# Introduction

On 11 October 1996, two and a half years after the end of apartheid, South Africa adopted a Constitution[1] that gave the eleven judges of that country's Constitutional Court the power to strike down any 'law or conduct' they found to be inconsistent with the new supreme law.[2] The circumstances leading up to this constitutional-design choice have been analysed from several different perspectives: by historians interested in the internal dynamics of the constitution-making process,[3] by transitional justice scholars interested in South Africa's attempt to deal with its authoritarian past,[4] and by comparative politics scholars interested in the causes and nature of South Africa's turn to liberal constitutionalism.[5] What has not been so extensively studied, however, is how it came about that a court that was given such a politically awkward and morally contested mandate – one that several mature democracies have been reluctant to give to their courts – was able to carry it out it so successfully. This book aims to fill that gap. In formal terms it is devoted to assessing the performance of the South African Constitutional Court in the first

[1] Constitution of the Republic of South Africa, 1996 ('the 1996 Constitution').
[2] 1996 Constitution, s 2.
[3] See Hassen Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa* (Cape Town: Oxford University Press, 1998); Richard Spitz with Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Oxford: Hart Publishing, 2000).
[4] See, for example, Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, 2001).
[5] The two leading accounts of the lessons to be drawn from the South African experience are Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press, 2000) and Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000* (Cambridge University Press, 2008). South Africa is one of four countries considered in Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004). There is also a short, but insightful, comparative treatment of South Africa in Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003) 55–7.

decade of its existence, from the establishment of the Court under the interim Constitution[6] on 14 February 1995 to the retirement of its first chief justice, Arthur Chaskalson, on 31 May 2005.[7] This time in the life of the Court is thought by many to have been exceptional. Of all the constitutional courts that were established after the end of the Cold War, only the Hungarian Constitutional Court under President László Sólyom comes close to it.[8] The period in question includes such celebrated decisions as *S* v. *Makwanyane*,[9] on the constitutionality of the death penalty, and the Court's two major social rights decisions, *Grootboom*[10] and *Treatment Action Campaign*.[11] Through these and other decisions, the Court built an unrivalled reputation in the comparative constitutional law community for technically accomplished and morally enlightened decision-making.[12] The judges were fêted on the

[6] Constitution of the Republic of South Africa, 1993 ('the interim Constitution'). Following Penelope Andrews and Stephen Ellmann (eds.), *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Johannesburg: Witwatersrand University Press, 2001), the 1996 Constitution and the interim Constitution will be collectively referred to as 'the post-apartheid Constitutions'.

[7] Arthur Chaskalson was appointed President of the Court under the interim Constitution in June 1994, but the Court was formally opened by President Nelson Mandela only on 14 February 1995, and heard its first case (*S* v. *Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC)) on that day. Its first judgment, *S* v. *Zuma and Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (SA)), was delivered on 5 April 1995. Chaskalson's title was changed to that of Chief Justice in November 2001. For simplicity's sake, this book refers throughout to 'Justice Chaskalson'.

[8] Other highly regarded constitutional courts to emerge after the end of the Cold War include the Polish, Israeli, South Korean and Colombian Constitutional Courts. On the record of the Hungarian Constitutional Court, see András Sajó, 'Reading the Invisible Constitution: Judicial Review in Hungary' (1995) 15 *Oxford Journal of Legal Studies* 253; Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, 2000) 75–108; László Sólyom and Georg Brunner (eds.), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor, MI: University of Michigan Press, 2000); Gábor Halmai, 'The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court' in Wojciech Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer Law International, 2002) 189–211.

[9] Above, note 7.

[10] *Government of the Republic of South Africa and Others* v. *Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

[11] *Minister of Health and Others* v. *Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC).

[12] The term 'comparative constitutional law community' will be made to do a lot of work in this study and thus it is worth defining up front. It is used here to mean the transnational community of legal academics, judges and practising lawyers interested in comparing the

international speaking circuit, their decisions cited by fellow judges in new and old democracies, and their jurisprudence written about and analysed in almost universally approving terms by legal academics. At the same time, the Court made remarkable strides in asserting its institutional role in South African politics. What began as a necessary device for the enforcement of a multiparty political pact had, by the time of Justice Chaskalson's departure from office, become a powerful political institution in its own right.

Such a degree of success was not inevitable and therefore demands explanation. In setting itself this task, this study begins by articulating more precisely what the criteria for assessing the performance of a constitutional court should be. Two main sets of criteria are explored: legal and political. These criteria suggest themselves because they capture the common-sense understanding of the Chaskalson Court's achievement. On the one hand, the Court was held in high regard by lawyers – its decisions described as 'extraordinary',[13] 'influential',[14] 'impressive',[15] and generally as having contributed to international understanding of the way a modern liberal-democratic constitution like the South African ought to be interpreted. On the other hand, the Court handed down a number of decisions in politically controversial cases, all of which were enforced, and none of which triggered a debilitating attack on the Court.

If this common-sense understanding of the Chaskalson Court's achievement is correct, the explanation for its success must lie, first, in providing a conceptually rich account of what it means to say that a constitutional court has been successful in legal and political terms and, secondly, in exploring how it came about that the Chaskalson Court was able to achieve success on these two fronts *at the same time*. What is remarkable about the Court's achievement, in other words, is not just that it handed down some very fine decisions, or that it managed to stay out of political trouble, but that it did each of these things without compromising its ability to do the other. The two phenomena, significant

way constitutional courts in different parts of the world go about their work with a view to understanding the general patterns, dynamics, argumentative tropes, constraints and transformative possibilities of this form of judicial practice.

[13] Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (New York, NY: Oxford University Press, 2001).

[14] Ronald Dworkin, 'Response to Overseas Commentators' (2003) 1 *International Journal of Constitutional Law* 651, 651.

[15] Mark S. Kende, 'The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism' (2002) 26 *Vermont Law Review* 753, 766.

enough in themselves, require an overarching explanation that satisfactorily accounts for their co-existence.

Chapter 1 draws on two bodies of literature in an initial attempt to answer this question: the relatively self-contained field of judicial politics and the broader and more permeable field of liberal legal theory. The first body of literature consists mainly of accounts of judicial behaviour in the United States, but also of some accounts of the performance of constitutional courts in new democracies. Of the three main approaches in this field, the so-called strategic approach and the historical-institutionalist approach are the ones most obviously relevant to this study. According to the first, constitutional judges are politically constrained actors who must sometimes forgo their policy preferences in order to take account of the capacity of other political actors to frustrate their decisions. From this perspective, what constitutional judges need to do is to calibrate their decisions to the policy preferences of these other political actors. In this way, constitutional judges can ensure that their decisions are enforced and that their court's institutional legitimacy is gradually enhanced. On the historical-institutionalist approach, by contrast, a constitutional court's success is associated with its capacity to differentiate itself as a legal actor. Only in this way may a court assert and defend its constitutionally assigned veto role in national politics.

When these two approaches are applied to South Africa, it is clear that the political dimension of the Chaskalson Court's achievement must be understood in quite specific terms. As studies by James Gibson and others have shown,[16] the Court never built much institutional legitimacy (in the sense of 'diffuse public support'), and thus the kind of success that the strategic approach posits for a well-functioning constitutional court eluded it. Nevertheless, measured by its capacity to decide politically controversial cases and have its decisions enforced, the Court was very effective. Indeed, the interesting thing about the Chaskalson Court is that it was able to play its constitutionally assigned veto role from the very outset, and that it continued to play this role without ever building much institutional legitimacy.

[16] See James L. Gibson and Gregory A. Caldeira, 'Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court' (2003) 65 *Journal of Politics* 1; James L. Gibson, 'The Evolving Legitimacy of the South African Constitutional Court' in François Du Bois and Antje Du Bois-Pedain (eds.), *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge University Press, 2008) 229.

The legal dimension of the Court's achievement must likewise be carefully defined. Although the performance of constitutional courts in legal terms inevitably depends on an evaluation of the Court's decision-making record, the Chaskalson Court's reputation in the comparative constitutional law community is a broader phenomenon than can be captured by any particular normative theory of judicial review. Rather than adopting one of the available theories, therefore, this study develops its own account of the Court's legal-professional reputation. According to this account, the Court's success in legal terms consisted in its ability to satisfy certain widely shared criteria associated with the liberal-legalist ideal of adjudication according to law. Since this aspect of the Court's achievement required it to eschew both ideological and result-oriented decision-making, its simultaneous success in legal and political terms is indeed intriguing and worthy of explanation. In particular, what is remarkable about the Court's achievement is the way in which it was able to give a principled account of the post-apartheid Constitutions without triggering a debilitating attack on its independence. Explaining this achievement requires an interdisciplinary approach that synthesises the insights and methods of judicial politics and liberal legal theory.

Chapter 2 takes the first step in this direction by developing a conceptual framework for assessing the performance of constitutional courts in interdisciplinary law/politics terms. The prerequisite for any such framework, the chapter argues, is a mediating concept that will enable us to examine how constitutional courts manage the sometimes contradictory legal and political influences impacting on them ('the law/politics tension'). Though not ideal in all respects, the best candidate for such a concept is the notion of constraint, which is used by both liberal legal theorists and judicial politics scholars to refer to a particular type of influence on judicial behaviour, disregard for which entails a loss in legal or political terms. Following the discussion in Chapter 1, the constraining influence of law is said to consist in a court's need, on pain of triggering a loss in legal legitimacy, to give principled answers to the questions it is asked to decide. The constraining influence of politics, in turn, is said to consist in the capacity and inclination of major political actors to thwart a court's commitment to principled decision-making by undermining its institutional independence.

By conceiving of the legal and political influences on constitutional adjudication as interacting forms of constraint in this way, it is possible to see how a court's response to one set of constraints may affect its ability to respond to the other. It is also possible to see that the precise

interaction between the legal and political constraints impacting on a court will depend on the relative strength of these constraints. Chapter 2 represents this idea in the form of a two-dimensional matrix, the four sectors of which correspond to four ideal types. The first of the four sectors thus represents the typical court in a mature constitutional democracy, which is insulated from political attack by a well-established political culture of respect for judicial independence, but which is at the same time constrained by a strong legal-professional attachment to the ideal of adjudication according to law. The other three sectors of the matrix and their corresponding ideal types are: the court in a new or recently redesigned constitutional democracy, where the legal profession maintains a strong attachment to the ideal of adjudication according to law, but where there is at the same time a weak political culture of respect for judicial independence; the court in a new or fragile constitutional democracy, with no political tradition of respect for judicial independence, and a weakly developed legal-professional attachment to the ideal of adjudication according to law; and the court in a new or fragile constitutional democracy, with no political tradition of respect for judicial independence and a weakly developed legal-professional attachment to the ideal of adjudication according to law, but where fortuitous political circumstances insulate the court from political attack.

When viewed in this way, the performance of a constitutional court may be seen to depend on (a) its position on the matrix at Time $T_1$ (the start of the analysis marked, say, by the appointment of a new chief justice) and (b) its capacity to manage the legal and political constraints impacting on it from Time $T_1$ to Time $T_2$ (the chief justice's retirement). Although factors beyond the court's control will undoubtedly affect its performance, there is reason to think that a constitutional court may be able, not only to manage the law/politics tension from within its particular sector of the matrix, but also to alter its position. In this sense, a successful constitutional court may be thought of as a court that is able to exploit aspects of its political and institutional environment to maintain its position in, or manoeuvre itself towards, the normatively preferred sector of the matrix.

Chapter 3 sets out the methodology used to operationalise this conceptual framework. Mapping the Chaskalson Court's starting position on the matrix at the commencement of its work, the chapter argues, requires a qualitative assessment of various factors, including both the impact of colonialism and apartheid on the development of South African legal-professional culture and the nature and extent of the new democratic

Government's commitment to judicial independence. This broad-brush analysis then needs to be complemented by an analysis of the legal and political constraints impacting on the Court in particular cases. By moving from the general to the particular in this way, any provisional conclusions arrived at after the first stage of the analysis may be tested and refined during the second stage.

Chapters 4 and 5 comprise the first part of this two-stage project. Chapter 4 explores the political context for judicial review from 1995 to 2005, breaking this period up into the Mandela-led racial reconciliation era and the ensuing period of technocratic centralism under President Thabo Mbeki. The nature of the African National Congress's commitment to judicial independence changed during this time, the chapter argues, from a commitment that was initially based on its strategic interest in the Court's capacity to consolidate the transition to democracy to one based on the Court's role in legitimating the ANC's social transformation project. As that project began to falter, and as the moderate wing of the ANC that had supported the constitutional settlement began to lose control of the party, the Court became increasingly exposed to political attack. By the time of Justice Chaskalson's retirement, the fragility of the ANC's support for the Court that was later to surface in the leadership battle between Mbeki and his successor as President, Jacob Zuma, was already apparent.

Turning to the legal constraints impacting on the Court, Chapter 5 assesses a range of factors relevant to the changing nature of South African legal-professional culture's attachment to the ideal of adjudication according to law, including the impact of colonialism and apartheid on the dominant mode of legal reasoning, the necessary and contingent changes to that dominant mode triggered by the adoption of the post-apartheid Constitutions, and the Chaskalson Court judges' legal-professional socialisation. In combination, the chapter argues, these factors suggest that the members of the Chaskalson Court shared a strong judicial ethic of decision-making according to law. At the same time, the transition to a system of rights-based judicial review meant that the Court had to adapt South Africa's fairly formalist mode of legal reasoning to the more substantive methods required to give effect to the post-apartheid Constitutions. This situation was both advantageous and disadvantageous to the Court. On the one hand, giving effect to the post-apartheid Constitutions' textual commitment to substantive legal reasoning provided the Court with clear opportunities to develop flexible, context-sensitive review standards. On the other, the Court could not entirely abandon, at least not immediately, South

African legal-professional culture's attachment to reasoning according to authoritative rules. Understanding the way the Court mediated these competing concerns forms a key part of the overall explanation for its achievement.

In light of these considerations, the conclusion drawn at the end of Chapter 5 is that, for most of the period covered in this study, the Chaskalson Court was relatively strongly constrained by both law and politics. Although initially quite well insulated from the effects of its low public support by the ANC's commitment to judicial independence, the Court became progressively more exposed to political attack as Chaskalson's term as Chief Justice progressed, certainly when compared to courts in mature constitutional democracies. At the same time, a shared judicial ethic of decision-making according to law, supported by a strong legal-professional attachment to the separation of law and politics, exerted a powerful influence on the Court: there was a real sense in which case outcomes, though not absolutely determined by law, needed to be justified by principled reasons that were both internally consistent and also faithful to the text and moral commitments of the post-apartheid Constitutions. The fact that the Court was doubly constrained in this way explains why there was such a degree of international interest in its work and also why the Court's apparent success in negotiating the competing legal and political constraints impacting on it was met with such acclaim.

The remaining chapters examine the Court's decision-making record. Drawing on the earlier theoretical discussion, these chapters deploy the notion of an 'adjudicative strategy' as the main heuristic device for understanding what the Court did. As used here, the term refers to the Court's development of a series of doctrines that responded, on the one hand, to the relatively strong pressure exerted by South African legal-professional culture to decide cases in a principled way and, on the other, to the need to avoid a debilitating attack on its independence.

Chapter 6 begins the analysis by exploring the Chaskalson Court's approach in three cases in which the post-apartheid Constitutions' moral values ran counter to positive morality: *S* v. *Makwanyane*[17] (on the constitutionality of the death penalty), *Bhe*[18] (on the compatibility of the customary law principle of male primogeniture with the right to

[17] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).
[18] *Bhe* v. *Magistrate Khayelitsha; Shibi* v. *Sithole; South African Human Rights Commission* v. *President of the RSA* 2005 (1) SA 563 (CC), 2005 (1) BCLR 1 (CC).

equality), and *Fourie*[19] (on same-sex marriage). In all of these cases, the Court was faced with the same basic difficulty: how to enforce the Constitution's moral values against countervailing social values without alienating a significant section of the South African population. On the one hand, close examination of the politics of these cases reveals that this difficulty was not as intractable as it first appeared. Given the ANC's political dominance, the Court was able to exploit differences between the party leadership and the ANC's mass political support base to hand down legally plausible and, in some cases, highly persuasive decisions. On the other hand, the cases illustrate the Court's sensitivity to the long-run consequences of the divergence between the post-apartheid Constitutions' moral vision and positive morality, and therefore to the need to persuade the South African public of the appropriateness of its decisions. The Court attempted to do this, the chapter argues, through a distinctive adjudicative strategy that saw it vindicating the Constitution's moral values, not through an appeal to the framers' intentions, or to an overarching political theory, but by depicting the post-apartheid Constitutions' moral values as the embodiment of South Africans' higher moral aspirations.

Chapter 7, on the Court's social rights jurisprudence, is in many ways the pivotal chapter in the book since it is this aspect of the Court's record that is most contested in the legal-academic literature. By framing the central question as being about the Court's capacity to manage the competing demands of law and politics, the chapter takes issue with those scholars who argue that the Court should have given greater normative content to social rights. Such arguments – while reminding us of what was lost as a matter of principle in cases like *Grootboom*[20] and *Treatment Action Campaign*[21] – do not present a realistic picture of the political constraints under which the Court operated. When those constraints are taken into account, the adoption of the reasonableness review standard emerges as a largely successful strategy on the part of the Court to assert an institutionally sustainable role for itself.

[19] *Minister of Home Affairs and Another* v. *Fourie and Another* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).
[20] *Government of the Republic of South Africa* v. *Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).
[21] *Minister of Health and Others* v. *Treatment Action Campaign and Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC).

Chapter 8 makes roughly the same argument in relation to the Chaskalson Court's property rights decisions. The leading case in this respect is *First National Bank*,[22] in which the Court announced a flexible, context-sensitive review standard for alleged violations of the constitutional property clause. Indeed, the *First National Bank* case is the paradigmatic example of the way the Court was able to devise a review standard that minimised the risk of its being confronted at some later date with an irreconcilable choice between fidelity to law and the need to safeguard itself from political attack. In another case, *Modderklip*,[23] the Court can be seen to have shifted the doctrinal basis for the decision from property rights, on which the Supreme Court of Appeal's decision had been based, to the right of access to court. Since the order handed down in this case remained essentially unchanged, it is reasonable to suppose that the Chaskalson Court did this to avoid laying down an awkward doctrinal rule that might have restricted its room for manoeuvre in later cases.

The Chaskalson Court's political rights jurisprudence is perhaps the most disappointing aspect of its record, in the sense that it failed to work out a convincing institutional role for itself. Its decision in the *United Democratic Movement* case, for example,[24] has been widely criticised for relying on a thin conception of democracy inadequate to the task of ensuring that the ANC did not abuse its dominant position in South African politics. Chapter 9 largely endorses this critique, and argues that the Court's rather deferential review standard in this case, as well as the *New National Party* case,[25] misconstrued the contribution a robust political rights jurisprudence might have made to the Court's long-term institutional independence.

Chapter 10 deals with three cross-cutting issues – the Court's separation of powers doctrine, its decisions on access and jurisdiction, and purely rhetorical strategies. The first two issues are important in the

[22] *First National Bank of SA t/a Wesbank* v. *Commissioner for the South African Revenue Services and Another; First National Bank of SA t/a Wesbank* v. *Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC).

[23] *President of the RSA and Another* v. *Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).

[24] *United Democratic Movement* v. *President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy and Another as* Amici Curiae*) (No 1)* 2003 (1) SA 488 (CC), 2002 (11) BCLR 1179 (CC).

[25] *New National Party of South Africa* v. *Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC).