
INTRODUCTION

In 1996, a decade ago, South Africa adopted a new constitution. The nation’s transition from racist authoritarian government to multi-racial democracy has been miraculous. South Africa’s Constitutional Court is an exemplar of the country’s new constitutional order. It recently moved from a colorless office building to an architecturally breathtaking and physically transparent new courthouse, built symbolically on the grounds of a former prison. The prison is believed to be the only one in the world that, at different times, held Mahatma Gandhi and Nelson Mandela.

While in a different prison, President Nelson Mandela participated in secret negotiations that eventually led to South Africa’s relatively peaceful revolution. He saw his white oppressors as full South Africans despite what they had done to him and the country. Mandela’s efforts, and those of many others, averted enormous bloodshed.

President Mandela’s multi-racialism was emblematic of much of the African National Congress’ history. The ANC’s 1955 Freedom Charter Preamble said, “That South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people…” The Charter contained many noble principles that found their place in the South African Constitution. Indeed noted American constitutional law scholar Cass Sunstein describes the South African national charter as “the most admirable constitution in the history of the world”.

On Tuesday February 14, 1995, President Mandela delivered a speech opening the new Constitutional Court in its original office building. He said that it was a “court on which hinges the future of our democracy” and that, “South Africa did not establish the court to be another rubber stamp.” And he joked that the last occasion he had been in a court was when he and his Rivonia treason trial co-defendants learned whether they would be sentenced to death.

President Mandela’s statements revealed that he was not going to follow the path of certain African leaders who had undermined constitutionalism and an independent judiciary. This problem is described in an article titled “Constitutions without Constitutionalism: Reflections on an African Political Paradox”, by H.W.O. Okoth-Ogendo. The author there explains how African leaders have utilized constitutional provisions to consolidate power rather than assent to checks and balances.

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4 This article can be found in: DOUGLAS GREENBERG, et.al., eds., *Constitutionalism and Democracy: Transitions in the Contemporary World*, 1993.
What I want to do in this paper is highlight several Constitutional Court cases and show how President Mandela helped ensure the Court’s effectiveness.

CERTIFICATION AND AN INDEPENDENT JUDICIARY

One of the Court’s most important decisions was Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment), 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253. There the Court invalidated the newly adopted Constitution passed by the elected Constitutional Assembly. The Court based its ruling on the South African Interim Constitution’s requirement that the final Constitution had to satisfy 34 Core Principle. These principles were adopted during multi-party negotiations. The Court ruled, for example, that the final Constitution did not fully “entrench” basic human rights, and that it did not delegate enough power to the provinces.

I am not aware of another new Constitutional Court that was immediately required to decide the legitimacy of the governmental structure. President Mandela, however, did not express frustration or hostility. Instead, he said the ruling would result in a constitution that strictly adheres to the 34 Core Principles.

Similarly when the Court ruled, in another case, that President Mandela exceeded his authority by attempting to amend a provincial government order, Mandela responded that “the judgment of the Constitutional Court confirms that our democracy is taking firm root and that nobody is above the law. This is something of which we should be proud and which the whole of our country must welcome.”

South African Constitutional Court Justice Albie Sachs has described President Mandela’s reaction as “the moment when South Africa’s new democracy was baptized in the font of constitutionalism.”

Perhaps Mandela’s acceptance of the rule of law, and of an independent judiciary, reflects that he was a lawyer before he became a revolutionary.

EXECUTIVE POWER

Justice Sachs was involved in drafting the Constitution. He described the problem of executive power in this passage:

It is both a virtue and a danger that our Constitution today is taken for granted, as if somehow it wrote itself. Yet every detail was labored over and thought through. Madiba was such a popular figure that some harboured the idea of creating a powerful Presidency invested with vast authority to promote the transformation that the country needed. Yet with the full concurrence of Madiba himself this temptation was resisted.

Specifically, Mandela supported creation of a South African Constitution that made Parliament, not the President, the central government authority. Indeed, the President was to be selected by and answerable to Parliament.

THE DEATH PENALTY

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9 ASMAL, et. al., eds., op.cit., p. 54.
The Mandela government refused to support the death penalty when the issue reached the nation’s highest court, despite a huge crime problem and strong public support for capital punishment. The Constitutional Court in *S. v Makwanyane*, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 then courageously acted against public opinion by ruling that the death penalty was cruel and inhumane. The Court explained that the apartheid authorities had employed brutal punishments including the politicized use of capital punishment. The Court said the new South Africa should follow the international trend favoring abolition, especially given that racism and bad legal counsel often infect the sentencing process. This decision is part of Mandela’s legacy, especially since he had faced a possible death sentence.

**GENDER DISCRIMINATION**

At his 1994 inauguration, President Mandela celebrated by pardoning all female prisoners who had committed non-violent offenses, and who had children under twelve. A non-violent male prisoner and widower, with a child under 12, then brought a lawsuit against Mandela for gender discrimination. To assist the defense, Mandela submitted an affidavit stating that “Having spent many years in prison myself, I am well aware of the hardship which flows from incarceration. I am also well aware that imprisonment inevitably has harsh consequences for the family of the prisoner.” He also took “[a]ccount...of the special role I believe that mothers play in the care and nurturing of younger children” in African society compared to fathers.

The Court upheld the pardons in *President of the Republic of South Africa v. Hugo*, 1997 (4) SA 1 (CC), 1997 (6) BCLR 708. The Court acknowledged the concern from a dissenting Justice that the pardon perpetuated gender stereotypes about women as mothers. But the Court explained that the pardon would improve the lives of both children and their mothers. The pardon was also fair because women suffered severe discrimination under apartheid. The Court further reasoned that President Mandela could not have pardoned many male prisoners without causing panic, given the country’s crime problem. This case reflected President Mandela’s pragmatic effort to achieve substantive equality for vulnerable groups, not mere formalistic equality.

It also reflected Mandela’s African values as Article 30 of the 1990 African Charter on the Rights and Welfare of the Child, entitled “Children of Imprisoned Mothers,” specifies that “[s]tates Parties to the present Charter shall undertake to provide special treatment to...mothers of infants and young children who have been accused or found guilty of infringing the penal law...”.

**NATIONAL RECONCILIATION**

The Truth and Reconciliation Commission (TRC) is one of South Africa’s most internationally noteworthy achievements. The TRC showed that a society can transition from oppression to democracy without revenge. The TRC embodied the attitudes of Nobel Peace Prize laureates such as Archbishop Desmond Tutu and President Mandela. In his 1994 inauguration speech, President Mandela emphasized that, “The time for the healing of the wounds has come. The moment to bridge the chasms that divide us has come. The time to build is upon us.” Asmal, et. al., eds. *Nelson Mandela* 69. Yet the TRC has always been controversial in South Africa. Its legality was challenged in *Azanian People’s Organization (AZAPO) v. President of the Republic of South Africa*, 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015.

There the Court had to decide whether the TRC’s amnesty provisions were consistent with the Constitution’s guarantee of access to the courts. Amnesty arguably precluded a full judicial remedy for victims. The Court, however, upheld the TRC and said that the Constitution’s authors could reasonably
conclude that South Africa should not punish those perpetrators who admitted what they did, and who were acting pursuant to official instructions. Moreover, the TRC was supposed to ensure victims received reparations.

SOCIO-ECONOMIC RIGHTS

Perhaps the Constitutional Court’s two most important decisions were issued after President Mandela left office. Yet they correspond to his philosophy that governments have positive obligations to their people. Indeed, President Mandela affirmed at a 1995 United Nations Summit that “basic rights, including a social clause in international arrangements, are desireable”\(^\text{10}\). More specifically, the South African Constitution includes socio-economic rights provisions. Critics such as the U.S. Supreme Court have argued that the judiciary is ill-equipped to implement positive rights.

However, in \textit{Republic of South Africa v. Grootboom}, 2000 (11) BCLR 1169, the Constitutional Court upheld the enforceability of the right to housing, and ordered the government to develop a plan to assist the homeless. And in \textit{Minister of Health v. Treatment Action Campaign}, 2002 (10) BCLR 1033, the Court enforced the right to health care by ordering the government to provide HIV-infected pregnant women with a drug that protects the fetus. These rulings show that the Court can play a crucial part implementing President Mandela’s transformative vision. Apartheid’s cruel impact demands no less.

CONCLUSION

Several Constitutional Court’s Justices have said that one of the core values animating the South African Constitution is “Ubuntu.” This South African term means social harmony and healing. President Mandela’s vision of South African constitutionalism embodies Ubuntu in his support for inclusivity, democracy, pragmatism\(^\text{11}\), and human rights.

\(^{10}\) ASMAL, et. al., \textit{op.cit}., p. 196.