

Cambridge University Press

978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional Court, 1995–2005

Theunis Roux

Frontmatter

[More information](#)

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.

THEUNIS ROUX is Professor of Law at the University of New South Wales, Sydney, Australia. He is a former Secretary-General of the International Association of Constitutional Law (IACL) and the Founding Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC).

Cambridge University Press
 978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional
 Court, 1995–2005
 Theunis Roux
 Frontmatter
[More information](#)

CAMBRIDGE STUDIES IN CONSTITUTIONAL LAW

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.

Series Editors

David Dyzenhaus
Professor of Law and Philosophy,
University of Toronto, Canada
 Adam Tomkins
John Millar Professor of Public Law,
University of Glasgow, UK

Editorial Advisory Board

T. R. S. Allan,
 Cambridge, UK
 Damian Chalmers,
 LSE, UK
 Sujit Choudhry,
 Toronto, Canada
 Monica Claes,
 Maastricht, Netherlands
 David Cole,
 Georgetown, USA
 K. D. Ewing,
 King's College London, UK
 David Feldman,
 Cambridge, UK
 Cora Hoexter, Witwatersrand,
 South Africa
 Christoph Moellers,
 Goettingen, Germany
 Adrienne Stone,
 Melbourne, Australia
 Adrian Vermeule,
 Harvard, USA

Cambridge University Press
978-1-107-01364-3 - *The Politics of Principle: The First South African Constitutional Court, 1995–2005*
Theunis Roux
Frontmatter
[More information](#)

Books in the series

The Politics of Principle: The First South African Constitutional Court, 1995–2005

Theunis Roux

The New Commonwealth Model of Constitutionalism, Theory and Practice

Stephen Gardbaum

Searching for the State in British Legal Thought, Competing Conceptions of the Public Sphere

Janet McLean

Judging Social Rights

Jeff King

Proportionality, Constitutional Rights and their Limitations

Aharon Barak

Parliamentary Sovereignty, Contemporary Debates

Jeffrey Goldsworthy

Cambridge University Press

978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional Court, 1995–2005

Theunis Roux

Frontmatter

[More information](#)

Cambridge University Press
978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional
Court, 1995–2005
Theunis Roux
Frontmatter
[More information](#)

THE POLITICS OF PRINCIPLE

The First South African Constitutional
Court, 1995–2005

THEUNIS ROUX



Cambridge University Press
 978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional
 Court, 1995–2005
 Theunis Roux
 Frontmatter
[More information](#)

CAMBRIDGE
 UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Published in the United States of America by Cambridge University Press, New York

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of
 education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107013643

© Theunis Roux 2013

This publication is in copyright. Subject to statutory exception
 and to the provisions of relevant collective licensing agreements,
 no reproduction of any part may take place without the written
 permission of Cambridge University Press.

First published 2011, 2013

Second Edition 2012

Reprinted 2013

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Roux, Theunis.

The politics of principle : the first South African Constitutional Court,
 1995–2005 / Theunis Roux.

pages cm. – (Cambridge studies in constitutional law ; 6)

Includes bibliographical references.

ISBN 978-1-107-01364-3 (Hardback) – ISBN 978-1-107-61906-7 (Paperback)

1. South Africa. Constitutional Court–History. 2. Constitutional courts–South
 Africa–History. 3. Constitutional law–South Africa. 4. South Africa–Politics
 and government–History. I. Title.

KTL2620.R68 2013

347.68'035–dc23

2012036779

ISBN 978-1-107-01364-3 Hardback

ISBN 978-1-107-61906-7 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of
 URLs for external or third-party internet websites referred to in this publication,
 and does not guarantee that any content on such websites is, or will remain, accurate
 or appropriate.

Cambridge University Press

978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional Court, 1995–2005

Theunis Roux

Frontmatter

[More information](#)

*For my father,
who taught me how to paint*

Cambridge University Press

978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional Court, 1995–2005

Theunis Roux

Frontmatter

[More information](#)

CONTENTS

<i>Acknowledgements</i>	xii
Introduction	1
PART I Problematic, Theory, Methodology	13
1 The Chaskalson Court's achievement	15
1.1 Judicial politics: a brief introduction	17
1.2 Criteria of success in political terms	27
1.3 The Court's success in political terms	33
1.4 The Court's success in legal terms: four illustrative responses	38
1.5 The ideal of adjudication according to law	49
1.6 Translating the common elements of the ideal into shared criteria	62
1.7 The distinctiveness of the criteria and the justification for this study	66
2 A conceptual framework for assessing the performance of constitutional courts	72
2.1 Two forms of constraint	73
2.2 Four central cases	88
2.3 Judge-driven changes to a court's position on the matrix	93
2.4 Constitutional courts in new and old democracies	104
2.5 The success of constitutional courts in interdisciplinary law/politics terms	108
3 Operationalising the conceptual framework to explain the Court's achievement	112
3.1 The Court's starting position on the matrix	114
3.1.1 The vertical axis: South African legal-professional culture	114
3.1.2 The horizontal axis: the Court's relative insulation from political attack	120

3.2	Tracking the Court's movement across the matrix	128
3.3	Choosing the cases	138
PART II Context		141
4	The political context for judicial review, 1995–2005	143
4.1	South Africa's pre-democratic tradition of judicial independence	145
4.2	The character of the ANC and its commitment to liberal constitutionalism	152
4.3	Constitutional provisions affecting the Court's independence from political control	161
4.3.1	The two-stage constitution-making process	162
4.3.2	The judicial appointments process	165
4.4	The changing political context for judicial review	170
4.4.1	Racial reconciliation, 1994–1996	171
4.4.2	Technocratic centralism, 1997–2005	177
4.5	Conclusion	189
5	Constraints and opportunities: The law/politics distinction in South African legal-professional culture	191
5.1	The received tradition: South African legal-professional culture before 1994	192
5.2	The impact of the post-apartheid Constitutions on South African legal-professional culture	201
5.2.1	The character of the post-apartheid Constitutions	203
5.2.2	The necessarily entailed impact of the post-apartheid Constitutions	207
5.2.3	The contingent impact: internal factors	209
5.2.4	The contingent impact: external factors	215
5.3	The Chaskalson Court's judicial ethic	219
PART III Thematic Case Studies		233
6	Death, desire and discrimination: the Chaskalson Court between constitutional and positive morality	235
6.1	Abolishing the death penalty: <i>S. v. Makwanyane</i>	238
6.2	Customary law and the right to equality: <i>Bhe</i>	248
6.3	Same-sex marriage: <i>Fourie</i>	252
6.4	Identifying the strategy	257
7	Social rights	262
7.1	Background to the inclusion of social rights in the 1996 Constitution	265

CONTENTS

xi

7.2	An ‘agonising’ start: <i>Soobramoney</i>	273	
7.3	Choosing the strategy: <i>Grootboom</i>	280	
7.4	Exploiting the micro-politics: <i>Treatment Action Campaign</i>	292	
8	Property rights	304	
8.1	Political parameters	305	
8.1.1	The political origins of s 25	305	
8.1.2	ANC economic policy after 1994	308	
8.2	The cases	312	
8.2.1	Constructing the constitutional property clause inquiry	314	
8.2.2	Reconciling property rights and the right to housing in s 26	324	
8.3	Concluding thoughts	331	
9	Political rights	334	
9.1	Prisoners’ right to vote: <i>August</i> and <i>NICRO</i>	336	
9.2	Judicial review of electoral system rules: <i>New National Party</i>	341	
9.3	Floor-crossing: <i>United Democratic Movement</i>	351	
9.4	Resolving the paradox	362	
10	Cross-cutting strategies	365	
10.1	The Court’s separation of powers doctrine	366	
10.2	Access and jurisdiction	377	
10.3	Purely rhetorical strategies	383	
	Conclusion	387	
	<i>Bibliography</i>	399	
	<i>Index</i>	419	

Cambridge University Press

978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional Court, 1995–2005

Theunis Roux

Frontmatter

[More information](#)

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

¹ Siri Gloppen, Roberto Gargarella and Elin Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Frank Cass, 2002).

Cambridge University Press

978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional Court, 1995–2005

Theunis Roux

Frontmatter

[More information](#)

ACKNOWLEDGEMENTS

xiii

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 un glossed. 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

Cambridge University Press

978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional Court, 1995–2005

Theunis Roux

Frontmatter

[More information](#)

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

Cambridge University Press

978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional Court, 1995–2005

Theunis Roux

Frontmatter

[More information](#)

ACKNOWLEDGEMENTS

xv

at their institutions: Stephen Ellmann at New York Law School, Frank Michelman at Harvard Law School, Wil Waluchow at McMaster University, Sujit Choudhry, who was then still at Toronto Law School, and Tom Ginsburg and Rosalind Dixon at Chicago Law School. I am delighted that Rosalind has since returned to UNSW, her alma mater, to work. She has already raised my game (and forced me to think more quickly on my feet), for which I am grateful.

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.

Much of Chapter 6 was previously published in Theunis Roux, 'The Constitutional Value System and Social Values in South Africa' in András Sajó and Renáta Uitz (eds.), *Constitutional Topography: Values*

Cambridge University Press

978-1-107-01364-3 - The Politics of Principle: The First South African Constitutional Court, 1995–2005

Theunis Roux

Frontmatter

[More information](#)

xvi

ACKNOWLEDGEMENTS

and Constitutions (The Hague: Eleven International Publishing, 2010). One paragraph from Chapter 8 appeared in Theunis Roux, ‘The Arbitrariness Vortex: Constitutional Property Law after *FNB*’ in Stu Woolman and Michael Bishop (eds.), *Constitutional Conversations* (Pretoria University Press, 2008).