Speculum Juris

Special Issue on Rights-based Governance, Participatory Democracy and Accountability

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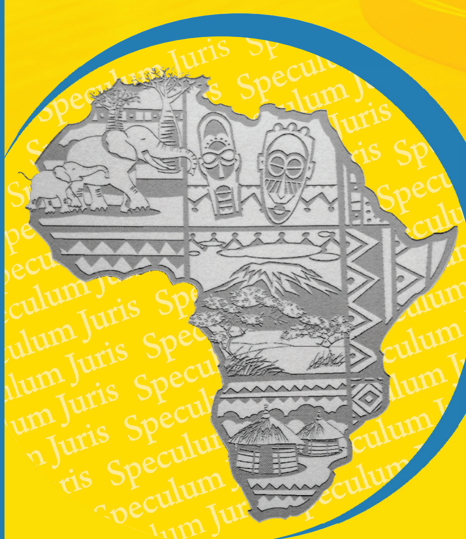
Vol 34 No 3 (2020)
Published 28 February 2021

ISSN 2523-2177



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Cite as: Theron "The Role of Constitutional Adjudication in the Promotion of Good Governance, Participatory Democracy and Accountability" 2020 (34) Spec Juris 8

The Role of Constitutional Adjudication in the Promotion of Good Governance, Participatory Democracy and Accountability*

Justice Leona Theron
South African Constitutional Court

I am going to speak largely on participatory democracy and good governance, which is the main theme of this conference. If ever we needed good governance in South Africa – it is now. Ke Nako, World Cup songs.

A man once remarked, "The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society." That man was Mr Thurgood Marshall, the first African American to be appointed to the US Supreme Court. It is likely that no one knew better than he did the need for laws, and for democracy itself, to evolve.

Today I will be addressing you on the role of constitutional adjudication in the promotion of good governance, participatory democracy and accountability. Constitutional adjudication is intertwined with our concept of democracy, particularly in South Africa where we have a constitutional democracy. For this reason, I see the role of constitutional adjudication in the way Thurgood Marshall saw all law, it is an evolving form which changes through the process of democracy. In a sense, this is also reflected in the idea that the Constitution is a living document that must be adapted as our democracy develops.

Across the world, constitutional adjudication evolved as a direct result of the prevalence of totalitarian systems, dictatorships and the systematic violation of human rights prior and during the Second World War.[1] These systems, and their consequences, created a demand for a mechanism to ensure that governments

1 Grimm "Constitutional adjudication and constitutional interpretation: between law and politics" 2011 *NUJS Law Review* 15.

* Presented at the Joint Conference, East London, University of Fort Hare, 15 October 2018.

were kept in check and, later that demand evolved to include the protection of human rights. In South Africa, the demand came slightly later than the rest of the world. It followed the dismantling of apartheid, the advent of democracy and the adoption of our Interim and Final Constitutions. At its heart, this transition, whether here in South Africa or across the world, places the law – in the form of a constitution – above politics[2] and compels the political arms of government to do the same. This was noted by the Chief Justice, Moegoeng in the Secret Ballot case where he stated:

> Central to the freedom "to follow the dictates of personal conscience" is the oath of office. Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme. Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail. This is so not only because they were elected through their parties to represent the people, but also to enable the people to govern through them, in terms of the Constitution.[3]

In 1995, around the time South Africa was in the process of its transition to democracy, the Israeli Supreme Court remarked that "judicial review is the soul of the constitution itself. ... Strip the constitution of judicial review and you have removed its very life"[4] This statement was made in a context where there was no explicit provision for judicial review in the Israeli Constitution and the Court, in this judgment, sought to vest itself with that power nonetheless. The situation in South Africa is different because the Constitution creates a specific role for the Courts within government.

In section 2, the Constitution declares itself the supreme law of the country and binding upon all. In various other sections, the Constitution vests different arms of government with distinct and separate kinds of authority. Parliament is vested with national legislative authority, the President is vested with the executive authority of the Republic and must exercise this authority with the other members of cabinet. Versions of this division occur at the provincial and municipal levels as well. The courts are vested with the judicial authority of the republic and are subject only to the Constitution and the law. Section 167(5) is of particular import, it gives the Constitutional Court the final say on whether an Act of Parliament, a provincial Act or conduct of the President is constitutional. The Constitutional Court is uniquely empowered to determine any matter concerning the interpretation, protection or enforcement of the Constitution.

The various roles of each arm of government can be explained along the following lines; the legislature creates the law, the executive implements the law and the courts adjudicate both the correctness of the law and its implementation.[5] The Bill of Rights goes further and imposes obligations on all arms of government in respect of rights owed to citizens. In certain circumstances, it compels the government to take steps to realise the right while in others it may prevent the government from interfering.[6] However, in and amongst the delegation of authority, there is an obligation on each of the arms of government to hold the other accountable; the system of checks and balances created by the doctrine of separation of powers.

The Constitutional Court has itself attempted outline the relationship between the rule of law and the other branches of government within the South African context. Froneman J concisely traversed what the rule of law requires of the Executive in *Albutt* when he stated:

> [U]nder the Constitution, the President must always act in accordance with the rule of law, even when exercising executive functions. . . . The impact and meaning of the rule of law [must be determined and understood] in the context of our recent history – the political strife

2 Grimm 2011 *NUJS* 16.
3 U*nited Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) at para 79.
4 *United Mizrahi Bank v. Migdal Cooperative Village* (CA 6821/93, 1908/94, 3363/94) at 225.
5 Okpaluba "Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa (Part 1)" (2003) 18 *SAPR/PL* 334-5.
6 Du Bois "Rights trumped? Balancing in Constitutional Adjudication" (2004) in *The Practice of Integrity* at 156.

that preceded and accompanied the birth of our democracy.[7]

Due to the nature of a courts' power to adjudicate, it is easy to believe that the primary or even sole responsibility of accountability lies with the judicial arm, but this squarely contradicts the very nature of a democracy where the ultimate authority of a government is derived from the will of the people. Unelected judges are given the power to, in certain instances, override the actions of government in a manner that could have political ramifications and impact the functioning of our democracy. This is the heart of the counter-majoritarian dilema. However, constitutional ideals are unlikely to be achieved where, in pure statistical majoritarianism, a ruling party or faction pursues its own interests and convictions freely and without limit.[8] This is the tension of a constitutional democracy such as ours. In this constitutional democracy the Courts must grapple with the relationship between the counter-majoritarian dilemma and their constitutional mandate.

There is no doubt that the constitutional mandate and authority given to South African courts is broad.[9] Our history of social, economic and racial inequality, entrenched and worsened by discriminatory laws necessitate this.[10] As the former Deputy Chief Justice Moseneke once remarked:

> [The law was an instrument] to kick down every door of oppression in my way and there were many doors. The legal profession made it hard for black attorneys to become advocates; the estate laws had one set of rules for black and another for white.[11]

The particular role of courts under the constitutional dispensation was discussed in *Pharmaceuticals Manufacturers Association* where it was stated:

> Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed."[12]

In this reversal it is tempting to construe the powers of judicial review and constitutional adjudication the Courts hold as absolute and complete over the other arms of government. This temptation can only grow in the public's perception as legal cases steeped in political controversy continue to come to and be determined by the Constitutional Court. In the last two years, the Constitutional Court has been compelled to rule on controversies like the Public Protector's report on Nkandla, whether the Speaker of the National Assembly had the power to allow a secret ballot and the rules concerning motions of No Confidence. The Court has, more recently, also decided cases impacting how certain public services function from the decision on Digital Migration of Television broadcasting, the administration of social grants and whether information concerning the funding of political parties should be disclosed. The judgments in these matters have seldom been easy and indeed, on occasion have split the Court, but the determination of the legal questions that arise in these cases is part of the Court's duty and constitutionally-granted mandate. The Chief Justice put it well when he stated:

> Our departure point is our Constitution. It is the rule of law, and that same Constitution vests the authority to interpret the Constitution and the law to resolve disputes, in the courts of this country. That position remains unchanged.[13]

7 *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) at para 88.

8 Du Bois 2004 164.

9 Okpaluba 2003 *SAPR/PL* 335.

10 *Ibid.*

11 https//www://city-press.news24.com/News/newsmaker-dikgang-moseneke-the-end-of-a-historic-era-20160522 (accessed 15-10-2018).

12 *Pharmaceuticals Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (3) BCLR 241 (CC) at para 45.

13 https//www://city-press.news24.com/News/Mogoeng-The-law-remains-the-final-word-20150830 (accessed 15-10-2018).

However, this should not be interpreted to mean that the courts are the sole mechanism for enforcing accountability and good governance in South Africa's democracy. The realisation of certain constitutional values specifically that of a vibrant and function democracy, can only be realised through public participation and an active citizenry. As Jafta J put it in *Mazibuko v Sisulu*:

> Political issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution.[14]

In a sense, it is often the Courts' limited function to ensure that the other arms of government provide the space and opportunity for citizens to participate in the decision-making processes and politics of the country without pronouncing on the substance of political issues.[15] Citizens must utilise the opportunity for public participation which the Constitution affords them and take an active role in the law making process. This participation does not begin and end with a vote once every four years, but should be the ongoing obligation of each citizen.

While the role of constitutional adjudication, and judicial review more generally, will ebb and flow with our democracy, it can never replace the impact of political will and participation of South Africa's citizenry. In some instances, the law leads and in others it follows. I conclude with further words from Mr Thurgood Marshall, which, 24 years into our democracy, are equally prophetic to South Africa's constitution.

> [In time] We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not.

14 *Mazibuko v Sisulu and Another* (CCT 115/12) [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 83.

15 *Doctors for Life International v Speaker of the National Assembly* (CCT12/05) [2006] ZACC 11.