THE POLITICS OF PRINCIPLE

Under its first chief justice, Arthur Chaskalson, the South African Constitutional Court built an unrivalled reputation in the comparative constitutional law community for technically accomplished and morally enlightened decision-making. At the same time, the Court proved remarkably effective in asserting its institutional role in post-apartheid politics. While each of these accomplishments is noteworthy in its own right, the Court’s simultaneous success in legal and political terms demands separate investigation. Drawing on and synthesising various insights from judicial politics and legal theory, this study offers an interdisciplinary explanation for the Chaskalson Court’s achievement. Rather than a purely political strategy of the kind modelled by rational choice theorists, the study argues, the Court’s achievement is attributable to a series of adjudicative strategies in different areas of law. In combination, these strategies allowed the Court to satisfy institutional norms of public reason-giving while at the same time avoiding political attack.

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The aim of this series is to produce leading monographs in constitutional law. All areas of constitutional law and public law fall within the ambit of the series, including human rights and civil liberties law, administrative law, as well as constitutional theory and the history of constitutional law. A wide variety of scholarly approaches is encouraged, with the governing criterion being simply that the work is of interest to an international audience. Thus, works concerned with only one jurisdiction will be included in the series as appropriate, while, at the same time, the series will include works which are explicitly comparative or theoretical – or both. The series editors likewise welcome proposals that work at the intersection of constitutional and international law, or that seek to bridge the gaps between civil law systems, the US, and the common law jurisdictions of the Commonwealth.

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THE POLITICS OF PRINCIPLE

The First South African Constitutional Court, 1995–2005

THEUNIS ROUX
For my father,
who taught me how to paint
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ACKNOWLEDGEMENTS

My interest in the politics of judicial review was sparked in 2002 by an invitation to attend a workshop in Bergen, Norway, organised by the Chr. Michelsen Institute. Our host, Siri Gloppen, had gathered together a remarkable group of (then still relatively) young researchers, all with an interest in constitutional courts in new democracies. Up to that point, as a University of Cape Town LLB graduate and Cambridge PhD, I had only ever heard academic lawyers talk about courts, in those reverential tones they use even when delivering the harshest of criticisms. So you can imagine the thrill of listening to the keynote speaker, Martin Shapiro, casually dismiss (not by frontal assault but in passing) the legalist model of judging. I can still picture Professor Shapiro – in physical appearance and destructive effect not unlike Marlon Brando in *The Godfather* – dispatching the latest theorist/family member to fail to understand the rules, the *real* rules, that determine how things work. On the long plane journey back to South Africa I read Siri’s PhD thesis and was again struck by the very different way political scientists view courts, and in particular by their focus on the policy outcome of judicial decisions. I was intrigued, but at the same time not entirely convinced, by this new scholarly discourse, and determined to find some way of reconciling the two perspectives that made sense to me.

My first attempt was published in the anthology of papers emerging from the Bergen workshop,¹ and I realise now to my horror that I have spent the last ten years rewriting that piece, developing the argument each time but not deviating fundamentally from my initial insight: that law and politics are best conceived as interacting social systems, each with its own distinctive characteristics and inner logic, but open to influence by the other. For most of those ten years, I was living in South Africa, working first at the Centre for Applied Legal Studies (CALS) and

then at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC). SAIFAC was the brain-child of Laurie Ackermann, the Chaskalson Court’s leading comparativist and someone with a far-sighted vision for the role of public-law scholarship in the promotion of democracy, not just in South Africa, but on the African continent as a whole. In my four years as Director of SAIFAC, Laurie became a mentor and a friend, and I will be forever grateful to him for giving me the opportunity to assist in making his vision a reality. Laurie and I see the interaction between law and politics very differently, and I fear that he will not like everything in this book, but he is the sort of person who forgives good-faith mistakes and I hope he will do so again in this instance.

During my time at CALS and SAIFAC, I was part of a close-knit community of legal academics whose efforts to support South Africa’s constitutional democracy are insufficiently recognised, both by foreign commentators on the Constitutional Court and by some of the judges themselves. One of the central players in this community is Stu Woolman, now the Elizabeth Bradley Chair of Ethics, Governance and Sustainable Development at Wits Business School. Stu’s tireless work in editing the leading academic commentary on the Court’s case law, Constitutional Law of South Africa – much of which he has written himself – gave me the space to indulge my parochial concerns, confident in the knowledge that Stu and his team would leave no judicial sentence unglossed. Stu has also recently completed his own book, The Selfless Constitution, and I advise anyone planning on reading this book to go there first before coming back to the work of a mere mortal.

The intellectual stimulation of working in a young constitutional democracy is matched in almost equal measure by the dangers of living in what are by definition uncertain times. In my case, this correlation was borne out in 2008, when three armed men broke into my family’s home in Johannesburg, tied up my wife and two young daughters, and ransacked the property, stealing many precious but financially valueless items that had been collected on our travels around the globe. The most painful loss, apart from my children’s innocence, was an oil painting given to me by my father, and subsequently re-created by him, at the age of 82, as his contribution to our healing process. It is this painting that adorns the front cover of this book. The tree is a Namaqua fig or ‘melkerhout’, which has the capacity to grow in the most barren of conditions, seemingly out of pure rock. I have inherited none of my
father’s artistic skill, but what I know about how to represent the world by leaving some things out, I have learned from him.

The invasion of our home accelerated an already-planned move to Australia, where I was fortunate to be offered a position at the University of New South Wales. UNSW Law Faculty is renowned for its commitment to social justice and its unusually collegiate atmosphere, and in neither respect has its reputation proved unfounded. What I did not anticipate, however, was the Faculty’s generosity in allowing me to devote the first three-and-a-half years of my new position to writing what amounts to a lament for the country I left behind. I would like to thank David Dixon, the Dean of the Law Faculty, for his faith in me, and also Brendan Edgeworth, who was Head of School for most of the time during which the book was written, for his consistent support.

One colleague at the Faculty, in particular, has made the transition to life in Australia less painful, and that is Martin Krygier. Martin, as all who meet him quickly appreciate, is that most unfashionable and therefore perennially inspiring of people: a scholar and public intellectual whose mind and academic sensibility were fashioned before the time of key performance indicators and comparative benchmarking. Without Martin’s friendship and counsel this book would not have been written. In addition to everything else, Martin, and his wife Julie Hamblin, generously allowed me the use of their rural retreat in Bucketty, north of Sydney, where two of the chapters of this book were written. Martin may not have been able to curb all of my enthusiasms, but whatever is of value in this book I owe to him.

At the end of my first year in Australia, in November 2009, Adrienne Stone invited me to participate in a colloquium at which I presented a very crude version of Chapters 1 and 2. Her colleague at Melbourne Law School, Cheryl Saunders, whom I had gotten to know through the International Association of Constitutional Law (IACL), had earlier been instrumental in convincing UNSW to take a chance on me. I have seen far less of Cheryl in Australia than I did in South Africa, which says much about her peripatetic lifestyle and my contrastingly hermitic one. I regret particularly having to withdraw almost completely from the community of scholars I got to know and admire at the IACL. I hope that the publication of this book will provide some explanation.

In April 2011, I was granted funding by UNSW to take a draft of the first three chapters on a North American road tour. I would like to thank the following people who graciously arranged for me to present seminars.
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As this project neared its end in January 2012 and my writing energies were beginning to flag, I was fortunate to secure a two-month fellowship at the Stellenbosch Institute for Advanced Study (STIAS). When I began the fellowship, the book still seemed like an insurmountable hurdle. By its end, I felt that I was in the home straight. I thank André van der Walt for facilitating this opportunity and Hendrik Geyer for hosting me. While in Stellenbosch, Sandy Liebenberg arranged a seminar for me with her postgraduate students that I found stimulating and helpful. On my way back to Australia in February 2012, I presented a draft of Chapter 4 at Wits Law School, hosted by Jonathan Klaaren, and of Chapter 5 at SAIFAC, hosted by my successor as Director, David Bilchitz. Independently of these seminars, I was also fortunate to receive detailed comments on Chapters 4 and 5 from Roger Southall and Martin Chanock respectively.

Rosalind Dixon and Martin Krygier opened their homes for one last discussion of the full manuscript in July 2012. I thank Rosalind, Martin, Andy Durbach, Beth Goldblatt and Ben Golder for taking the time to read and comment on the book on that occasion. They have saved me much (but, I fear, not all) embarrassment. In addition to reading the manuscript and providing helpful advice, my research assistant, Rob Woods, compiled the Bibliography and Table of cases with care and attention. I will eventually forgive him for writing a precociously brilliant LLB research paper in which he applied the conceptual framework developed in this book to explain the Australian High Court’s reluctance to enter the rights arena.

Finally, to Stephen and Anthony, whose friendship I deeply cherish, thank you for understanding the reasons behind my physical absence. We will grow old together, but not just yet.

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