

## **Conference: Celebrating and Interrogating 30 Years of the Constitutional Court's Jurisprudence**

The SAIFAC, a centre of the University of Johannesburg, the Konrad Adenauer Stiftung and the Constitutional Court Review journal are hosting a special conference this year reflecting on and interrogating 30 years of the South African Constitutional Court's jurisprudence.

On 5 April 1995, the Constitutional Court delivered its first judgment: *S v Zuma and Others* ([1995] ZACC 1). The *Zuma* Court found a provision of the Criminal Procedure Act (section 217(1)(b)(ii)) inconsistent with the Constitution. The Court held the provision's requirement that an accused person must prove a confession had not been elicited freely and voluntarily stood in direct conflict with various components of the right to a fair trial: the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. Shortly thereafter, on 6 June 1995, the Court released its judgment in *S v Makwanyane* ([1995] ZACC 3) and declared the death penalty to be unconstitutional.

These two early judgments articulated a number of paradigm-shifting commitments for South African law. First, the provisions of the Constitution reigned supreme over other forms of law and various kinds of conduct. Soon after, the Court would establish the proposition that all law draws its legitimacy and its force from the basic law. Secondly, the Court rearranged our understanding of the separation of powers between the coordinate branches of government. Parliament no longer possessed primacy of place. Sovereign power now had to be shared between the various branches of government, and the boundaries of these branches invariably overlapped. Thirdly, while overlap was an ineluctable consequence of the desiderata of a constitutional democracy, the courts had been clearly entrusted to determine whether law promulgated by the legislature or the executive (as well as conduct) breached specific provisions of the Constitution. Those early judgments employed a generous and purposive approach to constitutional interpretation, unbound by stagnant notions of originalism. Fourthly, the courts were

tasked with developing all law in light of the spirit, purport and objects of the Bill of Rights and the Founding Provisions of the Constitution: in short, the creation of an open and democratic based upon dignity, equality, freedom. The Court also, importantly, drew on the African value of ubuntu in determining what constituted the spirit, purport and objects of the Bill of Rights. Finally, these judgments reflect a volte face with the politics and the jurisprudence of apartheid South Africa: they indicated that every person must be treated as an end and never solely as a means; and that the polity is committed to the protection of the most vulnerable of its people – no matter the reason for their status.

Over the next 30 years, the Court built a body of jurisprudence that has been widely celebrated across the world. Given the deeply entrenched inequality created over centuries of discrimination, disenfranchisement, and dispossession of the vast majority of South Africans, it is hardly a surprise that the drafters way of saying – ‘never again’ – meant that the first right entrenched in the Constitution is equality and the second is dignity. The Court – employing both rights -- has laid out a detailed rubric for determining whether unfair discrimination has taken place and moved beyond formal equality to embrace a conception of substantive equality based upon the 15 enumerated – as well as other analogous – grounds. It has also developed a particularly rich and ground-breaking body of cases -- on the African continent – by first decriminalizing same-sex sexuality, then according equal benefit entitlements to same-sex couples and, finally , recognizing the right to same-sex marriage.

In relation to civil and political rights, the Court has built a jurisprudence that recognizes the value of freedom in a democracy but also places necessary constraints upon its exercise. With regard to freedom of speech, it has, for instance, staunchly defended the rights of individuals to parody the trademarks of large corporations. At the same time, it has given significant and fairly broad content to acts that fall within the parameters of illegal and unconstitutional hate speech. It has recognized that in a nascent heterogeneous democracy, still divided by race, ethnicity, religion, gender, disability and sexuality (to name but a few distinctions that bedevil South Africa), words, designed to diminish members of ‘other’ groups, do indeed matter.

Given that South Africa still remains deeply divided economically – with 25% of society living in extreme poverty (\$2/day), and another 25% living at the upper bound threshold of poverty (\$5/day) -- the Court has developed a jurisprudence around socio-economic rights that partially addresses some of the deeply entrenched features of a polity with the highest gini-coefficient in the world. However, the Court has found that the constitutional responsibility with respect to the provision of such basic goods as food, water, housing, social security and education is shared with the legislature and executive. That approach to shared responsibility has meant that the Court has trodden rather lightly when determining whether action by other state actors (and occasionally private actors) was 'reasonable' or not.

Just as the Constitution's 14 Chapters and 243 provisions are not solely devoted to the Bill of Rights (Chapter 2), the Court's jurisprudence has played an essential role in shaping the contours of the authority of national, provincial and local government as well as the execution of state power. With increasing levels of corruption within state institutions, the Court has developed a robust rule of law jurisprudence and intervened rather formidably and effectively in matters that reflect significant political dysfunction at the highest levels of government. In one matter, the Court held that the evisceration (and thus absence) of an independent anticorruption authority within the state violated its constitutional and international obligations. In another matter, it held that secret voting may be required in order to ensure that a vote of no confidence in the President is meaningful.

Perhaps most strikingly, the Court determined that the Public Protector, a unique fourth branch institution designed to support constitutional democracy, possessed binding remedial powers that could hold a President to account and monetarily liable for manifold breaches of his constitutional duties. Not long thereafter, and following a novel line of accountability judgments, the Court found that then President Zuma's failure to appear before the State Capture Commission – after receiving a court order to do so – constituted contempt of court that warranted a sentence of 15 months in prison. That sentence laid

the foundation for a subsequent holding, in April 2024, that Mr Zuma could not run for public office as a member of Parliament in the elections of 2024. By reinforcing the rule of law and standing firm upon the express meaning of various textual provisions of the Constitution, the Court has – within the parameters of its powers – enabled citizens to exercise the franchise in a manner that recognizes that no one, however powerful, is above the law.

In light of this remarkable (if contested) 30 years of jurisprudence, the conference has been scheduled to fall between the auspicious 30th anniversary of the *Zuma* judgment and Freedom Day: between 23 and 24 April 2025. After receiving great interest in the programme with many diverse abstracts submitted, a programme has been developed with a wide variety of themes covered relating to the Constitutional Court's jurisprudence of the past 30 years. The programme can be seen on the SAIFAC website.