

INDEX

Note: Chaskalson Court is often shortened to ‘Court’ in subheading entries.

- 1993 Constitution, death penalty 238–9
- 1996 Constitution
 - analysis 205–7
 - background to inclusion of social rights 265–73
 - Bill of Rights 203–4
 - courts’ power re violation of rights 370–1
 - difficulties following adoption at same time as GEAR 177–80
 - equality clause 204–5
 - heterosexual marriage 253
 - housing rights 204, 283
 - hybrid approach to limitations on rights 369–70
 - judicial appointments 169–70
 - judicial independence 206
 - jurisdiction of Constitutional Court 380–2
 - Karl Klare’s views *see* Klare, Karl
 - political origins of property clause 304–8
 - property rights 204, 325–7
 - rights-based judicial review 203–4
 - special majority for amending Bills 354
 - voting rights 336–7
- access to constitutional courts 377–83
- Ackermann, Justice, *First National Bank* judgment 315–20, 332
- Ackermann, Laurie 220–1, 224–5
- adjudication, pragmatic 69–70
- adjudication according to law *see* ideal of adjudication according to law
- adjudicative strategies
 - Chaskalson Court 217–19, 257–61
 - constraints 99–101
- African attitudes to law, effect on Chaskalson Court 215, 217
- African National Congress *see* ANC
- agricultural land, redistribution of 30 per cent 173
- American legal system
 - appointment of federal judges 20
 - undermining Supreme Court’s independence 23
- ANC
 - Arms Deal 184–5
 - Bill of Rights following hybrid human rights tradition 203, 236
 - cadre deployment policy 178
 - centrist faction
 - human rights 155–6
 - Mbeki 177
 - reining in RDP 176
 - vulnerable to challenge 175–6, 179
 - character as a political party 143–4
 - Chaskalson Court
 - judges’ management of relationship with ANC 261, 350
 - legitimizing social transformation project 125
 - members’ ties to ANC 127
 - need for independence of 144, 162
 - nurturing ANC’s commitment to constitutional democracy 363
 - relationship with 261, 350, 363
 - in transition to democracy 127

- ANC (cont.)
 commitment to constitutional
 democracy 33–4, 363
 to constitutional project 388
 to human rights 155–6, 203, 236
 to judicial independence 127
 to liberal constitutionalism 160–1
 to social rights 265–7,
 269–71
 Constitutional Guidelines for a
 Democratic South Africa 266–7
 corruption 185
 COSATU rift 310
 crime 336, 340
 death penalty 174, 239–40
 divided civil service 171
 economic policy after 1994, 308–12
 entering office in May 1994, 171–3
 factionalism 388–9
 history and character 152–60
 HIV-prevention strategy 185–6
 land reform policy 305, 310–12
 legislative reform programme 164,
 173–5
 moral failures 178, 184–6
 National Party pact 172
 NEC's control of appointment of
 provincial premiers 183
New National Party case 350
 political dominance
 1994 elections 67
 1999 and 2004 elections 177
 Court under no threat 175
 Court's lack of public support 37–8,
 125–8
 reputation as South Africa's liberator
 389–90
 post-1996 163–5
 present situation 391–3, 398
 property rights 305–7
 racial reconciliation 1994–1996 171–7
 Zimbabwe 186
 apartheid
 human rights lawyers 150–1, 398
 impact on South African
 legal-professional culture
 117–18, 197
 implementation of 147–9
- Appellate Division, manipulation of
 147–8
 Arms Deal, ANC 184–5
 Asmal, Kader 157
 Atiyah, Patrick 80
 attitudinal model in judicial politics
 Court's achievement 68
 death penalty decision 34
 explanatory power compared with
 strategic model 22
 judicial behaviour as function of
 judicial ideology 30–1, 131
 main features 18–21
 Australian High Court, political
 turbulence 94–5
 authoritarian rule, culture of courts
 after 106
- Barak, Aharon 373–4
 Bilchitz, David
 criticism
 of Court's treatment of social
 rights 263–4
 of *Grootboom* decision 285, 291
 of *Treatment Action Campaign*
 decision 300
- Bill of Rights
 1996 Constitution 203–4
 challenges to legislation 207
 common law development 205
 conformance test required by post-
 apartheid Constitutions 208
*Constitutional Guidelines for a
 Democratic South Africa* 266–7
 following ANC's hybrid human
 rights tradition 203, 236
 interpretation of its provisions 242,
 250
 judges' reasoning methods 211
 socio-economic rights 203
 test for validity of legal rules 207
- Bizos, George 240
Black Administration Act 1927 248–9,
 251
- Calland, Richard 169
 Cape voters' roll, removal of Coloureds
 148–9

- cases
 chronological or thematic approach
 140
 politically salient 138–9
 centrist faction of ANC 175–6
 Chanock, Martin 194–6
 charts depicting constraints of
 constitutional courts 77–111
 Chaskalson, Arthur 220–1
 acquaintance with Mandela 173
 Constitution Fourteenth
 Amendment Bill speech 187
 as human rights lawyer 221–2
 as JSC interviewer 222–3
 leadership contribution to work of
 Court 41–2
 rhetorical skills 385–6
 role in transition to democracy 40
 term as Chief Justice 170
 Chaskalson Court
 1993 Constitution, expressing
 underlying values of 242
 1996 Constitution
 balance with GEAR 178–80
 certification 162
 effect on Court 206
 1996 Constitution review 271–2
 access and jurisdiction 377–83, 393
 achievement
 attributable to own actions 135–6,
 391
 historical-institutionalist approach
 68
 reasons for investigation 15–17
 reassessment factors 187–8
 adjudicative strategies
 foreign decisions, *ubuntu* 217–19
 identification of 257–61
 African attitudes to law 215, 217
 ANC connection 127
 ANC's deployment policy 180–4
 ANC's internal democratic processes
 183–4
 annual caseload 379–80
 assessment methods explained
 112–14
 attacks on Court's authority 187
 beginning
 in mature democracy 126–8
 in uncertain political
 circumstances 67–8, 126–7
 cases chosen for study 138–40,
 377–83
 civil society organisations 127–8
 composition of 219–31
 'constitutional matter' expansive
 approach 380–1, 383
 constitutional and positive morality
 linked 235
 context-sensitive balancing
 case-specific resolution in
 property cases 329
 FNB test 322–3
 Jafitha case 324–5
 preference in property rights
 jurisprudence 331–3
 property rights and *PIE Act*
 326–7
 as corporate institution 131–2
 criminal procedure cases in early
 years of democracy 174
 criticism by Karl Klare 44–5, 384
 death penalty 33–5
 see also death penalty
 democracy consolidation
 contribution 36–7
 external factors promoting a
 particular view of law 210–15
 gay and lesbian groups 36
 GEAR 178–80
 globalisation of legal-professional
 audience 215–17
 Grootboom case 280–92
 Grootboom decision criticised 285
 Grootboom and *Treatment Action*
 Campaign compared 372–4
 housing rights 39–40, 324–33
 see also Chaskalson Court,
 Grootboom case
 institutional efficacy 38
 institutional independence
 with ANC support 388–90
 during Mbeki presidency 177–86
 not that of a mature constitutional
 democracy 391
 institutional legitimacy 34–8

- Chaskalson Court (cont.)
 internal factors promoting a
 particular view of law 210–15
 judges
 appointment 220–1
 reaction to composition 221
 speaking engagements 130
 summarised 230–1
 judgments structure 241–2
 judicial ethic 219–31
 justificatory burden 367
 law/politics distinction
 necessary condition of Court's
 independence 215
 strategies 210–15
 strict conception of 383–5
 law/politics tension 274
 legislative reform programme period
 174–7
 male primogeniture 251–2
 mandatory relief 372–3
 Mandela presidency 137
 matrix
 horizontal axis issues 120–8,
 390–1
 starting point 114–28
 vertical axis questions 117, 390–1
 micro-politics management 137–8
 minimum core approach
 in *Grootboom* 285–90, 374
 in *Treatment Action Campaign*
 302
 morality
 building public support in *Fourie*
 decision 258–9
 decisions corresponding to highest
 aspirations of the people
 257–8
 natural law and positivism 214
 party/state distinction 182–3
 political attack
 exposure 125
 insulation 144
 political context
 changes 136–8, 180–4
 summary 189–90
 political rights jurisprudence
 overview 334–6, 363
 positive and constitutional morality
 linked 235
 positivism or natural law 214
 property rights
 cases options 312–14
 cases overview 311
 Court's enforcement role 304–5,
 308
 reconciled with right to housing in
 s 26 324–33
 public perceptions of 260
 public support in early stages 125–6
 reasonable review standard
 developed in *Grootboom*
 flexibility 292, 300
 highly discretionary and logically
 confused 290–1
 not used in *New National Party*
 case 375
 Treatment Action Campaign case
 302–3
 reasoning in
 August and Another v. Electoral
 Commission and Others case
 337–41
 Bhe case 251–2
 First National Bank case 322–3
 Fourie case 252–6, 375–6
 Jaftha case 327
 Kyalami Ridge case 332–3
 New National Party case 344–50,
 362
 NICRO case 339–40
 Port Elizabeth Municipality v.
 Various Occupiers case
 325–7
 President of the Republic of South
 Africa v. Modderklip 328–31
 Soobramoney case 273–80
 Treatment Action Campaign case
 299–303
 United Democratic Movement case
 354–62
 reasoning quality re institutional role
 42–3
 remedial powers 375–6
 remedy decision in *Fourie* case
 258–9

- reputation in comparative constitutional law community 67, 70–1
- rhetoric in *Treatment Action Campaign* case 366–7, 372
- rights-based constitutionalism 119–20
- same-sex marriage 252–6
- separation of powers 278, 366–77
 - Fourie* case 255–6
 - rival understandings 371–7
- small group dynamics 132
- social rights 273–92
 - and ANC 288
 - enforcement 272–3
- socio-economic rights jurisprudence 40–1, 43
- strategic choices requirement 201–7
- strategies for rights-based judicial review system 210–15
- success
 - in legal terms 38–49, 78–9
 - in political terms 33–8, 78–9
- Treatment Action Campaign* 36, 43
- veto role 35, 79
- voting rights
 - limitations 375
 - need to define scope of 361
 - New National Party* case 341–50
 - politics issues 339–41
 - prisoners 337–41
- written opinions as study focus 129–30
- Chaskalson, Justice
 - death penalty
 - international jurisprudence survey 243
 - limitations clause analysis 244
 - formalist argument use 332–3
 - prisoners' right to vote 339–41
 - public opinion and supreme-law Constitution 245–6
 - substantive moral reasoning 244–5
- civil service 171, 180
 - reform under President Thabo Mbeki 181
- civil society organisations, use of Court 127–8
- Clayton and Gillman, editors 25
- Cockrell, Alfred, 'rainbow jurisprudence' 218–19
- Coetsee, Kobie, Justice Minister 166
- Colombian Constitutional Court, annual caseload 379
- common law development, Bill of Rights 205
- comparative constitutional law
 - community
 - assessment of Court 39–45
 - courageous stands on principle and Court's reputation 70–1
 - ideal of adjudication according to law and Court's reputation 67
 - liberal-legalists and Court's reputation 49
 - shared criteria and Court's success 46
 - Concept of Law, The*, H. L. A. Hart 50–3
 - Congress of South African Trade Unions (COSATU)
 - constitutional litigation 185
 - endorsement of RDP 308
 - constitution-making process, two stages 162–5
- Constitutional Committee 157–8
 - Constitutional Guidelines 157–8
- constitutional courts
 - access and jurisdiction 377–83
 - after transition from authoritarian rule 106
 - competitive electoral system 121–2
 - constitutional rights assessment 369
 - constraints charts 77–111
 - ideal of adjudication according to law 70
 - independence from political control
 - benefits 122–3
 - explained 86–8
 - options 121–4
 - provisions 161–70
 - institutional efficacy standard of success 66–7
 - institutional legitimacy standard of success 66–7, 87
 - institutional role in the political system 65–6

- constitutional courts (cont.)
 - legal legitimacy 92
 - liberal-democratic government systems 40, 70
 - loss of institutional independence 79, 87
 - loss of legal legitimacy 79
 - explained 84–5
 - through disregard of legal constraints 90–1
 - morality enforcement 237
 - a new constitution 63
 - new constitutional value system 64–5
 - performance assessment 111
 - political attack
 - capacity to frustrate 122–3
 - constraints both legal and political 97
 - explained 86–8
 - law and politics in permanent contradiction 90–1
 - principled decision-making 96–7
 - weakened cases 90
 - powers adjustment 105
 - protection measures for newly established 107–8
 - purpose of 27
 - separation of powers doctrine
 - explained 368–9
 - success criteria 62–6
 - success in interdisciplinary law/politics terms 108–11
 - veto capacity
 - an essential factor 28
 - dependent on widespread public support 27
 - institutional legitimacy necessity 85–6
- constitutional democracies
 - mature 89, 104–8, 126
 - new 89–90, 103–8
- Constitutional Guidelines, Constitutional Committee 157–8
- Constitutional Guidelines for a Democratic South Africa*, ANC 266–7
- constitutional litigation, COSATU 185
- constitutional rights, assessment by courts 369
- constitutional value system
 - competing religious values 254–5
 - indigenous social values conflict 248–50
 - legitimated as South African through *ubuntu* 248
 - new 64–5
- constraints
 - adjudicative strategies 99–101
 - by legal norms on judicial behaviour 31–2
 - by legal-professional norms and practices 115
- charts re constitutional courts 77–111
- context-specific and case-specific 93
- four central cases 88–93
- judicial decision-making
 - CLS view 80
 - ideal of adjudication according to law 75
 - judges as check on abuse of political power 56–7
 - liberal-legalist view 80
 - strategic model 21–2
- legal and political
 - context- and case-specific 93
 - distinct but interrelated 74–5
 - entailing a loss 75–6, 91–3
 - example 76
 - matrix 77–85
 - overly strict conception of Court 355
 - study's use of term 'constraint' 133
- context-sensitive balancing
 - see Constitutional Court, context-sensitive balancing
- corruption
 - ANC 185
 - Arms Deal 185
 - corruption allegations, Jacob Zuma 185, 187
- COSATU
 - constitutional litigation 185
 - rift with ANC 310
- Cotterrell, Roger, legal culture 115–17

- court powers, post-apartheid
 - Constitutions 151–2, 160–1
- crime, ANC 336, 340
- critical legal theorists
 - minimal constraints on judges 80
 - role of judges 94
 - versus* liberal legalists 46–7
- customary law
 - living
 - in *Bhe* 249–51
 - and official customary law 251–2
 - official 250–1
 - right to equality 248–52
- death penalty
 - abolishing 238–48
 - ANC's opposition to 239–40
 - ANC's stance 174
 - attitudinal model in judicial politics 34
 - Chaskalson Court 33–5
 - international jurisprudence survey 243
 - micro-politics of choices facing the Court 240
 - support for retention of 238
- democracies *see* constitutional democracies
- Didcott, John
 - English-speaking judge originally appointed to Court 220–1
 - exponent of common law approach to statutory interpretation 226
 - JSC interview 223
- Dugard, John 197
- Dworkin, Ronald
 - adjudication theory 52–3
 - Chaskalson and transition to democracy 40–3
 - constraints on constitutional adjudication 69
 - criticism
 - of H. L. A. Hart's theory 50–3
 - of Richard Posner's work 70
 - decisions on remedy as decisions of law 258–9
 - legal positivism tradition 50–3, 65
 - moral judicial decision-making 60–1
 - morality enforcement role of constitutional courts 237
- Dyzenhaus, David
 - role of judiciary under apartheid 207
 - 'plain fact' and 'common law' approach 199–201, 207
 - preference for common law approach 210
- education, extension of 173
- egalitarian strategy, socio-economic rights jurisprudence 40
- electoral system
 - court's role in maintaining 121–2
 - judicial review 341–50, 361
- Ellmann, Stephen
 - positivism in human rights tradition 198–9
 - acceptable legal argument boundaries 210
 - crude form of positivism 200–1
- environment, right to non-harmful 204
- Epstein, Lee 23, 31
- equality clause, 1996 Constitution 204–5
- Ethics in the Public Domain*
 - Joseph Raz's essay on politics of rule of law 56
 - Joseph Raz's views on legal reasoning 53, 55
- floor-crossing
 - history 351–4
 - lifting the ban 356–8
 - proportional representation 357
 - see also* Chaskalson Court, *United Democratic Movement* case
- FNB* test
 - ideal of adjudication according to law 322
 - quality of reasoning 321
- Fraenkel, Ernst, dual state 196
- franchise *see* right, to vote
- Freedom Charter 1955 153
- Friedman, Lawrence, wide legal culture
 - definition 114–15
- Fuller, Lon 59

- GEAR 176–7
 adoption at same time as 1996 Constitution 177–80
 the Arms Deal 185
 Chaskalson Court 178–80
 strategy 309–10
- Gibson, James
 constitutional-court efficacy 28
 surveys on Court's public support 34, 125
- Ginsburg, Tom
 Korean Constitutional Court's role in consolidation of democracy 29, 42
 success of constitutional courts in political terms 32
- globalisation of legal-professional audience, Chaskalson Court 215–17
- Goldstone, Justice, *Harksen* judgment 314–15
- Goldstone, Richard
 English-speaking Court judge 220–1
 exponent of common law approach 226
Group Areas Act cases 226
- Growth, Employment and Redistribution strategy
see GEAR, strategy
- Halpin, Andrew, on views of Joseph Raz 55
- Hart, H. L. A., *The Concept of Law* 50–3
- health care, extension of services 173
- Hepple, Bob 397
- heterosexual marriage 253, 255
- historical-institutionalist approach
 Court's achievement 68
 courts as composite political actors 131
 judges' legal-professional socialisation 34
 reaction to attitudinal and strategic models 24–7
- HIV-prevention strategy of ANC 185–6
- housing, provision of affordable 173
- housing rights
 1996 Constitution 204, 283
 reconciling with property rights 324–33
 Sunstein on *Grootboom* decision 39–40
- human rights
 ANC's commitment to 155–6
 ANC's tradition adapted to post-Cold War era 157–8
 ANC's tradition reflected in Bill of Rights 203, 236
 lawyers and apartheid 150–1, 398
 tradition in South African legal-professional culture 198–9
- Hungarian Constitutional Court 68
 political constraints 95
- ICESCR
 as framework for Constitution 268, 270–1
 signing by South Africa 272
- ideal of adjudication according to law
 adjudication style changes 64
 attachment of legal-professional culture to 92, 117
 discussed 49–62
FNB test 322
 moral and political clarity 66
 motivation of judges 98–9
 requirement for 47, 49
 South African legal-professional culture 219–20
 strength indicators of attachment of legal-professional culture to 117
 strict conception of law/politics distinction 383
- independence from political control
see constitutional courts, independence from political control
- indigenous social values, in conflict with constitutional value system 248–50
- Inkatha Freedom Party 171–2, 175
- institutional independence
 of Chaskalson Court 388–91
 loss of
 following prioritising of legal constraints 92

- on political constraints axis 79
 - in political terms 87
- institutional legitimacy
 - capacity to withstand political attacks 87
 - Chaskalson Court 34–8
 - precondition to veto role 31
 - weakened by decisions outside tolerance level 23–4
- instrumental and non-instrumental
 - views of law 82–3
- internal legal culture 114, 116
- International Covenant on Economic, Cultural and Social Rights
 - see ICESCR
- International Journal of Constitutional Law* 40–1
- judges
 - see also Chaskalson Court, judges
 - ability to rationalise their decisions 80, 377
 - developing common law in 1996 Constitution 208
 - global audience constraint 216–17
 - global audience emboldening 216
 - guardians of country's legal tradition 62–3
 - judicial ethic study methodology 133–5
 - law/politics distinction to be maintained 220
 - law/politics tension
 - judge-driven changes on matrix 93–103, 133
 - strategies 214–15
 - legal and political constraints negotiation 98–9
 - management of relationship with ANC 261, 350
 - matrix navigation tools 94–6, 98
 - motivation 133
 - political constraints awareness 135–6, 382
 - prioritising constraints in *New National Party* case 350
 - public justification of decisions requirement 56–7
 - rational actors 21–2
 - rationalising decisions 80
 - reasoning conform to Bill of Rights 211
 - reasoning conform to *FNB* test 321
 - role of 94
 - setting parameters for social rights litigation 273–6
 - strategies of communicating reasons to public 235, 260–1
 - strategies open to liberal judges 198–201
 - substantive reasoning requirement 214
 - tone of language of decisions 385–6
 - transitional period cases 192
- judicial appointments
 - 1996 Constitution 169–70
 - JSC 169–70, 220, 222–3
- judicial appointments process 165–70
 - National Party 167–9
 - three tranches 166–8
- judicial decision-making, constraints
 - see constraints, judicial decision-making
- judicial ethic, Chaskalson Court 219–31
- judicial independence
 - the 1996 Constitution 206
 - ANC's respect for 127
 - National Party's commitment to 147–9, 159
 - South Africa's pre-democratic tradition 145–52
- tradition, timescale 146–7, 150–2
- judicial politics
 - attitudinal model see attitudinal model in judicial politics
 - comparative studies
 - legitimacy theory 28
 - multi-party democracy 182
 - political conditions for
 - constitutional court efficacy 30
 - strategic model 31–2
 - historical-institutionalist approach
 - see historical-institutionalist approach
 - introduction 17–27
 - Makwanyane* decision 246

- judicial politics (cont.)
 - political attack
 - explanation 86–8
 - insulation from 90, 96–7
 - standards of principled decision-making 96–7
 - strategic model 21–4, 31–2, 34–5
 - judicial politics literature compared with legal-academic 138–9
 - judicial protection of socio-economic rights 39–40
 - judicial review
 - defence of legitimacy of 211–12
 - electoral system rules 341–50
 - over both intergovernmental and rights issues 203
 - Judicial Service Commission (JSC), judicial appointments 169–70, 220, 222–3
 - jurisdiction of constitutional courts 377–83
 - justification of decisions, judges' duty to make public 56–7
- Kabwe ANC conference 156–7
- Klare, Karl
 - 1996 Constitution 205–6
 - 1996 Constitution and the Court legal-cultural transformation 212–13, 231
 - political project needing political means 223
 - criticism of Chaskalson Court 44–5, 384
- Klug, Heinz 156
- Knight, Jack 23, 31
- Korean Constitutional Court 29–30, 42
- Kriegler, Johann
 - Afrikaans-speaking Court judge 220–1
 - JSC interviewee 223, 225–6
- Kriegler, Justice, 1993 Constitution and death penalty 243
- land redistribution and housing provision, RDP 308–9
- land reform policy, ANC 305, 310–12
- Langa, Justice, state's provision of mechanisms for dispute resolution 329, 332
- Langa, Pius
 - Court judge 220–1
 - career 227
 - JSC interviewee 223
- law
 - African customary 194
 - in construction of South African state 194–6
 - responsive 81–2, 110
 - as weapon in hands of the state 195
- law/politics distinction
 - necessary condition of Court's independence 215
 - refashioning by Court 210–15
 - strict conception of liberal-legalists 383–5
- law/politics tension, judges *see* judges, law/politics distinction, judges, law/politics tension
- legal constraints *see* constraints
- legal culture 114–16
 - development of South African 192–201
 - narrow definition 115
 - wide definition 114–15, 194
- legal factors
 - constraints on adjudication entailing a loss if disregarded 75–6
 - matrix position 77–85
- legal ideology, definition 116
- legal legitimacy of court
 - loss of through failure to justify decision 89
 - loss of through failure to engage in principled legal argument 84–5
 - loss of through non-compliance with legal constraints 79, 90–1
 - store of 92
- legal norms, constraint on judicial behaviour 31–2
- legal positivism
 - Joseph Raz 53–4
 - Ronald Dworkin 50–3
- Legal Process School 58–60
- legal reasoning

- dominant mode before 1994, 192
- Joseph Raz 53–6
- legal rules, Karl Llewellyn 57–9, 64
- legal-professional culture 79–85
 - after transition from authoritarian rule 106, 209
- American
 - ideological decision-making 81
 - policy-based reasoning 102–3
 - substantive norms of judicial reasoning 80
- attachment to ideal of adjudication
 - according to law 92, 383
- Australian 81, 94–5
- Canadian 81
- English 80
- formal 80–1
- German 81–2
- impact of apartheid on South African *see* South African legal-professional culture
- justification for use of term 116–17
- substantive 80–1
- legislative reform programme of ANC 173–5
- legitimacy theory 28–9
- Leiter, Brian 51
- liberal constitutionalism, ANC's
 - commitment to 160–1
- liberal legal theory, need for
 - constraining judicial decision-making 75
- liberal legalists
 - constraints on constitutional adjudication 69, 80
 - judges' insulation from political attack 93–4
 - political morality 83, 398
 - responsive law 82
 - versus* critical legal theorists 46–7
- Liebenberg, Sandra 397
- literature, legal-academic and judicial
 - politics compared 138–9
- Llewellyn, Karl, legal rules 57–9, 64
- Madala, Tholie 220–1, 226
- Mahomed, Ismail 220–1, 223–4
- male primogeniture 248
- mandatory relief, Chaskalson Court 372–3
- Mandela, President Nelson 33
 - 1955 Freedom Charter 153
 - acquaintance with Chaskalson 173
 - Chaskalson Court during his presidency 137
 - commitment to value of judicial independence 127
 - death penalty 239
 - impartial Constitutional Court 163
 - judicial independence 173
 - leadership style 172–3, 177
 - Liberal Party 153
 - release from prison 158
- Manuel, Trevor, Minister of Finance 309
- marriage, same-sex 252–6
- matrix
 - Chaskalson Court's starting point 114–28
 - constitutional court success and failure 107–8, 390–1
 - navigation tools for judges 94–6, 98
- Maveety, Nancy 26
- Mbeki, President Thabo 170, 176
 - ANC's HIV-prevention strategy 185–6
 - civil service reform 181
 - Court's institutional independence 177–86
 - Treatment Action Campaign* case 292–9
- Meierhenrich, Jens, pre-democratic South African state 196–7
- Michelman, Frank 279
- minimum core approach
 - in *Grootboom* 285–90, 374
 - social rights
 - basic shelter needs 285–90
 - versus* rational justification approach 265
 - versus* reasonable review approach 394–5
 - in *Treatment Action Campaign* 302
- Mokgoro, Justice, context-sensitive
 - balancing 324–5, 332
- Mokgoro, Yvonne 220–1, 227

- morality
 constitutional different from positive 235
 enforcement by constitutional courts 237
 linking constitutional and positive Court's stance 259
 social rights cases 257–8
- Mugabe, President Robert 186
- Mureinik, Etienne
 JSC interviewer 225, 228–9
 rational justification approach 289–90
 social rights enforcement
 matching civil and political rights enforcement 269
 rational justification approach 273
 rationality of state's conduct 276
- National Party
 commitment to judicial independence 147–9, 159
 judicial appointment process 167–9
 National Party rule 1948 to 1994 146–50
- Native Court system 250–1
- natural law, distinction between law and politics 211
- natural law and positivism
 Chaskalson Court 214
 merits 200–1
- Nonet, Phillipe
 law categorisation 81–2, 110
 normative conception of judicial function 384
- normative judicial function, Phillipe Nonet's conception 384
- normative state, pre-democratic South Africa 196
- O'Regan, Justice
Fourie case 256, 375–6
New National Party case 347–50
- O'Regan, Kate 220–1, 227–8
- parliamentary sovereignty, move to constitutional supremacy 191–2, 203, 207
- PIE Act* 325–8
- political attack
 assessing a court's exposure to 121–4
 exposure of Chaskalson Court 125
 insulation of Chaskalson Court 144
see also constitutional courts, political attack
- political constraints *see* constraints
- political culture, definition 115
- political factors, constraints on adjudication 75–6, 85–8
- political rights, Chaskalson Court jurisprudence overview 334–6, 363
- politically salient cases 138–9
- positivism
 distinction between law and politics 211–12
 Hartian 197–8, 208
 inclusive and exclusive 208
 low and high 192, 209, 213
- positivism and natural law
 Chaskalson Court 214
 merits 200–1
- Posner, Richard 69–70
- post-apartheid Constitutions
 capacity of law to restrain abuse of political power 387
 character of 202–7
 constitution and validity of legal rule 207–9
 judges' view of law vindicated 220
 political choices on delivery of promises 392
 political environment for judicial review 170
 powers of courts 151–2, 160–1, 203
 South African legal-professional culture 118–19, 201–2
 South Africans' moral values 236, 390
- pre-democratic South Africa
 normative state 196
 prerogative state 196
- pre-democratic tradition of judicial independence 145–52
- prerogative state, pre-democratic South Africa 196

- prisoners' right to vote 336–41
- Pritchett, Herman 18
- property deprivation, proportionality test 315–17
- property deprivation (arbitrary), test for 317–21
- property rights
 - 1996 Constitution 204, 325–7
 - ANC 305–7
 - Chaskalson Court's enforcement role 304–5, 308
 - political origins of property clause 304–8
- proportional representation 356
 - floor-crossing 358–9
- proportionality test, property deprivation 315–17
- quality of reasoning, *FNB* test 321
- racial reconciliation 1994–1996 171–7
- rational and irrational law, South African legal-professional culture 196
- rational justification approach
 - Court's relationship with ANC 374
 - social rights cases 265
 - social rights inclusion in Constitution 289–90
- Raz, Joseph
 - Ethics in the Public Domain*
 - Chapter 13 53, 55
 - Chapter 16 56
 - ideal of adjudication according to the law 57
 - legal positivism 53–4
 - legal reasoning 53–6
 - the rule of law 56–7
 - successful constitutional court 62–3
- reasonable review standard of *Grootboom*
 - adjusting level of scrutiny 292
 - flexibility 300
 - open-ended category instead of minimum core 290–1
 - social rights 393–7
 - strategy of Court 302–3
- Reconstruction and Development Programme (RDP) 173, 179
 - land redistribution and housing provision 308–9
- religious freedom to, right 254–5
- religious values mediation, constitutional value system 254–5
- reproduction, right to make decisions about 203
- responsive law 81–2, 110
- right
 - of access to court 329
 - to emergency medical treatment 274
 - to equality before the law 238–9, 248–55
 - 1993 Constitution 238–9
 - Bhe* case 248–52
 - constitutional value of tolerance 253–5
 - to have access to adequate housing 283
 - to health care services 275
 - to housing
 - Court's review standard 39–40
 - evictions 204
 - reconciling property rights 324–33
 - to life 238–9, 274
 - to non-discrimination of sexual orientation 204
 - to non-harmful environment 204
 - to religious freedom 254–5
 - to respect for and protection of own dignity 238–9, 337–8
 - to shelter 283
 - to strike 204
 - to vote
 - 1996 Constitution 336–7, 361
 - Electoral Act* as amended 338
 - identity documents requirement 341–50
 - limitations to 375
 - prisoners 336–41
- rights-based constitutionalism, Chaskalson Court's move to 119–20
- rule of law, Joseph Raz 56–7

- Russian Constitutional Court
 annual caseload 379, 383
 suspension 23–4, 31
- Sachs, Albie
 ANC's Draft Bill of Rights 268
 career 228–9
 commitment to human rights 230
 Constitutional Committee member 157
 English-speaking Court judge 220–1
 former ANC member 230
 social rights inclusion in 1996
 Constitution 266–8
 tone of language 385
- Sachs, Justice
August case 337–8
Fourie case 376
 property rights 325–7, 332
 same-sex marriage in the *Fourie* case 253–6
- same-sex marriage 252–6
- Sampson, Anthony 239–40
- Selznick, Philip
 law categorisation 81–2, 110
 normative state 384
- separation of powers
 Chaskalson Court doctrine 366–77
Fourie case 255–6
 as system of checks and balances 367
- sexual orientation, right to non-discrimination 204
- Shapiro, Martin
 respect for judicial independence 105
 successful judicial review 29, 32
- Shevtsova, Olga 23, 31
- social rights
 ANC's commitment to 265–7, 269–71
 background to inclusion in 1996
 Constitution 265–73
 challenges to their provisions 271–2
 Chaskalson Court 273–92
 enforcement
 Court's strategy 272–3
 inclusion of social rights in
 Constitution 276
 matching civil and political rights
 enforcement 269
 Mureinik's rational justification
 approach 273
 rational justification approach
 and minimum core approach 265
 Mureinik 289–90
 socio-economic rights
 Bill of Rights 203
 egalitarian strategy 40
 judicial protection of 39–40
 jurisprudence of Chaskalson Court
 40–1, 43
 substantive strategy 40
 South African Law Commission,
 *Interim Report on Group and
 Human Rights* 265
 South African legal tradition 197–8
 South African legal-professional culture
 apartheid 117–18, 197
 before 1994, 192–201
 formalism 195–6
 human rights tradition 198–9
 ideal of adjudication according to
 law 219–20
 impact of post-apartheid
 Constitutions 201–2
 post-1994 internal factors 209–15
 rational and irrational law 196
 separation of legal from political
 195–6
 shift to rights-based
 constitutionalism 119–20
 strategic model in judicial politics
 constitutional court's awareness of
 national politics 31–2, 34–5
 Court's achievement 68
 court's capacity to store institutional
 legitimacy 92
 judicial behaviour as function of
 judicial ideology 131
 strengths and weaknesses 21–4
 transferability of model 23–4
 strike, right to 204
 substantive strategy, socio-economic
 rights jurisprudence 40
 Summers, Robert 80
 Sunstein, Cass

- 1996 Constitution 203
- quality of Court's reasons
 - Grootboom* 39–40
 - solving riddle of its institutional function 42–3, 65
- TAC
 - history 293–6
 - litigation strategy 295–7, 303
- Tamanaha, Brian 74
- instrumental and non-instrumental views of law 82–3
- Tambo, Oliver 157–8
- Technical Committee on Fundamental Rights 239
- technocratic centralism 177–88
- thematic approach to cases, reasons for 140
- theory of adjudication, Ronald Dworkin 52–3
- transition to democracy
 - ANC's reliance on the Court 127
 - impact on South African legal-professional culture 118–19
 - implications for legal-professional practice 191–2
 - strengthening of ideal of adjudication according to law 219–20
 - two stages 162–5
- Treatment Action Campaign *see* TAC
- Trengove, Wim 229
- Tushnet, Mark, Chaskalson Court's socio-economic rights jurisprudence 43–4
- ubuntu* 217–19
 - Bill of Rights interpretation 247
 - harmonisation of competing property interests 326–7
 - legitimising constitutional value system as South African 248
 - Makwanyane* decision 246–8
- US Supreme Court
 - politically and legally unconstrained 78, 102–3
 - prediction of outcome of cases 18–20
- values, legal-cultural 64–5
- veto role of constitutional court in national politics
 - dependent on institutional legitimacy 31
 - dependent on public support 28
 - insulation from political attack 85–6
- Waluchow, Wil, morality enforcement role of constitutional courts 237
- Wechsler, Herbert, principled decision-making 60
- Yacoob, Justice, *New National Party* case 345–50
- Zimbabwe 186
- Zuma, Jacob
 - corruption allegations 185, 187
 - elected as ANC President 187