

Principle and Pragmatism on the Constitutional Court of South Africa

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Abstract

According to the political science literature on courts,¹ the primary task facing a constitutional court² in a new democracy is to ensure its own survival. Whatever other goals such a court may set itself, it must remain in the adjudication business long enough to achieve them. Remaining in the adjudication business is in turn thought to depend on a court's capacity to build and maintain its legitimacy.³ An illegitimate constitutional court, political scientists postulate, is vulnerable to control by the political branches, and, in the worst-case scenario, to being closed down.⁴

The political science account makes two assumptions that lawyers may find hard to accept. First, the account assumes that constitutional courts may be regarded as unified political actors – that constitutional judges, despite their differences in background, temperament and ideology, are capable of acting in concert to promote the interests of their court as an institution.⁵ Second, the political science account assumes that constitutional courts are capable of pursuing a determinate political strategy *over time*, whatever the imperatives driving the resolution of particular cases may be.

For lawyers, neither of these assumptions is self-evident. Constitutional courts may sometimes be described as engaging in coordinated action,⁶ but more often than not are divided into different doctrinal or ideological camps, with no single, coherent strategy, and certainly none that they are capable of pursuing across a range of decisions in different areas of law. Nevertheless, there are some reasons to think that the assumptions underlying the political science account may not be entirely alien to legal theory. Constitutional judges in both new and mature democracies are understood by lawyers as having to adhere to the law/politics distinction as a condition of their legitimacy – not in political science terms, but in legal professional terms, in order to build or maintain their reputation as competent judges. Constitutional judges who decide cases on nakedly political grounds are thought to bring the legal profession into disrepute, and are subject to harsh criticism in the law journals for failing to apply the law. To this extent, the political science account and the lawyers' account of the imperatives driving constitutional courts in new democracies overlap, since a court that loses the respect of its professional

community is more vulnerable to political reprisals than one that does not.⁷ The difference between the two fields is really one of emphasis, with political science departing from the premise that constitutional adjudication is inherently political, and legal theory striving to show that it need not be.⁸

The other conceptual leap required of legal theory in order to engage with the political science account is a preparedness to view judges as being capable of collective action over time. In mature democracies this leap may be hard to make since there seems to be little reason why constitutional judges serving in courts whose legitimacy is already established would need to act in concert, and certainly not over a range of decisions in different areas of law. In new democracies, however, where the legitimacy of constitutional adjudication is by definition not yet established, the notion that judges may have a collective interest in establishing their court's legitimacy does not seem so far-fetched. In this setting, constitutional judges cannot draw on a long history of mutual respect between the three branches of government. Instead, they face the difficult task of having to establish their legitimacy even as they exercise their powers of review.

Accepting, then, the ball-park plausibility (if not the correctness) of the political science account, how might a constitutional court in a new democracy go about building its legitimacy? The political science account itself suggests that courts should behave as any other political actor might behave, making strategic trade-offs between the interests they wish to assert and the consequences of asserting those interests more forcefully than the balance of political power allows. From this perspective, what constitutional courts in new democracies need to do is to ensure that their decisions do not fall outside the 'tolerance interval' of other important political actors.⁹ For every decision, political scientists argue, a constitutional court's preferred outcome (in policy terms) may be mapped against the range of outcomes that the other branches of government would be prepared to tolerate. Provided the decision falls within this range it will be respected, and thus the court's legitimacy will be built, or at least not harmed.¹⁰ Over time, a constitutional court may, by ensuring that every decision it makes falls within the tolerance interval for each case, build its legitimacy to the point where it has fairly wide discretion to decide cases in accordance with its policy preferences.

There are two insuperable problems for legal theory with this extended version of the political science account. First, it ignores the restraining role of legal doctrine in narrowing the range of policy preferences that a constitutional court in a new democracy may seek to assert. For lawyers, an adequate description of the behaviour of such a court must take account of the way

legal rules and principles constrain and structure the court's capacity to act. Even the most rule-sceptical accounts of adjudication in legal theory do not entirely dismiss this factor.¹¹ Second, the extended political science account dismisses out of hand the possibility that a constitutional court may have no policy preferences in relation to a particular decision. Of course, any decision by a constitutional court expresses a policy preference in the sense that it distributes benefits and burdens between competing interest groups.¹² But it is important to many legal theorists that this inevitable result of all constitutional cases be seen as purely incidental to the application of 'neutral principles'.¹³ There is a vital distinction, these theorists would argue, between the incidental effect of a decision and the 'naked' assertion by a court of its policy preferences.¹⁴ A constitutional court that allowed its policy preferences to determine the outcome of a case would not be acting like a court at all, quite apart from the political repercussions that might follow from this sort of behaviour.

The extended political science account is thus unlikely to persuade many legal theorists. But this does not mean that legal theory should not try to come up with its own account. A convincing account of how constitutional courts in new democracies may (and in fact do) establish their legitimacy would be of immense value to legal theorists working on constitutional courts in more mature democracies, all the more so because it was directed at constitutional courts operating *in extremis*.

Two main possibilities suggest themselves.¹⁵ The first possibility is that a constitutional court in a new democracy should strive to build its legitimacy by adhering to the law/politics distinction in every case. By acting as a 'forum of principle'¹⁶ in this way, such a court could slowly build for itself a reputation as a court that was impervious to political influence. Because of the nature of the questions presented to it, some of the decisions it took, particularly in the early phase of its existence, would no doubt be seen as political, and might therefore expose the court to attempts by the political branches to rein it in or close it down. But in the long run, by steadfastly deciding cases on the basis of principle rather than policy, a constitutional court in a new democracy would eventually be able to found its legitimacy on a reputation for law-governed adjudication.

The leading proponent of this approach in Anglo-American legal theory is of course Ronald Dworkin. From his early engagement with Hartian legal positivism,¹⁷ to his more recent focus on the work of the US Supreme Court,¹⁸ Dworkin has been concerned to show how judges, notwithstanding the open texture of legal rules and the seeming need to exercise political discretion in

hard cases, may remain faithful to the ideal of principled adjudication. The essence of his argument is that, when presented with a hard case in which the legal materials appear to provide no obvious answer, judges should work out the single right answer to the case by first identifying and then weighing the contending legal principles.¹⁹ The weight to be accorded to each principle is in turn something that judges should deduce from the political theory that best interprets the 'moral convictions' and institutions of the community in which they are working.²⁰

Although Dworkin himself has not considered the implications of his theory for constitutional courts in new democracies,²¹ it is fair to assume that he would argue that it provides the best prescription for the way such courts should go about establishing their legitimacy. By grounding their decisions in the political theory that best interprets their community's moral convictions and institutions, Dworkin would presumably argue, constitutional judges in new democracies would be able to counter all allegations of personal political bias. Indeed, for Dworkin, this would be the only way in which a constitutional court in a new democracy would be able to maintain the law/politics distinction.

Ranged against this approach are those theorists who would advise constitutional court judges in new democracies to eschew principle in favour of pragmatism.²² On this view, judges should not pursue principle at all costs, but rather take into account the likely consequences of every case that they decide, and then adjust their decision so as to promote the interests of their community.²³ The leading proponent of this approach is Richard Posner, whose interpretation of the US Supreme Court's decision in *Bush v Gore*²⁴ as having been justified by the need to avert a constitutional crisis has attracted much attention.²⁵ As with Dworkin, Posner's arguments are not directed at courts in new democracies, and therefore require some extrapolation. To operate as a prescription for how constitutional courts in new democracies should behave one needs to graft onto Posner's account the notion that the building of its legitimacy might be something that a constitutional court in a new democracy could pragmatically pursue. In every case that comes before it, this revised account would hold, a constitutional court in a new democracy should assume that the interests of its community would best be served by the decision that most enhances its legitimacy.

Although this revision removes some of the flexibility essential to the pragmatist account (the freedom of individual judges to determine how the community's interest may best be served) it also resolves one of legal pragmatism's persistent problems (the fact that the freedom to determine the community's interest may be wielded by judges for cross-cutting ideological

purposes). Instead of the make-it-up-as-you-go-along brand of pragmatism Posner advocates, constitutional courts in new democracies would be advised to see their legitimacy as being closely connected to the legitimacy of their community's overarching constitutional project. Since the survival of that project could reasonably be assumed to be in the community's interest, the court would have a good, practical reason in every case to favour a decision that enhanced its own legitimacy.

Revised in this way, the pragmatic account comes close to the political science account of the imperatives driving constitutional adjudication in new democracies, with two differences. First, the revised pragmatic account would need to accept, as all legal pragmatists do, that a constitutional court in a new democracy should work within the constraints of legal doctrine. Whatever the outcomes it was trying to achieve, a pragmatic constitutional court in a new democracy would have to pursue those outcomes as a court of law, and should therefore frame its judgments, even if only for rhetorical purposes, as legal judgments. Second, the purpose behind building its legitimacy, for the revised pragmatic account, would not be to enable the court to assert its policy preferences with ever greater freedom. Rather, the purpose would be to enhance its capacity to decide cases in the interests of the community, so that, with time, the court could ensure the best practical outcome in even the most difficult case, whilst maintaining its legitimacy.

In an intriguing passage towards the end of *Law's Empire* Dworkin appears to make some concession to the practical limits on constitutional adjudication when remarking that:

'An actual justice must sometimes adjust what he believes to be right as a matter of principle, and therefore as a matter of law, in order to gain the votes of other justices *and to make their joint decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle at the constitutional level.*'²⁶

If one understands the reference in this passage to 'the spirit of a community of principle' as meaning something like the constitutional project that the revised pragmatic approach would counsel judges to promote, the difference between the two approaches narrows considerably. The precise import of Dworkin's concession is that the principled approach is an ideal to which individual judges should aspire, but one which may be compromised for two reasons: (1) to convince a sufficient number of the judge's colleagues to support a weaker version of the principled decision at stake; and (2) to make the decision 'more acceptable to the community'. The thinking behind the first reason is evidently that a weaker principled decision by a majority of judges

may on occasion be better, *strategically speaking*, than a stronger principled decision by a judicial minority. The second reason contemplates that a judge, in compromising on principle in order to win the support of fellow judges, may be additionally motivated by the thought that the community of which she is a part may not in any case be capable of accepting the more strongly principled decision. Rather than risking rejection by that community, Dworkin suggests, a judge may prefer to 'adjust' her reasons for decision in order to ensure its acceptance by the community, and by this device, the continued functioning of her community as a community of principle.

Dworkin does not go on to explain exactly what he means by the term 'adjust' or the circumstances in which such compromises would be justified in order to keep the ideal of a community of principle alive. Self-evidently, any adjustment of a principle could not extend to its abandonment, since that would do violence to the term and also make the last part of the passage, in which the community of principle is assumed to continue, contradict the first. More than this, however, we cannot say. In any case, Dworkin's argument, as noted already, is not directed at constitutional courts in new democracies. But what if it were? What sorts of adjustments and what sorts of circumstances could one envisage? Imagine that a case came before the court that was plainly controversial, either because the principled outcome would likely contradict the political branches' policy preferences or because a significant section of the population was known to be opposed to it (a constitutional challenge to a civil-law ban on same-sex marriage say, or to the lawfulness of the death penalty). In such a case, a court composed of judges who were individually committed to deciding cases on principle might find itself weighing the consequences of deciding in favour of the claimant against the long-term institutional costs of such a decision. Possessed of certain knowledge that a case like this, if decided on principle, would bring it into institution-threatening conflict with the political branches, the court might decide to compromise on principle, or hand down a decision less forceful as a matter of principle than it otherwise might have been. If pressed, the individual judges who joined such a decision might try to justify their action as being in the overall interests of the constitutional project, arguing that the success of that project depended on their preparedness to make strategic compromises of this sort. 'We decided the case this way', one might imagine them saying, 'in order to survive to fight another day'.

Of course, the decision whether or not to compromise on principle in a particular case would depend on a very difficult judgment call. Some highly charged cases would present questions of principle that could not be avoided,

even if it were to mean the immediate closing down of the court, or the replacement of its judges by more compliant ones. One could think here of a constitutional challenge to conduct on the part of the political branches that went to the very heart of the constitutional project. Compromising on principle in such a case would be self-defeating for a constitutional court, since it could never hope to recover its reputation for principled decision-making, and in any case the constitutional project would have no point if it required a court to compromise on principle in such cases. Between this type of case, however, and the many routine, uncontroversial cases that constitutional courts in new democracies decide, there would be other less clear-cut cases that a court might think were not worth deciding on principle for fear of the consequences. Examples here might be a difficult case involving the conduct of foreign relations, or the structure of the electoral system. In respect of these cases the court (meaning: a sufficient number of the individual judges) might decide that a tactical retreat from principle was required, thus avoiding confrontation with the political branches and permitting the court to build its legitimacy through principled adjudication in other, less controversial cases.²⁷

In addition to this type of highly charged case, one might imagine a constitutional court in a new democracy developing its jurisprudence in more run-of-the-mill cases so as to create doctrinal space for itself in later, more controversial cases. Behaviour of this sort would also evidence a pragmatic attitude on the part of the court, since the development of doctrine calculated to maximise the court's discretion would fit with legal pragmatism's preference for consequence-sensitive decision-making. In this instance, the goal of such a strategy would be to put the court in a position to adjust its decisions in later, more politically controversial cases to the demands of the political moment. Alternatively, the court, aware of the potential implications of an expansive, principled decision for later cases, might develop a collective judicial ethic of saying only as much as necessary to dispose of a case. Cass Sunstein has described this kind of strategy as involving the striking of 'incompletely theorized agreements'.²⁸ According to this understanding, the output of a constitutional court, in terms of principle, is necessarily less than the sum of its parts, since principled judges do not always agree, either amongst themselves or with competing principled views in their community. If true, the record of a constitutional court (especially in a new democracy, where so many issues of principle have yet to be decided) should resemble less the triumphant march of a forum of principle than the cautious output of a group of judges collectively sensitive to the need for a certain unanimity of purpose.

The argument of this paper is that something like this mix of principle and pragmatism provides the best explanation of the way the Constitutional Court of South Africa (CCSA) has successfully built its legitimacy in the first decade of its existence. In three highly charged cases, the paper contends, the CCSA can be shown to have compromised on principle in order to avoid confrontation with the political branches. As a proportion of its total record the number of these cases is very low, and there have been at least as many other highly charged cases in which the CCSA has not compromised on principle. Nevertheless, the three cases cannot be dismissed as aberrations – as mistakes rather than pragmatic compromises. For two reasons: first, because a close reading of the decisions reveals that in two instances judges writing for the minority set out principled arguments that the majority was at liberty to accept; and, second, because in numerous other, less highly charged cases, the CCSA can be seen to have eschewed principle in favour of pragmatism in the second sense just described. In this group of cases, the CCSA's pragmatism manifests itself in the form of doctrinal choices calculated to maximise its discretion to decide future cases on an all-things-considered basis. In its constitutional property jurisprudence, for example, the CCSA has interpreted a constitutional right that seemed to call for a fine-grained conceptual test as mandating an all-things-considered balancing test for proportionality. And in its equality jurisprudence, the CCSA, in place of the full-blooded moral reasoning that Dworkin's normative theory advocates, has adopted a formulaic test that confines moral reasoning to a few, carefully demarcated issues. Another recurrent theme has been the CCSA's use of doctrinally redundant rhetoric, both as a substitute for moral reasoning, and as a way of aligning itself with the political branches social transformation efforts. Even more so than the three politically controversial cases in which the CCSA can be seen to have made strategic compromises, these additional features of its record may be seen as pragmatic strategies aimed at building its legitimacy.

Notes

* Director, South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC). This paper was first presented, in a slightly different form, at a School of Oriental and African Studies/University of KwaZulu-Natal conference on *Law, Nation-building and Democracy* (Durban, February 2007). In rewriting this paper I have benefited from the comments given by the participants in that conference, and also from detailed comments subsequently received from my colleagues David Bilchitz and Stuart Woolman.

¹ There is a long political science tradition of studying courts and judicial behaviour in the United States. The field-defining article is Martin Shapiro 'Political Jurisprudence' in Martin Shapiro and Alec Stone Sweet *On Law, Politics and Judicialization* (Oxford UP, 2002) (first published in (1964) 52 *Kentucky LJ* 294). Another oft-cited article is Robert Dahl 'Decision-making in a Democracy: The Supreme Court as a National Policy-maker' (1957) 6 *Journal of Public Law* 279.

² The term 'constitutional court' as used here means both courts whose jurisdiction is limited to constitutional matters and supreme courts with mixed jurisdiction. There are important differences between these two types of courts for the argument of this paper. For one, a mixed court may build a reputation for principled adjudication in non-constitutional matters that it can use to good effect in more politically charged cases. The Constitutional Court of South Africa (CCSA) is a constitutional court of the first type, i.e. one whose jurisdiction is limited to constitutional matters.

³ See, for example, Jack Knight & Lee Epstein 'On the Struggle for Judicial Supremacy' (1996) 30 *Law & Society Review* 87; Lee Epstein, Olga Shvetsova & Jack Knight 'The Role of Constitutional Courts in the Establishment of Democratic Systems of Government' (2001) 35 *Law and Society Review* 117; Tom Ginsburg *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge UP, 2003); Siri Gloppen, Roberto Gargarella & Elin Skaar (eds) *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (2004).

⁴ The two examples commonly cited in the literature are the Russian Constitutional Court, which was suspended by President Yeltsin in 1993 for two years, and the Hungarian Constitutional Court, none of whose activist judges were re-appointed after the expiry of their first term of office in 1998.

⁵ See Shapiro op cit 21 ('courts as political agencies').

⁶ In the United States, for example, the appointment of a new Chief Justice is generally taken to signal a new era in the life of the Supreme Court, so that legal academics speak of the Warren Court's liberal project, or the Burger Court's partial dismantling of that project.

⁷ Cf Shapiro op cit 175 ('[t]he epistemic community of law has an enormous self-interest in defending constitutional courts, most basically in proclaiming their courtness').

⁸ For a survey of, and engagement with, Anglo-American legal theory on this issue, see Ronald Dworkin *A Matter of Principle* (Cambridge, MA: Harvard UP, 1985) 9-71. Dworkin is himself, of course, the legal theorist who has perhaps striven hardest to show that constitutional adjudication need not be political in the political science sense.

⁹ Epstein et al op cit.

¹⁰ Ibid.

¹¹ See, for example, Duncan Kennedy *A Critique of Adjudication (Fin de Siècle)* (Cambridge: MA, Harvard UP, 1997).

¹² Cf Dworkin *A Matter of Principle* op cit 9.

¹³ Herbert Wechsler 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harvard LR* 1 at 15 (accepting that constitutional adjudication deals with political questions but arguing that 'what is crucial ... is not the nature of the question but the nature of the answer that may validly be given by the courts').

¹⁴ See Ronald Dworkin *Taking Rights Seriously* (London: Gerald Duckworth & Co, 1977) 124.

¹⁵ I do not explore the implications of the claims of legal positivism for my research question in this paper, mainly because legal positivism lacks a coherent theory of constitutional adjudication. I also do not take seriously the possibility that by deferring to the intentions of the constitutional drafters or (something quite different) the views of the political branches when the constitutional text is unclear, a constitutional court in a new democracy may build its legitimacy. The weaknesses of intentionalism as a theory of constitutional adjudication are well known. (See Dworkin *Law's Empire* (London: Fontana, 1986) 359-69.) The problem with the second, 'passivist' approach is that it permanently relegates the court to an institutional position of no consequence. (Ibid 369-79.)

¹⁶ The term was coined by Ronald Dworkin *A Matter of Principle* op cit 33. See also Wechsler op cit 15-16.

¹⁷ See Ronald Dworkin *Taking Rights Seriously* op cit, *A Matter of Principle* op cit and *Law's Empire* op cit.

¹⁸ Ronald Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: MA, Harvard UP, 1996).

¹⁹ See Dworkin *Taking Rights Seriously* op cit 105-30.

²⁰ Ibid.

²¹ In a recent comment, Dworkin has spoken approvingly of the CCSA's socio-economic rights jurisprudence (Ronald Dworkin 'Response to Overseas Commentators' (2003) 1 *International J Constitutional Law* 651 at 652-53), but I am unaware of any article or book in which he has considered the constraints facing constitutional courts in new democracies in any detail.

²² Dworkin does not deny the role of pragmatism in his theory of adjudication, but limits judges' pragmatic discretion to compromising on principle where this is required to achieve the support of other judges (see Dworkin *Law's Empire* op cit 380). On the whole, as his sometimes acerbic exchanges with Richard Posner indicate, his theory is antithetical to pragmatism, which he pejoratively associates with activism (ibid 378).

²³ Cf Dworkin's definition of legal pragmatism in *Law's Empire* op cit 147.

²⁴ 531 US 98 (2000).

²⁵ *Law, Pragmatism and Democracy* (Cambridge, MA: Harvard UP, 2005) 322-56.

²⁶ Dworkin *Law's Empire* op cit 380-81, emphasis added.

²⁷ Constitutional courts with mixed jurisdiction obviously have more opportunity to engage in this kind of strategy.

²⁸ Cass R Sunstein *Legal Reasoning and Political Conflict* (New York: Oxford UP, 1996).