



Baker v Carr in South Africa, or How Political Questions Become Legal Questions

Theunis Roux

Presentation to conference on
*Law, Language and Politics in
South Africa: The Impact of the
Constitution* (1 July 2006)

[The CC's work is political...]

- *President of the RSA v SARFU* 1999 (4) SA 147 (CC):
 - One of the functions of the CC is to exercise exclusive jurisdiction ‘in a number of crucial political areas ... in respect of issues which would inevitably have important political consequences.’ (paras 72-73)
- *King v Attorneys Fidelity Fund Board of Control* 2006 (1) SA 474 (SCA):
 - Invalidation of an Act of Parliament for breach of the NA’s FC s 59(1) duty to facilitate public involvement in its processes ‘would be pre-eminently a “crucial political” question’, which the Constitution reserved for the CC to decide (para 23)

[But then again it isn't...]

- *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC)
 - ‘Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the Legislature and not the Court.’ (para 180)
- *UDM v President of the RSA (No 2)* 2003 (1) SA 495 (CC)
 - ‘This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court.’ (para 11)

[The contradiction resolved?]

- The apparent contradiction in these dicta may be resolved if the following propositions are both true:
 - The systemic function of the CC ('crucial political areas') and the consequences of its decisions - POLITICAL
 - The methods of reasoning employed by the CC – LEGAL
- Political questions get translated into legal questions for purposes of decision by the litigants and the CC itself
- The CC's work is political only in the broad sense of dealing with issues:
 - of high political moment, over which there is intense interest group competition; and
 - which have political consequences (i.e. which determine the distribution of power and resources in society)

But is adjudication always legal? And does it have to be?

- Traditional analysis assumes that the CC does not function as a political actor when choosing which legal rule to apply (cf. political science literature)
- This assumption is in turn thought to be crucial to the rule of law = adjudication according to neutral principles (Wechsler)
- Main argument of paper is that this assumption is unnecessary and does not adequately explain the CC's role in the maintenance of the rule of law
- The separation of powers doctrine gives a principled basis for 'political' adjudication of a certain type

[Outline of argument]

- Paper develops this argument by:
 - Introducing US political question doctrine and briefly discussing the fate of this doctrine in the US
 - Considering and dismissing applicability of political question doctrine in SA
 - Showing through the cases how the CC has managed without a formal political question doctrine
 - Concluding that the CC does function as a political actor in choosing rules, and that this is vital to the consolidation of South Africa's democracy
 - Functioning as a political actor is not just a matter of judicial restraint/judicious avoidance, but also of judicious engagement – 'legitimizing transformation'

[The political question doctrine]

- *Baker v Carr* 369 US 186 (1962)
 - ‘Prominent on the surface of any case held to involve a political question is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it ...

[The political question doctrine]

- *Baker v Carr* cont.
 - ... or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.' (p. 217)

[*Baker v Carr* in point form]

- Textually dependent criterion
 - Express textual commitment of issue to another branch
- Criteria related to nature of question itself
 - No judicially discoverable standards
 - Can't decide question without initial nonjudicial policy determination
 - Court can't resolve question without showing lack of respect for political branches
 - Court must respect political decision already made
 - Potential for embarrassment in conflicting pronouncements by different branches

Views of the doctrine

- Bickel: a prudential doctrine that allows US Supreme Court to avoid deciding questions that would not be in the national interest for it to decide
- Henkin: an unnecessary doctrine that is really just a collection of justiciability rules
- Tushnet: a prudential doctrine whose fate was sealed as soon as it was reduced to detailed rules in *Baker v Carr* and which has declined in importance in post-60s system of strong judicial supremacy

Fate of *Baker v Carr*

- Doctrine has waxed and waned since 1962:
 - *Powell v McCormack* 395 US 486 (1969) (reviewing decision of House of Reps to exclude duly elected member);
 - *Gilligan v Morgan* 413 US 1 (1973) (rejecting application to supervise conduct of National Guard during student protests against Vietnam War)
- Mini-revival in *Nixon v United States* 506 US 224 (1993) (declining to review Senate impeachment procedures against disgraced judge)
- But this revival was short-lived: not mentioned in *Bush v Gore* 531 US 98 (2000) (Tribe's regret, Tushnet's proof)
- Consensus: an extreme doctrine not needed by activist court of left or right once legitimacy of judicial review established
- Other strategies of judicial restraint can do the job without need for formal political question doctrine

Baker v Carr in South Africa

- 1996 Constitution does not commit any issue of constitutional interpretation to a 'co-ordinate branch of government' for final decision or expressly oust the CC's jurisdiction to decide any constitutional matter
- This flows from broad scope of supremacy clause in FC s 2 ('law or conduct inconsistent with it is invalid') and CC's powers of review in constitutional matters (FC 167(3) and (7))
- Item 1 on *Baker v Carr* list is thus not available in SA
- Declining jurisdiction to decide entire case on basis of political sensitivity of question would have to be justified by extra-textual considerations
- Impossible according to SA legal professional standards
- Items 2-5 may figure as justiciability doctrines in relation to discrete issues for decision, but will never be grounds for declining jurisdiction over an entire case

Walking the tightrope

- In absence of political question doctrine, three main ways in which CC manages its relationship with political branches:
 - Exploitation of doctrinal gaps
 - Choice of review standard
 - Equitable discretion in design of remedy
- Separation of powers doctrine informs rule choices made in these areas
- But these are not simply rules of restraint – CC selectively takes on issues useful for building its legitimacy

Some examples from case law

- Exploitation of doctrinal gaps
 - *Grootboom* (no binding precedent on the level of review implied by the state's obligation to take 'reasonable legislative and other measures in FC s 26(2))
 - *FNB* (the meaning of 'arbitrary deprivation of property' in FC s 25(1) - property clause)
 - *UDM* (the open-textured standard set by the phrase 'multi-party democracy' in FC s 1(d) – founding values)
 - *Kaunda* (case seems to turn on literal interpretation of FC s 7(1) – 'the rights of all people *in* our country')
 - *Modderklip* (case decided under FC s 34 access to courts rather than positive obligations arising from guarantee of property rights in FC s 25)

[Case law cont.]

- Choice of review standard
 - *City Council of Pretoria v Walker* (constitutionality of differential rates and selective enforcement decided under IC s 8(2) unfair discrimination standard rather than rational basis standard in IC s 8(1))
 - *Permanent Secretary, Dept of Education & Welfare* (distinction between legislative and administrative action in FC s 33 determines appropriate level of review for allocation of subsidies to independent schools, but budgetary allocations in principle reviewable)
 - *New National Party* (majority's choice of rationality standard for reviewing violation of FC s 19(3) voting rights influenced by judicial deference to legislative design of electoral system, whilst democratic theory supports O'Regan J's dissenting judgment)

Case law continued

- FC s 172(1)(b) – court deciding constitutional matter within its power may make ‘any order that is just and equitable’
- CC has used this equitable discretion to craft remedies respectful of separation of powers:
 - *Grootboom* (declaratory order in first major socio-economic rights case inviting dialogue between CC and political branches)
 - *TAC* (mandamus without supervision in case in which political context cushioned CC from political repercussions of its decision)
 - *Modderklip* (CC largely endorses SCA’s constitutional damages remedy in preference to mandamus ordering state to expropriate)

Conclusions from case law

- The three strategies are often used in combination, typically to exploit doctrinal gaps in setting of appropriate review standard
- CC does not only act strategically to find *in favour* of state, but also against state (*Walker, Permanent Secretary, Grootboom*) - judicious engagement as much as avoidance/restraint
- Legitimizing transformation: CC upholds and thereby legitimates rational and fair transformative measures, and is in turn itself legitimated by such decisions
- This legitimating function of CC is vital to democratic consolidation in SA
- To legitimate, CC must sometimes find against state (cf Charles Black's argument in relation to US Supreme Court's role in legitimating the New Deal)

[Overarching conclusion]

- No need to deny that rule choice under influence of separation of powers doctrine is political in this sense, i.e. CC takes into account the need to respect the proper limits of its role and interprets the legal materials to stay within those limits
- The real question is whether separation of powers doctrine supplies single correct answer in each case, or whether rules are sometimes/always indeterminate, allowing CC to act prudentially/strategically
- Answer depends on one's allegiance to Dworkin or Hart, but latter more persuasive in this instance – appropriate level of review or remedy is a policy choice that CC makes when the law runs out
- Over time, these policy choices (prudential rules) become steadily legalized, thus reducing room for manoeuvre (Tushnet's historical assessment of *Baker v Carr*)
- CC will survive if it can build sufficient institutional legitimacy for itself before this point is reached