²² that slavery was acceptable, as a matter of principle, within the constitutional system of the United States. For Lincoln, the existence of slavery in the Republic was a compromise, which was acceptable as a matter of expediency, only so long as it was understood that the institution was on a ‘course of ultimate extinction’.²³ Bickel argues that the United States Supreme Court manages this tension between principle and expediency, in circumstances in which it is called upon to either strike down or legitimate legislation based on principle, by adopting a third strategy, of doing neither. Instead, he argues, the Supreme Court has embraced a series of devices – whether jurisdictional or based on other grounds – to justify staying the Court’s hand. While the Constitutional Court, with its explicit duty to uphold the supremacy of the Constitution, has been less able or willing to avoid applying itself to difficult cases, I will argue that this institutional concern, to manage the tension between principle and expediency, in the way in which the Court formulates its understanding and application of the Constitution, may nevertheless be reflected in the Court’s jurisprudence. This then is not simply a question of ‘internal’ law or ‘external’ politics, but rather a balance between principle and institutional pragmatism within the Court’s own *Weltanschauung*.

While the ‘Lincolnian tension’ is one useful lens through which to understand a Court’s bifocal approach in difficult or politically charged cases, I believe a more focused analysis on the relationship or tension between an ‘internal’ perspective that seeks to enhance the legitimacy of legal argument in the eyes of legal experts, and an ‘external’ perspective that is concerned with a court’s institutional location *vis-à-vis* other constituencies, including competing political and constitutional institutions, needs to be pursued. To do this, I will explore the interaction between what I will term ‘principle’ and ‘institutional pragmatism’ as both an institutional necessity as well as a reflection of the Constitutional Court’s bifocal perspective of the ‘internal’ and ‘external’ dimensions of its work. If this is a useful analytical construct, it holds the promise of enabling us to explore the Court’s jurisprudence as a dynamic illustration of the Court’s role in

²¹ See A Bickel *The least dangerous branch: The Supreme Court at the Bar of Politics* (1986) 65-69. I want to thank my commentator, Conrado Hubner Mendes, for reminding me of this aspect of Bickel’s argument in the book, which is usually presented simply as a description of the counter-majoritarian dilemma.

²² See *Dred Scott v Sandford* 60 US 393 (1856).

²³ Bickel (n 21 above) 67.

our constitutional democracy and not simply as a series of cases addressing different rights or aspects of the Constitution. In developing this approach as a means to explore the Court's jurisprudence, it is necessary to understand that the Court's various roles are always evolving and that we will need to both identify particular strands or lines of argument and decisions within the Court's work to highlight these interactions, as well as appreciate the continuous change that marks the life of this extraordinary institution. Simultaneously, the Constitutional Court is building its own jurisprudence, a body of doctrine based on the cases that come before it, but which it does not freely choose while, at the same time, its primary decision makers are being periodically replaced as individuals – even as the institution is being constantly reshaped as a working entity adopting principled and strategic or 'institutionally pragmatic' responses to the world.

In practice, of course, these different dimensions and the various roles they enable or provoke are not distinct or separate from one another. At any moment, the Court is both tackling a particular set of cases, defined by a host of factors, mostly beyond the Court's control, as well as managing its own broader role in the polity with respect to other institutions and the public more generally. While much discussion in constitutional law focuses on the impact the evolution of judicial decisions have on particular constitutional issues or adopts a textual or normative evaluation and critique of judicial decision making, this paper will explore how the Court takes the opportunities offered in the cases that arise before it to shape some of the broader substantive issues long explored in socio-legal studies of courts and judges. How has the Constitutional Court sought to regulate the institutional concerns faced by the Court, such as the scope of constitutional jurisdiction, access to justice or the simple management of its docket? Has the Court continued to simply expand its definition of rights or have the problems of governmental capacity and the limits of resources forced the Court to reshape its approach to rights? Given the intensity of political and social conflict, both within the government and on the streets, how has the Court sought to mediate its commitment to democratic participation and the formal authority of democratic institutions? Understanding these aspects of the Court's jurisprudence provides us with a means to explore the specific interaction of the different roles the Court plays in relation to external conditions or influences and the internal evolution of the Court's jurisprudence, an interaction which we need to understand in order to comprehend more clearly the different dimensions that shape the Court's role in society.

Finally, do these different trends within the jurisprudence of the Court reveal anything about the broader theoretical question of the relationship between law and politics? As a methodological starting

point, this study takes seriously Ehrlich's admonition that we consider judicial decisions as an 'important source of knowledge of the living law',²⁴ and not simply as 'juristic literature which is to be examined not as the truth of the legal relations described therein ... but as to the correctness of the statutory interpretations and of the juristic constructions contained therein'.²⁵ Adopting this perspective, this paper approaches the Constitutional Court's 2009 decisions as a necessarily arbitrary and uncontrolled sample of the Court's work. The 2009 term provides, in other words, a circumscribed frame within which to explore both the internal life of the Court's reasoning as well as the external and institutional influences with which these decisions are infused. Each term, however, is also framed by the particular historical moment raising distinct issues that must be taken into account in exploring the interaction between 'principle' and 'institutional pragmatism'. In this way, the Constitutional Court is an institution clearly vested with the essentially political function of upholding a supreme constitution, while as an institution it must rely on the relative autonomy of legal norms and methods of legal reasoning to preserve its own unique role as a court of law, rather than simply becoming another arena of political contestation.

2 Of principle and institutional pragmatism: Developing a bifurcated understanding of the Court's jurisprudence

In order to explore these questions, it is important to identify both the issues over which the Court has some control and those over which it is powerless. Let us first focus on those elements over which the Court has little or no control. First, as an institution, the Constitutional Court has no formal authority over the processes of judicial selection and retention and, as the Court learned during the Judge Hlophe controversy,²⁶ the judges of the Constitutional Court may all too easily be drawn into political contestations in which their own role as a court of last resort may be threatened. This threat was formally side-stepped by the Judicial Service Commission's decision to terminate the proceedings in August 2009, but the easing of tensions seemed to come about as much by the natural transformation of the membership of the Constitutional Court, as judges came to the end of their terms and were replaced by new judges. This process included

²⁴ E Ehrlich *Fundamental principles of the sociology of law* (1962) 493.

²⁵ Ehrlich (n 24 above) 494.

²⁶ See Judicial Service Commission 'Complaints of judges of the Constitutional Court against Judge-President Hlophe and the counter-complaint against the judges of the Constitutional Court: Decision and reasons of the Judicial Service Commission' 28 August 2009. See, generally, H Klug *The Constitution of South Africa: A contextual analysis* (2010) 233-237.

the elevation of Justice Sandile Ngcobo to Chief Justice by President Jacob Zuma in 2009, which had the immediate effect of alleviating concerns that the ANC was intent on undermining the independence of the Constitutional Court, and also presaged a significant decline in the political attacks on the judiciary which characterised the early part of this period. Second, while limitations on the power of the Court are clearly outside of its own control, the relative power of the Court and the effectiveness of any attempts to contain its authority are clearly subject, in part, to the Court's own handling of its authority and the degree of legitimacy the Court enjoys both domestically and in the international arena.²⁷

Let us turn now to those aspects over which the Court enjoys greater power. If the Court has little power to affect the appointment of its judicial personnel and only limited ability to formally counter attempts to constrain its authority, it does enjoy formal control over its own jurisdiction and thus, in theory, over access to justice. This authority is, of course, constrained to the extent that the Constitutional Court is an apex institution. While it does have jurisdiction to hear direct applications and has been called upon to ensure access to justice through the provision of counsel to litigants who cannot afford to hire lawyers, it is hardly possible for the Court to ensure effective access to justice for all in a country with limited judicial and legal resources. It is from this very constrained institutional perspective of the power of the Constitutional Court that we might surmise that the area of greatest autonomy for the Court is in writing its own decisions and developing its jurisprudence. Even if the flow of cases and the arguments of counsel do in fact circumscribe, even in this context, the scope of the Court's role, there is little to constrain the judges in articulating their understandings of the cases before them and to develop the full scope of their jurisprudence. In fact, it is often assumed that the powerful rights jurisprudence that has flowed from the Constitutional Court since its inception is precisely a reflection of this freedom to uphold principle despite the grim realities of economic disparity and the wanton inhumanity that still impact post-apartheid society.

Given this description of the place of the Court as an institution, how do we begin to understand the relationship between what we may theoretically define as the 'principled' and 'institutionally pragmatic', or more generally describe as the 'internal' and

²⁷ See the debate over legislation for the administration of the courts and the changes in sec 13 of the draft Superior Courts Bill, shifting authority over the executive director and staff of the proposed Office of the Chief Justice from under the direction and control of the Minister of Justice to the Chief Justice. See Department of Justice and Constitutional Development, Annual Report 2009/2010, 26 sec 2.8.3.2.(v).

‘external’ dimensions of the Constitutional Court’s jurisprudence? On the one hand, the judgments of the Court share, with other courts around the world, the discipline and tradition of legal argumentation and, as is the case with most constitutional courts, a form of the common law method. This internal structure relies on the classic techniques of legal reasoning and authority in which precedent may be called upon, analogised to or distinguished, historical comparisons claimed or rejected, and the rationality of policies and behaviours evaluated and judged. It is within this realm that debates occur over the persuasiveness of the Court’s opinions, yet at the same time the judgments of the Constitutional Court are characterised as bold or pragmatic, as exhibiting a willingness to challenge the government or as executive-minded, revealing from this perspective a clearly ‘external’ or ‘institutional’ dimension. While this ‘external’ perspective, particularly as reflected in the outcome of cases, has often led to criticisms of the judges as being too activist or has led some observers – from the legal realists on – to focus on the backgrounds or personal philosophies of the judges, this paper explores the Court’s legal opinions within a pre-defined set of decisions as a way to focus on the interaction between the ‘internal’ and ‘external’ dimensions of the Court’s own decision making – hoping to develop a more theoretically satisfying understanding of the relationship between law and politics within the Constitutional Court’s jurisprudence.

Before embarking on this particular analytical journey, let me first distinguish my approach in this article from other understandings of the internal/external distinction in understanding the work of courts. While there is a wealth of literature on the relationship between law and politics, including interesting new efforts to build theoretical models to explain the relationship between doctrinal developments within law and the political constraints inherent in the external environment within which courts work,²⁸ my focus is on the tensions within the Constitutional Court’s own decision making as the justices engage in legal arguments that are torn between the framework of justifiable legal argumentation and the various institutional interests and concerns they see facing the Court. From this perspective then, the internal/external tension is one within the Court itself, as it manages its own role, rather than a tension between ‘internal’ legal principles and ‘external’ political constraints. I would not deny the significance of external political constraints, but in this project I am more concerned with the Court’s own vision of its place in South Africa’s new democracy and how this is managed through its

²⁸ See T Roux *The politics of principle: The first South African Constitutional Court 1995-2005* (forthcoming, Cambridge University Press, 2012), in which he develops a conceptual framework for assessing the Court’s performance in terms of the legal and political constraints on the Court; ch 2.

emphasis on different legal arguments. It is in this sense that I treat the Court's opinions as sociological artifacts, as suggested by Ehrlich, rather than simply the source of constitutional doctrine.²⁹ Instead of constructing or testing a generalisable model, my approach seeks a contextual understanding of the relationship between the structure of legal argument and institutional goals and concerns within the Court – as traced through the jurisprudence of the Court's 2009 term – with the goal of providing some additional insight into the Court's decision-making process.

It is useful, as a means to examine the relationship between the internal and external dimensions of the Court's jurisprudence, to first categorise cases decided in the Court's 2009 term into three distinct, if broad, groupings. The first group of cases concerns the most traditional of political rights, the right to vote, in a year in which the country went to the polls for the fourth time to elect its national government since achieving democracy in 1994. The stability of electoral outcomes, despite the challenge of COPE and other opposition parties, marks the country's unipolar democracy and stands in stark contrast to the second set of cases in which the Court was challenged to address the most contested and problematic aspect of governance and rights in post-apartheid South Africa – cases that reflect the intense contestation over essential resources, from housing and electricity to water, all elements of what is framed as 'delivery' – containing both the promise and frustrations of the new constitutional order. A core set of cases in this group are those in which people are challenging threats or acts of eviction, which simultaneously evokes the struggle against arbitrary displacement and loss of home that is so central to South Africa's historical memory, but also raises concerns about the implementation of the rule of law in which the claims of property are set squarely against the dignity of those who are facing displacement. The third group of cases is one that reveals most explicitly the institutional concerns of the Court as it seeks to manage its own role and to promote justice by broadening access and attempting to prod the government into greater responsiveness to its legal duties and the rule of law. These institutional concerns pervade many of the Court's other decisions as well and it is through an analysis of these institutional issues that this paper will attempt to draw out the interactions between the 'internal' and 'external' dimensions of the Courts' work and to demonstrate how the Constitutional Court is seeking to find its place in our young and turbulent democracy.

²⁹ See, generally, BZ Tamanaha 'A vision of socio-legal change: Rescuing Ehrlich from "living law"' (2011) 36 *Law and Social Inquiry* 297-318.

3 Elections and democratic participation

While many discussions of judicial or constitutional review are deeply concerned with the tension between the ideal of democratic representatives embodying the will of the people and the power of unelected judges to exercise a counter-majoritarian power to strike down decisions of the elected branches,³⁰ the embrace of constitutional supremacy in the text and founding provisions of the 1996 'final' Constitution has mediated this tension in South Africa.³¹ Yet, questions of democratic participation have become a major concern for the Constitutional Court, both substantively in its interpretation of the promise of democracy in the founding provisions of the Constitution,³² as well as in the context of actual elections where, despite the creation of an Electoral Court to manage conflicts over voting, the Constitutional Court is drawn into the political fray in each electoral season by individuals or participants seeking to secure the rights of their potential voters. These cases are thus both politically charged and urgent, since they seek to bring voters into the process so that they can participate in an election whose date is already determined.³³ This urgency and the location of these rights at the centre of the political process may be contrasted with the Court's more cautious handling of the more recent rights cases that lie outside of the classical realm of 'political rights', yet are fully recognised in the Court's jurisprudence.³⁴ It is this comparison that highlights both the Constitutional Court's institutional responsiveness to the needs of the democratic process as well as the growing complexity of the jurisprudence of rights the Court is now undertaking.

Although there was little doubt that the African National Congress (ANC) would win the April 2009 elections and that Jacob Zuma would be elected by Parliament to serve as President of the Republic, inevitably the electoral contest presented questions that the Constitutional Court could not avoid. In this election, there were three questions that came to the Court. The first two cases, in which judgment was delivered contemporaneously by the Constitutional

³⁰ See M Tushnet *The Constitution of the United States of America: A contextual analysis* (2009) 134-140.

³¹ See T Roux 'Democracy' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2006) 10-62 to 10-77.

³² See *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 5 SA 47; 2007 1 BCLR 47 (CC); and *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC).

³³ See *The AParty & Others v Minister for Home Affairs & Others* [2009] ZACC 4 para 5.

³⁴ See *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC); 2011 7 BCLR 651 (CC) and *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC); 2009 (11) BCLR 1105 (CC).

Court, were brought by individuals and parties claiming that eligible voters outside of South Africa should be given the ability to vote in the elections. While both cases questioned the exclusion of registered voters who are outside the country on election day, the applicants in the *AParty* case also claimed the right of eligible citizens, who are outside the country, to not only vote outside, but also to register to vote outside the country. The third case involved the exclusion of someone from the ANC's list of candidates because he was not registered to vote. While the factual basis of the exclusion was shown to be a mistake, the significance of the case lies in the preliminary argument that the Constitutional Court had no jurisdiction to hear the appeal, since the Electoral Act designates the Electoral Court as having 'final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review'.³⁵ Refusing to accept the ouster of its jurisdiction, the Constitutional Court, in a *per curium* opinion, argued that, while the Electoral Act clearly designated the Electoral Court as the court of last resort for all electoral matters, this ouster could only be constitutional if it was read as not applying 'where the dispute itself concerns a constitutional matter within the jurisdiction of this Court'.³⁶

The Constitutional Court's contemporaneous opinions in the *AParty* and *Richter* cases are excellent examples of the interaction between 'principle' and 'institutional pragmatism' or the 'internal' and 'external' dimensions of the Court's jurisprudence. In the *AParty* decision, Justice Ngcobo highlights the constitutional significance of voting rights in a democratic state, but also uses the factual context and the relationship between rights and duties of citizens to distinguish registered voters abroad from other South Africans who are overseas by arguing that citizens are 'equally subject to the duties and responsibilities of citizenship', thus shifting the burden to register to vote before leaving the country onto the claimants. In making this distinction, Justice Ngcobo is able to balance the importance the Court places on the foundational value of universal adult suffrage³⁷ with the more immediate concern of a looming election, Parliament's authority and duty to design the electoral system³⁸ and a 'reluctance to deal in undue haste with a matter of this sort as a court of first and last instance'.³⁹ Addressing this complex of factors, Justice Ngcobo effectively relies on an argument of judicial propriety, not to act in haste and, a broader jurisprudential

³⁵ Sec 96(1) Electoral Act 73 of 1998.

³⁶ *African National Congress v Chief Electoral Officer of the Independent Electoral Commission* [2009] ZACC 13 [8].

³⁷ *AParty* case (n 33 above).

³⁸ *AParty* case (n 33 above) para 6.

³⁹ *AParty* case (n 33 above) para 80.

claim, that it is better for cases to come up through the lower courts, since the decisions of the Constitutional Court are ‘greatly enriched by being able to draw on the considered opinion of other courts’,⁴⁰ to deny direct access. While the Court explicitly declined to make a decision on the constitutionality of the registration provisions challenged in the case, it did manage to (i) postpone a possible confrontation with the government over the scope of legislative power to design the electoral system;⁴¹ (ii) establish a fairly high standard for when it would be appropriate to grant direct access to the Constitutional Court; and (iii) use the facts of the case to argue that the outcome was essentially the consequence of the applicants’ own tardy behaviour since they had failed to fulfil their duty as citizens to make the appropriate arrangements to register to vote before departing the country and instead relied on a limited political process in an attempt to secure their rights.

If in *AParty* the Court emphasised the importance of the right to vote, yet declined to rule on the question of voter registration abroad, in *Richter* the Court embraced an existing regulation that provides for some classes of registered voters to use special votes if abroad on polling day and found that restricting the class of voters who may use this mechanism was a limitation on the right to vote that the government failed to justify. In her opinion for the Court, Justice O’Regan cites Constitutional Court precedent on the significance of the right to vote, noting ‘that each vote strengthens and invigorates our democracy’,⁴² and then argues that there is an ‘obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised’.⁴³ While Justice O’Regan highlights the significance and importance of citizens exercising their right to vote, she does not go as far as the Court did in *AParty* to define voting as a duty of citizenship. Instead, she creates a test that seeks to ‘determine whether the consequence of any of the challenged provisions is such that, were a voter to take reasonable steps to seek to exercise his or her right to vote, any of the provisions would prevent the voter from doing so’.⁴⁴ When she asks whether the government has justified this limitation, she simply observes that the government, in its submissions and arguments before the Court, did not actually address this issue since they remained fixated on the question of voter registration abroad. As a result, Justice O’Regan is able to conclude that the ‘government has not sought to point to any legitimate

⁴⁰ *AParty* case (n 33 above) para 56.

⁴¹ Ngcobo J acknowledges that the ‘key issue is the question of the validity of the electoral system - a matter that lies peculiarly with Parliament’s constitutional remit’. See *AParty* (n 33 above) para 80.

⁴² *Richter v Minister of Home Affairs & Others* [2009] ZACC 3 paras 52-53.

⁴³ *Richter* (n 42 above) para 54.

⁴⁴ *Richter* (n 42 above) para 58.

government purpose served by restricting the categories of registered voters who qualify for a special vote, and I can think of none.⁴⁵ When asked by the government to limit the remedy to reading in the applicants into the existing overseas voting exception, rather than declaring the regulation unconstitutional, Justice O'Regan switched away from the expansive mode of interpretation she applied in her analysis of the right to vote and instead argued that to do so would unduly strain the language of the regulation – it is simply unconstitutional.

In the context of voting rights, the Court has employed many of the mechanisms of restraint identified by Bickel to avoid direct confrontation with the political branches.⁴⁶ While the Court is careful to build a coherent common law type legal argument based on a 'principled' understanding of democracy embedded in the Constitution and the legally relevant facts of each of the voting rights cases it decided, its decisions also reflected the broader 'institutional pragmatism' of an apex court asked to define the legitimacy of an electoral contest. Instead of simply upholding the principle of a citizen's right to vote, the Court recognised the institutional limitations faced by the government in providing voting access to citizens abroad. The Court also refused, however, merely to include some categories of voters abroad within the existing exemptions, a solution offered as a remedy by the state. Striking down the relevant law as unconstitutional provided a 'principled' response, yet the Court's acceptance of the argument that citizens have a duty to register to vote before they travel allowed the Court to adopt an 'institutionally pragmatic' stance that no doubt deflected some of the political tensions generated by the Court's decision.

4 Judging delivery?

Delivery, or the failure to deliver social and economic resources, has become the dominant mantra of South African politics over the last decade. Despite 15 years of democracy, the legacies of apartheid, including poverty, unemployment, limited government capacity as well as criminal and domestic violence, remain an ever-present reality. In addition, the country has faced new challenges, including a devastating HIV/AIDS pandemic and increasing inequality.⁴⁷ At the local government level, this is reflected in extraordinary levels of inequality between and within municipalities,⁴⁸ producing an uneven

⁴⁵ *Richter* (n 42 above) para 78.

⁴⁶ Bickel (n 21 above) 111-198.

⁴⁷ See J Seekings & N Natrass *Class, race and inequality in South Africa* (2006).

⁴⁸ See N Seidman Makgetla 'Local government budgets and development: A tale of two towns' in HSRC *State of the nation: South Africa* (2007) 146-167.

landscape in which contestation over resources, unfulfilled expectations and governance failures are reflected in ongoing – and at times violent – service delivery and other protests. Local protests increased after the 2004 national elections, grew to a crescendo of around 6 000 in 2006,⁴⁹ and have continued sporadically since then. While these forms of public resistance are clear evidence of local anger and disenchantment with ineffective delivery or unpopular government decisions – such as the redrawing of municipal and provincial boundaries – the vast majority of municipalities have been engaged in a protracted process of transformation with decidedly mixed results. Analysts have identified three underlying problems that they argue are the main causes of public anger: ‘ineffectiveness in service delivery, the poor responsiveness of municipalities to citizen’s grievances, and the conspicuous consumption entailed by a culture of self-enrichment on the part of municipal councillors and staff’.⁵⁰ Tackling these issues and thus delivering the benefits of democracy are viewed by government and social movements as both addressing a pressing need as well as a constitutional imperative. At the same time, as Chanock concluded in his book *The making of South African legal culture*:

Law is seen as the means through which solutions to conflicts, which the political processes may have failed to compromise, are to be found. Yet a vigorous rights discourse is evidence of the prevalence of wrongs. And the idealising language of law conceals not only the ambitions of the state, but also its incapacities, which are the major threat to a ‘rule of law’.⁵¹

It is this dichotomy, the promise of rights and the limits of governance, which draws the Constitutional Court into the centre of struggles over ‘delivery’.

While the government has remained publicly committed to addressing these legacies, debates over government priorities and policies have led some activists to stress the Constitution’s provision of justiciable social and economic rights and the duty of government to promote and fulfil these rights. Increasingly, this has led activists to seek redress in the courts with the hope of redirecting government policies and resources. The most successful of the new social movements to emerge in the post-apartheid era have adopted a multi-layered strategy of appeals to government, public mobilisation and legal strategies. It is in this context that problems of ‘delivery’

⁴⁹ See S Letsholo ‘Democratic local government elections in South Africa: A critical review, EISA Occasional Paper 42, September 2006 6.

⁵⁰ D Atkinson ‘Taking to the streets: Has developmental local government failed in South Africa?’ in HSRC (n 48 above) 53.

⁵¹ M Chanock *The making of South African legal culture 1902-1936: Fear, favour and prejudice* (2001) 538.

become central to the work of the Constitutional Court as they are reflected in a multitude of legal challenges involving a range of government programmes and obligations, from the distribution of social grants and other government benefits, to challenges over the provision of housing and access to water. Significantly, the constitutional issues that have arisen in this arena have implicated both the negative and positive aspects of social and economic rights, demonstrating the intimate relationship between and even the entanglement of these different dimensions of constitutional rights. As a result, issues of 'delivery' and the scope and form of social and economic rights have become increasingly central to the jurisprudence of the Constitutional Court.

Responding to these cases, the Court has steadily built and refined its social and economic rights jurisprudence. It has also been called upon to decide cases that impact service delivery through claims that government action or inaction has interfered with property rights or has violated the obligation to perform its duties diligently and without delay. The developing 'jurisprudence of delivery' is most evident in a series of cases decided during the 2009 term, from *Machele*, *Joe Slovo* and *Abahlali base Mjondolo* involving evictions and housing to *Reflect All 1025*, *Nokotyana*, *Joseph* and *Mazibuko*⁵² that address broader issues of service delivery including: property rights, infrastructure planning, procedural fairness and access to electricity and water services. Significantly, these cases all reflect the struggles of urban dwellers, from high-rise apartment blocks to informal settlements, for access to essential social and economic resources, and reveal both the limited capacity of government to deliver the services it promises at each election cycle and the gross inequalities that continue to mark the lives of so many people in the country. The Constitutional Court's engagement with these cases presents an extraordinary window into the lives of these communities and has required the Court to confront both the limits of its very early social and economic rights jurisprudence – by looking beyond policy to the failure of implementation – while at the same time seeking to formulate a clearer understanding of the role of the Court in this arena.

The one set of cases within this 'delivery jurisprudence' that is of enormous importance to understanding the relationship of the negative and positive dimensions of social and economic rights in the

⁵² *Machele v Mailula* 2010 2 SA 257 (CC); 2009 8 BCLR 767 (CC), *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC); 2010 3 SA 454 (CC), *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* (CCT12/09) [2009] ZACC 31; 2010 2 BCLR 99 (CC), *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC); 2010 1 BCLR 61 (CC), *Nokotyana v Ekurhuleni Metropolitan Municipality* (CCT 31/09) [2009] ZACC 33; 2010 4 BCLR 312 (CC), *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC); 2010 4 SA 55 (CC), *Mazibuko* (n 34 above).

Constitution are those cases in which the right to housing and processes of eviction have become entangled. The first case decided in this series was *Machele*, which involved an appeal against a court-ordered eviction of the residents of Angus Mansions, a building owned initially by a company (Philani) established by the Gauteng Department of Housing as part of a scheme for the use of a national government subsidy to provide security of tenure to the residents. While the High Court decided the building had been transferred to a new owner and granted the eviction order at the request of the owner, the judge also granted leave for Philani to appeal the question of ownership and failed to consider either the constitutional rights to housing of the residents or the requirements of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (PIE) in making the decision to grant the eviction order. It seems that for Willis J, this was a simple case of private law in which the established owner had a right to occupy their property. The response of the Constitutional Court was to pounce on this failure, castigating the High Court's behaviour as 'inexcusable' for authorising 'the eviction without having regard for the provisions of PIE' and asserting the importance of PIE, 'given that there are still millions of people in our country without shelter or adequate housing and who are vulnerable to arbitrary evictions'.⁵³

While PIE is a statutory provision, Justice Skweyiya proceeds to imbue it with constitutional authority by drawing on the history of forced removals to declare that '[i]n my view, an eviction from one's home will always raise a constitutional matter'.⁵⁴ He also relies upon the Court's own precedent which held that PIE was adopted to ensure that evictions would take place in a manner consistent with the values of the new constitutional order⁵⁵ to declare that the

application of PIE is not discretionary. Courts must consider PIE in eviction cases. PIE was enacted by Parliament to ensure fairness in and legitimacy of eviction proceedings and to set out factors to be taken into account by a court when considering the grant of an eviction order. Given that evictions naturally entail conflicting constitutional rights, these factors are of great assistance to courts in reaching constitutionally appropriate decisions.⁵⁶

This decision gives all housing or residential evictions constitutional standing, but also draws on the legislative framework adopted by democratic institutions to shape the role of the courts and thus provide a 'democratic interpretation' of the constitutional

⁵³ *Machele* (n 52 above) para 16.

⁵⁴ *Machele* (n 52 above) para 26.

⁵⁵ See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC) para 11.

⁵⁶ *Machele* (n 52 above) para 15.

requirement that only courts may order evictions 'after considering all the relevant circumstances' and the prohibition against arbitrary evictions.⁵⁷ If in this case the Court was able to protect the residents from imminent eviction pending the appeal over the ownership of the building, the two subsequent cases reveal a much more complicated landscape in which the process of delivery and evictions is more intimately entangled.

In the first of these two cases, *Joe Slovo*, the Constitutional Court was confronted with a decision by the Western Cape High Court granting an eviction order that authorised the mass relocation of approximately 20 000 people. The order had been sought by and was granted to a housing company that was attempting to implement a government contract to 'facilitate the development there of better quality housing than the informal housing presently in use'.⁵⁸ From this perspective, the eviction process was merely a required step in the redevelopment of an informal settlement and the building of housing units as part of the process of delivery explicitly required by the government's housing policy. In the Constitutional Court, there was agreement among the judges that there were two legal issues to be addressed: first, whether the respondents had made a case for eviction in terms of the PIE Act;⁵⁹ and second, whether the respondents had acted reasonably within the meaning of section 26 of the Constitution in seeking the eviction of the applicants.⁶⁰ While the Court agreed in its fractured decision on the disposition of the legal issues, there was an important difference of opinion over the specific contours of the Court's right to housing jurisprudence.

Citing the Court's early social and economic rights decision in *Grootboom*, Justice Yacoob argued that the measures undertaken by the respondents – the public housing company and the city – in a context in which the evictions were deemed necessary to proceed with the housing development, were reasonable.⁶¹ The premise of Justice Yacoob's argument is that the obligation on the government is to have, in the language of *Grootboom*, a 'coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means'.⁶² His only acknowledgment of the evolution of the Constitutional Court's section 26 jurisprudence, however, is his assertion that in this case 'there has been reasonable engagement all the way',⁶³ thus

⁵⁷ Sec 26(3) Constitution.

⁵⁸ *Joe Slovo* (n 52 above) para 8.

⁵⁹ *Joe Slovo* (n 52 above) para 3.

⁶⁰ As above.

⁶¹ *Joe Slovo* (n 52 above) para 115.

⁶² *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46; 2000 11 BCLR 1169 para 41, cited by Yacoob J in *Joe Slovo* (n 52 above) para 115.

⁶³ *Joe Slovo* (n 52 above) para 117.

fulfilling the duty to consult first announced in *Grootboom* and developed in subsequent cases into a requirement that there be ‘meaningful engagement’⁶⁴ with the affected communities. This approach arguably reduces the engagement requirement – ‘to consult meaningfully with individuals and communities affected by housing development’⁶⁵ – under the circumstances of ‘delivery’, to a purely procedural requirement that the government should consult with the legal representatives of the affected community.⁶⁶

While the four other members of the Court who wrote separate judgments in *Joe Slovo* all supported Justice Yacoob’s final order, they differed from him in their conception of the importance of the fact that the residents of the Joe Slovo informal settlement had received certain facilities from the government before the question of redevelopment of the area arose. In contrast to Justice Yacoob’s formalistic interpretation of ‘unlawful occupation’, Deputy Chief Justice Moseneke adopts a purposive interpretation of ‘consent’ and embeds the idea of ‘unlawful occupation’ within the ‘dark history of spatial apartheid and forced removals from land’.⁶⁷ Emphasising the landlessness that is at the centre of the problem of ‘informal settlements’, Justice Moseneke states that, without the requirement that 70 per cent of the new housing go to existing or past residents of Joe Slovo, he would not have considered it just and equitable to grant the eviction order. In particular, the

eviction and relocation order [without this condition] would have made the residents of Joe Slovo sacrificial lambs to the grandiose national scheme to end informal settlements when the residents themselves stood to benefit nothing by way of permanent and adequate housing for themselves.⁶⁸

Justice Moseneke concludes that in cases where there is a long settled community, and especially if that community is on state land,

different and more stringent considerations may well apply given the obligations under section 26(2) of the Constitution. The state, alive to its onerous constitutional obligations to facilitate access to housing and to prevent and protect people from arbitrary eviction, cannot lightly escape these obligations by simply resorting to treating occupiers who have nowhere else to go as mere unlawful occupiers liable to eviction. Also, the longer the occupation upon state land, the greater the state’s

⁶⁴ See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); 2008 5 BCLR 475 (CC) paras 10-21; *Port Elizabeth Municipality* (n 55 above) paras 39 & 43-47.

⁶⁵ Section 2(1)(b) of the Housing Act 107 of 1997, cited by Yacoob J in *Joe Slovo* (n 52 above) para 164 n 18.

⁶⁶ *Joe Slovo* (n 52 above) para 117.

⁶⁷ *Joe Slovo* (n 52 above) para 147.

⁶⁸ *Joe Slovo* (n 52 above) para 138.

obligation to afford occupiers due and lawful processes consistent with constitutional protections on eviction and access to housing.⁶⁹

The four concurring opinions also seem to reject Justice Yacoob's purely procedural conception of 'engagement' and instead imply that the acceptance by the respondents, memorialised in the Court's order, that 70 per cent of the new housing would be made available to those who had, or will have to, leave the area, is indicative of effective engagement. The consultation requirement announced in *Grootboom*, and subsequently developed in other cases, is in this way linked to the specific needs and demands of the community, indicating not only that the government has 'consulted' but also that it has heard and responded reasonably to those it has engaged.

Justice Moseneke's concern that residents of informal settlements should not be 'sacrificial lambs to the grandiose national scheme to end informal settlements' and the entanglement of evictions and the delivery of housing became the core issue in the final evictions case of the 2009 term. In *Abahlali base Mjondolo*, the Court was confronted with a new statutory scheme, the KwaZulu-Natal Elimination and Prevention of the Re-Emergence of Slums Act, which both the majority decision and the dissent recognise as 'experimental pilot legislation which may be duplicated in other provinces if it is effective'.⁷⁰ Drawing a strained distinction between 'informal settlements' and 'slums', the legislation sought to empower the provincial MEC to compel municipalities and property owners 'to evict certain categories of unlawful occupier'⁷¹ in the name of effective housing delivery. The case also saw a further crystallisation of the different approaches of Justices Yacoob and Moseneke, with a clear indication that the majority of the Court have rejected the formalism inherent in Justice Yacoob's willingness to accept vague assurances in legislation that its goal is the delivery of decent housing when in substance it undermines constitutional guarantees and the protections given in the PIE Act. Unlike the divided opinion in *Joe Slovo*, the Court united in *Abahlali* to reject Justice Yacoob's defence of this Slums Act, which Deputy Chief Justice Moseneke explicitly contrasts with the 'dignified framework that has been developed for the eviction of unlawful occupiers' in the Constitution, the National Housing Act and the PIE Act. Finding section 16 of the Slums Act to be incapable 'of an interpretation that does not violate this framework',⁷² the majority reaffirms that the purpose of these provisions is to 'ensure that [unlawful occupiers'] housing rights are

⁶⁹ *Joe Slovo* (n 52 above) para 148.

⁷⁰ *Abahlali* (n 52 above) paras 16 & 126.

⁷¹ *Abahlali* (n 52 above) para 1.

⁷² *Abahlali* (n 52 above) para 122.

not violated without proper notice and consideration of other alternatives'.⁷³

The difference in interpretative approaches between Justice Yacoob and the majority in the *Abahlali* case provides an important lens through which to observe the interplay of the 'internal' and 'external' dimensions of the Court's jurisprudence. While Justice Yacoob focused on the formal statements in the provincial legislation claiming that there was no inconsistency between the coercive requirements of section 16 and fealty to the national housing laws, PIE and the Constitution, the majority of the Court refused to rely on the plain wording of the statute and instead took cognisance of the broader context in which provincial legislation was being used. In *Joe Slovo*, the majority was less willing to blindly accept that the goals of local authorities to redevelop informal settlements and 'deliver' housing should be assumed to be reasonable, especially when the question of eviction, which invokes a negative obligation against state action, becomes a central mechanism in the 'delivery' of the positive obligation to provide housing. In *Abahlali*, the Court is obviously concerned that a formalistic interpretation of the legislation would simply gloss over the allocation of coercive power to a government that seems increasingly willing to override local concerns in the name of delivery.

A purely doctrinal approach based upon the plain meaning of the words would seem to support Justice Yacoob's argument that the Court should assume the constitutionality of the provincial legislation, especially in a case of abstract review when the wording of the statute asserts that it should be interpreted in conformity with national law and the Constitution.⁷⁴ In fact, Justice Yacoob defends his argument for the constitutionality of the Slums Act arguing that the majority opinion does

not give full weight to (in fact it virtually ignores) the words 'in a manner provided for in section 4 or 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act' contained in section 16(1) as well as the obligation on the municipality to 'invoke the provisions of section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act' prescribed by section 16(2) of the Act.⁷⁵

Here Justice Yacoob is clearly calling for an 'internal' reading of the law and the Court's jurisprudence and criticises his colleagues for looking outside and beyond the words by quoting the statement on constitutional interpretation made by Acting Justice Kentridge in *S v*

⁷³ As above.

⁷⁴ *Abahlali* (n 52 above) para 43.

⁷⁵ *Abahlali* (n 52 above) para 61.

Zuma, the Constitutional Court's first reported case, reminding them that

[t]his Court has made it plain that 'if the language used by the lawgiver is ignored in favour of a general resort to "values", the result is not interpretation but divination'. It does not matter whether the words of a law are simply ignored or whether they are ignored in favour of a general resort to values. Words should not be ignored.⁷⁶

In contrast to this 'internal' orientation, the majority evoke an 'external' understanding by recognising the purpose of this legislation and highlighting its coercive form. Justice Moseneke argued that 'an appropriate construction is one that recognises the coercive import of section 16. This means that owners and municipalities must evict when told to do so by the MEC in a notice'.⁷⁷ These compulsory evictions also mean that section 16 does not in fact reflect the 'provisions of the national Housing Act and of the National Housing Code which stipulate that unlawful occupiers must be ejected from their homes only as a last resort'.⁷⁸ While concurrent provincial legislation does not need to be in conformity with national legislation, Justice Moseneke argues that the 'courts must give legislation a purposive and contextual interpretation' and must through their interpretation promote the 'spirit, purport and object of the Bill of Rights'.⁷⁹

Applying this approach requires a view of the Court's role that incorporates not only the internal language of the law, but also the consequences of the law in action so as to give real content to the notion that eviction be resorted to only as a last resort and that evictions only go forward after reasonable engagement with the community. The substantive consequences of this approach are evident in the emergence of the idea of engagement, which has been transformed from an initial commitment to consult to a prerequisite for any legal eviction, thus placing real constraints on the coercive power of the state. According to Justice Moseneke:

No evictions should occur until the results of the proper engagement process are known. Proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ*; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction.⁸⁰

⁷⁶ As above.

⁷⁷ *Abahlali* (n 52 above) para 111.

⁷⁸ *Abahlali* (n 52 above) para 113.

⁷⁹ *Abahlali* (n 52 above) para 119.

⁸⁰ *Abahlali* (n 52 above) para 114.

Significantly, the majority relies on the distinction between the ‘coercive import’ of section 16 and the ‘fact that the PIE Act does not compel any owners or municipality to evict unlawful occupiers’ to find this key element of the Slums Act unconstitutional. Here the Court is concerned more with the coercive power of the state and less with the impact their decision might have on resource allocation. In this sense, the case falls well within the realm of a defensible response to government decision-making, despite the consequences for the ‘delivery’ goals of local authorities and the national government.

If the Constitutional Court has continued to develop its housing jurisprudence, specifically addressing the entanglement of the positive and negative obligations that are implicit in the context of the delivery of adequate housing in informal settlements, it has also confronted the demand that the Court set minimum standards for the delivery of social and economic rights. This confrontation arose most dramatically in a case involving claims of rights to access water in which the lower courts – both the High Court and the Supreme Court of Appeal – ordered the delivery of specific amounts of water as the appropriate means of enforcing the right. Much to the disappointment of many activists, the Court, in a unanimous judgment written by Justice O’Regan, not only refused to uphold the lower courts’ determination of a minimum core as an aspect of the right to sufficient water, but instead ‘concluded that neither the Free Basic Water policy nor the introduction of pre-paid water meters in Phiri [Soweto] as a result of Operation Gcin’amanzi constitute a breach of section 27 of the Constitution’.⁸¹ In this case, the Court is unanimous, relying on the ‘text of the Constitution’ and ‘an understanding of the proper role of courts in our constitutional democracy’⁸² to conclude that, while social and economic rights contain both negative and positive dimensions, the difference between negative obligations that restrain government and the positive obligations requiring ‘delivery’ is quite distinct. While defining the realm of legal restraint seems to fit easier into the Court’s conception of its role, the enforcement of positive rights places courts, the decision argues, in a secondary role. On the one hand, the Court argues that ‘ordinarily it is inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right’,⁸³ while, on the other hand, the Court argues that ‘social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement’⁸⁴ of these rights.

⁸¹ *Mazibuko* (n 34 above) para 169.

⁸² *Mazibuko* (n 34 above) para 57.

⁸³ *Mazibuko* (n 34 above) para 61.

⁸⁴ *Mazibuko* (n 34 above) para 59.

It would be a mistake to conclude that on its face this opinion indicates that the Court is retreating from the struggle over 'delivery' or is simply overwhelmed by the complexity of 'polycentric' decision-making. While the Constitutional Court does indeed reverse the 'strong' decisions of the lower courts – by refusing to adopt a minimum core approach to the definition of positive obligations – it does, for the first time, lay out exactly what it sees as the role of the courts in upholding the positive obligations of the state to 'realise' social and economic rights and makes it clear that this is not simply an administrative law standard of reasonableness. Significantly, the Court's approach now ties together three strands of constitutional analysis that are all important for locating the role of the Court as much as providing a basis for the review of social and economic rights achievement. First, the Court makes it clear that it is the legislature and the executive who must define the manner in which these rights are delivered as 'it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subject to democratic popular choice'.⁸⁵ Second, the Court points to a combination of context and circumstances to highlight the variability of options and even the degree of positive obligation, arguing that the courts are 'ill-placed to make these assessments for both institutional and democratic reasons',⁸⁶ and to assert that the decisions of the Court in this realm – *Grootboom* and *TAC (No 2)* – demonstrate the 'court's institutional respect for the policy-making function of the two other arms of government'.⁸⁷ Finally, even as the Court asserts this classic separation of powers argument, it seeks to clarify its own role by defining the purpose of social and economic rights litigation concerning positive obligations as being to 'hold the democratic arms of government to account'.⁸⁸

But defining the role of the Court as holding the government to account for the substantive delivery of social and economic resources surely begs the question - what content do these rights have? Here the Court proceeds to explain how it sees its role in upholding the promise of the *Certification judgment's* holding that social and economic rights are indeed justiciable by proceeding to define the minimum level of enforcement required of the courts. First, 'if government takes no steps to realise the rights, the courts will require government to take steps'.⁸⁹ Second, if 'government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness'.⁹⁰ Third,

⁸⁵ *Mazibuko* (n 34 above) para 61.

⁸⁶ *Mazibuko* (n 34 above) para 62.

⁸⁷ *Mazibuko* (n 34 above) para 65.

⁸⁸ *Mazibuko* (n 34 above) para 160.

⁸⁹ *Mazibuko* (n 34 above) para 67.

⁹⁰ As above.

if ‘government adopts a policy with unreasonable limitations or exclusions ... the Court may order that those are removed’⁹¹ and, finally, ‘the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised’.⁹² While these requirements definitely go beyond the scope of a reasonableness review of government decisions and actions as required by administrative law and are clearly a crystallisation of the Constitutional Court’s prior experiences in *Grootboom* and *TAC (No 2)*, they also reflect the tension between an internal logic of jurisprudential development that was leading inexorably towards the conclusion that there must be some minimum content to these rights, and an external or sociological understanding of the place of the Court in the struggle over delivery in post-apartheid South Africa.

5 Institutional concerns and responses

The dynamic interrelationship between a ‘principled’ approach based on internal legal logic and an external sociological understanding of each case and the role of the Constitutional Court more generally – an understanding in other words that recognises the role of ‘institutional pragmatism’ – may also be explored through a review of the Court’s own institutional concerns and responses. It is in the responses to institutional questions: jurisdiction; direct access; requests for condonation; and the awarding of costs; as well as the way in which the Court explicitly sees litigation and its role, that it is possible to trace some of the contours of the relationship between the jurisprudence of the Court and its concern for finding its place within the political system. While these issues arise in many of the cases that come to the Constitutional Court, a review of the 2009 term demonstrates an interesting pattern of concerns and responses. First, the question of jurisdiction arises in a particularly interesting way, as both a question of whether there is a constitutional issue for the Court to decide and if so, when to decide and what consequences should flow from this decision. While in *Machele* the Court asserts that ‘an eviction from one’s home will always raise a constitutional matter’,⁹³ this does not resolve the question of whether an interim order may be appealed, especially if the parties have been given leave to appeal to the Supreme Court of Appeal. Here the Court decides that if there is a constitutional matter at issue and a threat of irreparable harm if the interim order to evict goes ahead, this leads to the principled conclusion that the ‘interim order’ must be subject to review as part of the constitutional challenge. Significantly, even though the Court

⁹¹ As above.

⁹² As above.

⁹³ *Machele* (n 52 above) para 26 .

halted the eviction, it did not resolve the underlying legal issue but rather let the substantive appeal go ahead in the Supreme Court of Appeal, reflecting an institutional pragmatism that seeks both to avoid competition and tension within the judicial branch of government, but also stresses the need in most cases for issues to be canvassed through the lower courts before reaching the highest level of constitutional appeal.

Constitutional jurisdiction is also at the centre of a number of cases in which the Court is responding either to attempts to oust the jurisdiction of the Court or to circumstances where the effect of jurisdictional rules, including statutes of limitation or the distribution of costs, have the effect of limiting access to justice. While the Constitutional Court relied on the explicit limitation of its jurisdiction to conduct an abstract review of a Bill only at the request of the President or a Provincial Premier to initially avoid a politically contentious case concerning the disbandment of the Scorpions,⁹⁴ it defended its constitutional jurisdiction in rejecting claims that the Electoral Court or the Labour Court have exclusive rights to decide cases within their jurisdiction, even if constitutional issues are at stake. If in *ANC v IEC* the Court accepted that the Electoral Court had final jurisdiction over electoral matters, it argued that this ouster of its jurisdiction could only be constitutional if it was read as not applying 'where the dispute itself concerns a constitutional matter within the jurisdiction'⁹⁵ of the Constitutional Court. In *Gcaba*, the Court rejected those High Court decisions that have 'endorsed the view that the Labour Court and High Court have concurrent jurisdiction to adjudicate on labour-related disputes', but again argued that exclusive jurisdiction over specific subject matter – whether elections or labour law – 'does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts'.⁹⁶

In contrast to *Gcaba*, where the Court united around the opinion of Justice Van der Westhuizen to clarify what was considered a contradictory set of cases involving the jurisdiction of the Labour Court, the Constitutional Court was roughly divided in its response to an important case that directly addressed the public-private distinction by asking whether parties who agree to private arbitration are waiving any constitutional rights they might have to a fair and

⁹⁴ See *Van Straaten v President of the Republic of South Africa* 2009 3 SA 457 (CC); 2009 5 BCLR 480 (CC) para 4.

⁹⁵ *African National Congress v Chief Electoral Officer of the Independent Electoral Commission* [2009] ZACC 13 [8].

⁹⁶ *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC); 2010 1 BCLR 35 (CC) para 73.

impartial hearing. In *Mphaphuli v Andrews*,⁹⁷ the Court was asked to review the refusal of the lower courts to consider an application to review and set aside a private arbitration award that was being enforced by the courts. Dividing three ways, the Court was left with no decision carrying a majority of the Court. Thus, while there was a decision in this case, it is much harder to argue that there is a clear opinion from the Court on the important issue of private arbitration that is increasingly serving as an alternative to the courts. While Acting Justice Kroon, joined by two colleagues, argued that the constitutional right to a fair hearing directly applies to private arbitrations, since it implicates the administration of justice, Justice O'Regan, joined by four colleagues, made a distinction between the direct application of the Constitution to private arbitrations, which she rejected, and the possible indirect application of the Constitution, which she did not address in this case. For Justice O'Regan, section 34 simply does not apply to private arbitrations since, by choosing private arbitration, the parties have not asserted their constitutional rights. Instead, Justice O'Regan argues that the courts should 'respect the decision to refer the dispute to private arbitration ... so long as it is voluntary',⁹⁸ and the fairness of a private arbitration should be judged by the statutes and common law under which private arbitrations are constituted.⁹⁹ The Constitution enters according to Justice O'Regan if the arbitration agreement contains 'a provision that is contrary to public policy in light of the values of the Constitution', in which case it would be void.¹⁰⁰

Preference for its appellate role over the exercise of its original jurisdiction through direct access is openly declared by the Court, which argues in the *AParty* case that 'the jurisprudence of this Court is greatly enriched by being able to draw on the considered opinion of other courts',¹⁰¹ yet, at the same time, the Court repeatedly granted direct access during the 2009 term in order to resolve issues it considered urgent. While the Court is able to use both denials of direct access and denials of permission to appeal as means to manage its docket, it is also careful to protect its jurisdictional prerogative and answered a resounding yes when the question arose over whether a court may 'raise, on its own, a constitutional issue'.¹⁰² While the Court acknowledged that litigation is based on an adversarial system,¹⁰³ Justice Ngcobo stresses that the courts have a duty to

⁹⁷ *Lufuno Mphaphuli & Associates v Nigel Athol Andrews and Bopanang Construction* CC [2009] ZACC 6 (CC).

⁹⁸ *Mphaphuli* (n 97 above) para 219.

⁹⁹ *Mphaphuli* (n 97 above) paras 221-222.

¹⁰⁰ *Mphaphuli* (n 97 above) para 220.

¹⁰¹ *AParty* (n 33 above) para 56.

¹⁰² *Director of Public Prosecutions (Transvaal) v Minister for Justice and Constitutional Development (DPP)* [2009] ZACC 8 paras 31 & 34.

¹⁰³ *DPP* (n 102 above) para 39.

uphold and protect the Constitution and to promote the Bill of Rights, and cannot enforce unconstitutional laws,¹⁰⁴ thus requiring courts to raise constitutional issues even if the parties do not. Given the facts of this case, addressing the role of child witnesses in criminal hearings involving child complainants in sexual offences cases, it is easy to see how concern over courts' duty to protect the rights of the child and an acknowledgment of the supremacy of the Constitution¹⁰⁵ leads to the conclusion that courts must be willing to intervene and raise constitutional questions when the litigants fail to do so. However, it is the limits of this duty that the Court also seeks to define in *DPP*, stating that a court may 'raise and decide a constitutional issue where (a) the constitutional question arises on the facts; and (b) a decision on the constitutional question is necessary for a proper determination of the case before it; or it is in the interests of justice to do so.'¹⁰⁶ This authority the Court emphasises is tied to the facts of the case and 'a court may not ordinarily raise and decide a constitutional issue, in abstract, which does not arise on the facts of the case in which the issue is sought to be raised.'¹⁰⁷ Justification for exercising the Court's authority in this case is further buttressed by a concern that refusal to address the constitutional issues raised by the High Court, even if it had made a mistake by considering those issues, would create a situation of legal uncertainty, which Justice Ngcobo describes as 'most undesirable'.¹⁰⁸

The Court also takes the opportunity in *DPP* to address what it considers to be the proper approach to statutory interpretation in terms of the injunction in s 39(2) of the Constitution for 'all courts to interpret legislation so as to 'promote the spirit, purport and objects of the Bill of Rights'.¹⁰⁹ Citing the Court's earlier decisions in *Hyundai*¹¹⁰ and *Daniels*,¹¹¹ Justice Ngcobo cautions that 'an interpretation that seeks to bring a provision within constitutional bounds should not be unduly strained' and that courts 'must prefer the interpretation of [a provision] that will bring it within constitutional bounds over those that do not'.¹¹² It is precisely this tension over strained interpretations, that divides the Court in *Abahlali*. Rejecting Justice Yacoob's suggestion that the 'facial

¹⁰⁴ *DPP* (n 102 above) para 36.

¹⁰⁵ As above.

¹⁰⁶ *DPP* (n 102 above) para 43.

¹⁰⁷ As above.

¹⁰⁸ *DPP* (n 102 above) para 64.

¹⁰⁹ *DPP* (n 102 above) para 81.

¹¹⁰ *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others (Hyundai)* [2000] ZACC 12; 2001 1 SA 545 (CC); 2000 10 BCLR 1079 (CC).

¹¹¹ *Daniels v Campbell & Others* [2004] ZACC 14; 2004 5 SA 331 (CC); 2004 7 BCLR 735 (CC).

¹¹² *DPP* (n 102 above) para 84.

invalidity' of section 16 of the Slums Act may be overcome by interpreting the statute to include 'at least six qualifications which he specifies in the judgment', Justice Moseneke for the majority argues that an 'intrusive interpretation of this magnitude offends requirements of the rule of law and of the separation of powers'.¹¹³ On the one hand, Justice Moseneke argues that as a founding value of the Constitution the rule of law 'requires that the law must, on its face, be clear and ascertainable', and that the 'over-expansive interpretation' of the statute 'is not only strained but offends ... [this] rule of law requirement'.¹¹⁴ On the other hand, Justice Moseneke also points to the idea of the separation of powers which is only implicit in the constitutional structure to argue that 'courts should not embark on an interpretative exercise which would in effect re-write the text' of legislation being interpreted to conform with the Constitution.¹¹⁵

6 Conclusion: Law and politics in the work of the Court

Each of these three broad areas of constitutional jurisprudence that run through the Court's 2009 term offers distinct views of the interaction between 'principle' and 'institutional pragmatism' within the work of the Constitutional Court. While these perspectives allow us to explore the tension between 'principle' and 'pragmatism' within the Court's decisions, they also enable us to construct a more complex vision of the 'internal/external' dichotomy within constitutional jurisprudence. If at one level of abstraction we may distinguish between an internal orientation that seeks to ensure that there is a consistency in the legal logic of the decisions of the Court that might be distinguished from the Court's concerns with the external world, at another level of abstraction, we may identify a related tension within both the 'internal' and 'external' dimensions of the Court's work. Even within the legal logic of the decisions there is a tension between 'principle' and 'institutional pragmatism' that is to a degree distinct from the tension between 'principle' and 'expediency' that characterises the Court's more overt relations with the external world, whether it is in the politics of judicial selection and administration or concerns for the legitimacy of the Court more broadly. If democratic theorists have at times been critical of the role of courts that serve as 'quasi-guardians' within the democratic process,¹¹⁶ closer attention to the tensions between principle and institutional pragmatism within judicial reasoning allows us to

¹¹³ *Abahlali* (n 52 above) para 123.

¹¹⁴ *Abahlali* (n 52 above) para 125.

¹¹⁵ As above.

¹¹⁶ See RA Dahl *Democracy and its critics* (1989) 187-191; F Michelman 'Law's republic' (1988) 97 *Yale Law Journal* 1493.

understand that the justices of the Court serve simultaneously as judges and guardians both – applying principle and protecting their institutional capacity within each decision – a task that integrates law and politics.

The Constitutional Court's role and the place of litigation in maintaining the constitutional order are matters of repeated discussion in the Court's jurisprudence, particularly in the realm of social and economic rights. Justice Sachs argued in *Joe Slovo* that the problem of the redevelopment of informal settlements 'is not a matter in which formal legal logic alone can solve the conundrum of how to do justice to the one side without imposing a measure of injustice on the other', and the task for the Court is 'not to seek an unattainable solution that is "correct", but to aim for an outcome that [is] in keeping with the objectives and spirit of the Constitution and relevant statutory provisions'. At a more general level of abstraction, Justice Sachs argued that

in a constitutionally-based, pluralistic society such as ours, the court's function will often move from simply determining the frontiers between 'right' and 'wrong', to holding the ring between 'right' and 'right' ... [and] the judiciary will be obliged to accept the intellectually more modest role of managing tensions between competing legitimate claims, in as balanced, fair and principled a manner as possible.

In *Mazibuko*, Justice O'Regan added a more specific task for the Court, arguing that the 'purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation'.¹¹⁷ To this end, Justice O'Regan stated that '[i]f the City had not continued to review and refine its Free Basic Water Policy after it was introduced in 2001, and had taken no steps to ensure that the poorest households were able to obtain an additional allocation', the Court may 'well have concluded that the policy was inflexible and therefore unreasonable'.¹¹⁸ Confronted with the argument that the city had only been responsive as a result of the threat of litigation, Justice O'Regan argues that, even if that is the case, 'it is not something to deplore ... [since] one of the key goals of the entrenchment of social and economic rights is to ensure that government is responsive and accountable to citizens through both the ballot box and litigation'. Focusing on litigation, Justice O'Regan concludes that the litigation would 'have attained at least some of what it sought to achieve' if government in response to litigation adopts measures that 'are reasonable, within the meaning of the Constitution'.¹¹⁹

¹¹⁷ *Mazibuko* (n 34 above) para 160.

¹¹⁸ *Mazibuko* (n 34 above) para 95.

¹¹⁹ *Mazibuko* (n 34 above) para 96.

Government's responsiveness to the courts and public claims of right are also matters of concern to the Constitutional Court, which repeatedly sought during the 2009 term to remind government and its lawyers of their duty to be responsive to litigants and to ensure that statutes of limitation and other barriers that inhibit access to justice or other means of making government transparent and accountable are not unduly burdensome. In this regard, the Court in *Brümmer*¹²⁰ struck down the 30-day limit on judicial appeals in the Promotion of Access to Information Act as a violation of the right to information; in *Strategic-Liquor*¹²¹ found that the failure of the Labour Court of Appeal to provide timely reasons for its decision, 'when requested for the appeal process', violated the employers' right of access to courts; in *Von Abo*¹²² found that the failure of the state to appeal the High Court decision means that the decision stands; and, finally, in *Van Straaten* held that the failure of the state to respond to a case before the Constitutional Court was 'regrettable' since the 'state has an obligation to respond to court processes'. Noting that '[t]his is not the first time that the state has not responded to a matter that is before this court', the Court, in its *per curiam* opinion, described the failure of the State Attorney's Office in Johannesburg as 'cause for grave concern in a country governed by the rule of law'.¹²³ In order to ensure that this is not repeated, the Court decided to request the Registrar of the Court to send

a copy of [the] judgment to the offices of the President and the Minister of Justice and Constitutional Development. We are confident that these offices will take appropriate steps to prevent a situation like this from occurring again.¹²⁴

For the Court, the greatest threat is that it is ignored. While *Van Straaten* illustrates that the Court has itself experienced the failures of governmental capacity so evident in many of the cases that it has been called upon to decide, there is no evidence to date that the government has actively attempted to circumvent or undermine the Court. Instead, the government has repeatedly declared its allegiance to the constitutional order and the role of the Constitutional Court within that order. While elements within the ruling party and its alliance partners have at times levelled public criticism at the Court, this has produced a healthy public response in defence of the Constitutional Court and the Constitution more generally. It is this

¹²⁰ *Brümmer v Minister for Social Development* 2009 6 SA 323 (CC); 2009 11 BCLR 1075 (CC).

¹²¹ *Strategic Liquor Services v Mvumbi No* 2010 2 SA 92 (CC); 2010 2 SA 92 (CC); 2009 (10) BCLR 1046 (CC).

¹²² *Von Abo v President of the Republic of South Africa* 2009 10 BCLR 1052 (CC); 2009 5 SA 345 (CC).

¹²³ *Van Straaten* (n 94 above) para 9.

¹²⁴ *Van Straaten* (n 94 above) para 10.

continuing and vociferous support for constitutional democracy that is providing the space for the Constitutional Court to find its place in South Africa's young democracy.