Chimera or real - how robust is South Africa's post-1994 Constitutional order?

TWENTY YEARS OF SOUTH AFRICAN CONSTITUTIONALISM
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At times, South Africa's constitution appears to capture either all the hopes or all the fears of a precarious society. On the one hand, the Constitution is blamed for almost everything. On the other, it is supposed to solve everything. Both 'fetishize' the Constitution from opposite ends of the spectrum: one positions the Constitution as an 'all purpose magic bullet'; the other, as a demon that stands in the way of 'real' socio-economic transformation. Neither view of the Constitution is fair or reasonable. Twenty years in, how robust is the South African Constitutional order proving to be?

Recent shifts in the political landscape that have heralded the arrival of a more obviously venal and populist impulse, that finds expression within the ANC (such as within the nationalist faction of which newly appointed Mineral Resources Minister, Ngoako Ramathlodi, is a prime example) and outside the ruling party (most obviously in the form of former ANC Youth League leader, Julius Malema, and his Economic Freedom Fighters [EFF]). From a standing start in late 2013, the EFF performed surprising well – not just in terms of winning 7% of the national vote in the May 2014 national election, but more significantly winning up to 22% in some working class voting districts in and around Johannesburg – and offers a platform for a more militant form of political discourse that is potentially a grave threat to the principles of legality and democracy enshrined with South Africa's much-admired Constitution, but which may also force South Africa to return to the politics of struggle and social emancipation that characterized its fight against apartheid.

From both sources – the EFF and the nationalist wing of the ruling party – there come covert, and sometimes overt, attacks upon the constitutional settlement of 1994 and the final Constitution that was written immediately thereafter and which until recently has enjoyed high levels of legitimacy and widespread acceptance within broader South African society. As an exceptionally clear

expression of this attitude, one need look further than the op-ed piece that was penned by Minister Ramathlodi in 2012:

> We thus have a Constitution that reflects the great compromise, a compromise tilted heavily in favour of forces against change. However, there is a strong body of thought arguing the view that our Constitution is transformative. In this regard, a point needs to be made that a constitution can either be progressive or reactionary, depending on the balance of forces in the society it governs. In our case, the black majority enjoys empty political power while forces against change reign supreme in the economy, judiciary, public opinion and civil society. The old order has built a fortified front line in the mentioned forums. Given massive resources deriving from ownership of the economy, forces against change are able to finance their programmes and projects aimed at defending the status quo. As a result, formal political rights conferred on blacks can be exercised only within the parameters of the old apartheid economic relations. This imbalance is reflected across the length and breadth of the country in economic, social and even political terms to some extent. The objective of protecting white economic interests, having been achieved with the adoption of the new Constitution, a grand and total strategy to entrench it for all times, was rolled out. In this regard, power was systematically taken out of the legislature and the executive to curtail efforts and initiatives aimed at inducing fundamental changes. In this way, elections would be regular rituals handing empty victories to the ruling party. Regarding the judiciary, a two-pronged strategy is evident. The first and foremost is to frustrate the transformation agenda by downplaying requirements of gender and colour representation…The other tactic is to challenge as many policy positions as possible in the courts, where the forces against change still hold relative hegemony. The legislature itself has not escaped the encroaching tendency of the judiciary, with debatable decisions taken by majority views, in some instances.

As I have written elsewhere, in response to this threat to the Constitution and the concern about the gap between the promise of the constitution and the lived reality for the majority of people in South Africa:

> Stripped to its bare essentials, this line advances the following set of propositions: black people are still very poor compared with white people; white people are using institutions such as the judiciary to frustrate change and the transfer of economic power; the Constitution is to blame for this because it contains political compromises that are exploited now by white interests… When there is doubt about the

> legitimacy of the constitution, then certain people or interest groups will exploit the weakness to further their own anti-democratic agenda. (Calland, 2013A: 200).

In an address to a conference on access to Justice, President Zuma gave a speech in which he made the following remarks: "Political Disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote must not be subverted, simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel other arms of the State are avenues to help them co-govern the country. ... Political battles must be fought on political platforms." And in a subsequent address to Parliament: "[T]here is a need to distinguish the areas of responsibility, between the judiciary and the elected branches ... especially with regards to policy formulation. Our view is that the Executive, as elected officials, has the sole discretion to decide policies for government..."

At the other end of the spectrum can be found 'constitutional fetishists' who would have people believe that the Constitution can either magically resolve all the weaknesses in South Africa's politics and government, or else no less magically 'transform' its society, notwithstanding the brutal and unforgiving political economy and the entrenched structural fault-lines of its economy.

Liberal democratic or conservative academics such as Venter suggest that:

> An analysis of the jurisprudence of the Constitution Court shows that the South African constitutional state may be defined as a state in which the Constitution prevails over all law and all actions of the state, where fundamental rights are acknowledged and protected through the independent authority of the judiciary to enforce the Bill of Rights and the Constitution, a separation of powers is maintained, all government action is required to be legally justified, the state has a duty to protect fundamental rights, legal certainty is promoted, democracy and the rule of law are maintained, where a specific set of legal principles apply and an objective normative system of values guides the executive, legislature and the judiciary. (Venter, 2011).

Meanwhile, the constitutional transformers such as Klare present an ambitiously aspirational view of the Constitution as a bridge to nirvana:

> "By transformative constitutionalism I mean a long term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social

> institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law" (Klare, 1998: 150).

Clearly, there are numerous ways in which the evidence of what has happened since 1994 can be scrutinized to determine whether Klare's (rebuttable) proposition is proving to be justified or not. But to start at the beginning, as it were, it is important to recognise that the principle of legality is now a core part of the South African system and there have been numerous cases where the courts have over-turned either the legislature or the executive. "In doing so, the judiciary may no longer follow a formalistic 'positivist' approach to legal interpretation. It has been replaced by a purposive, generous and value-oriented interpretation of legislation, common law and customary law. The traditional and orthodox method of interpretation must be adapted to be consistent with the new constitutional order 'to promote the spirit, purport and objects' of the Bill of Rights" (Pienaar & February, 2014: 26).

As of 2013, in its 17 years of existence, the Constitutional Court has handed down 422 judgments, roughly 25 judgments a year. Of the 422 cases, 147 required the Court to determine whether a provision in an Act of Parliament was consistent with the Constitution, of which 90 were found to be inconsistent – an average of just over five times a year. The Court has upheld 20 challenges to the validity of legislation in the area of equality and 10 challenges on the right of access to courts. There have been nine challenges to the property clause – all unsuccessful – while there have been 13 successful challenges to legislative powers of the president, parliament, provincial and local government (O'Regan 2012).

It is also worth noting that the courts have made substantial adverse findings against each of South Africa's democratic elected presidents. In the SARFU case, the high court found that President Mandela had acted beyond his lawful authority in appointing a judicial inquiry into the governance of South African rugby, albeit that the constitutional court overturned the judgement on appeal, on the facts, whilst accepting that presidential power of this sort was reviewable[i]; in Albutt, that President Mbeki had infringed the bill of rights and acted irrationally when granting presidential pardons to a category of political prisoner whilst excluding another category to whom no right of prior representation was granted[ii]; and in Simelane, that President Zuma had acted irrationally in failing to take into account serious adverse findings that had been made against his appointee as National Director of Public Prosecutions. Even this small sample of cases makes the bigger point: that since the advent of the 1996 'final' Constitution, public power in South Africa – up to the highest office in the

land – has been subject to judicial review and the principles of legality and rationality[iii].

The constitutional court has made it clear that all exercises of public power must be reasonable and rational, as well as within the confines of the law, and that the courts have the authority to overturn governmental action (or inaction) on such grounds. In a case concerning fishing quotas and the socio-economic transformation of the sector, the court held that the decision of the government to award a quota to a black empowerment fishing company Bato Star Fishing was on review reasonable and not, as the company alleged, too low[iv]. While 'reasonableness' is, by its core nature an elastic and flexible legal test, and one that is very context and fact specific, it does ensure that all unreasonable exercises of executive discretion can be challenged in court.

A recently published study suggests that the cases surveyed over a period of time (2009-13), which usefully coincides with the first Zuma administration, do not reveal a pattern of the Court systematically failing to have proper regard to the principle of deference and the doctrine of the separation of powers, and that judgements which might seem intrusive into the domain of other branches of government must be assessed in the context of the Court's constitutional mandate, which vests it with significant powers of review (DGRU 2014). The study also notes that "the debate misses many nuances surrounding the separation of powers, which would benefit from being more fully considered. These include separation of powers between all branches of government; a tendency to over-emphasise the popular mandate of the executive; the complexities of assessing the appropriate degree deference in cases between different branches of government; the impact of the legislative framework that is drafted and passed by the political branches of government; the effect of government litigation strategy on its success in court; and compliance by other branches of government with court decisions as an aspect of the separation of powers".

In a constitutional democracy, especially one where separation of powers is contested as a doctrine, or at least is subject to increasing political scrutiny and questioning, a great deal turns on the quality and independence of the judiciary itself. Whether the judiciary's independence is secure depends both on institutional safeguards and more intangible factors such as its legitimacy and the experience and independent-mindedness of judges.' (February & Pienaar, 2013: 31). Accordingly, the judiciary will 'survive and thrive' only if it 'wins the trust of a large section of the South African population, who would be prepared to defend its independence and impartiality' (De Vos 2010: 106). In recent times, the judiciary has come under attack from President Zuma and other leaders from within the ruling party, on occasion calling the judiciary 'counter-revolutionary'.

In recent times, the ANC, accompanied by 'African legal nationalists' have opened up a 'new front' in the Judicial Service Commission (JSC), another constitutional body, whose responsibility it is to appoint judges. The JSC is now mired in procedural and substantive difficulties arising from a lack of consensus around both the law and its own practice when considering candidates. There is, moreover, an unfortunate alliance between the senior ANC figures on the JSC, who prefer candidates who are more inclined towards being deferential to the executive branch of government, 'legal nationalists', who just want to see black candidates appointed. This has served to undermine the JSC's ability to assess quality and to appoint judges who are independent-minded.

Institutions matter to the quality of constitutional democracy and to the strength of otherwise of the rule of law. The integrity of the courts, and the independence of the judiciary, is an essential element. But there are other important institutions which form part of the Constitutional infrastructure established by the 1994 settlement, and that are essential to the rule of law, such as the Public Protector, the Human Rights Commission, the Independent Electoral Commission and beyond these constitutional bodies, a range of state institutions such as the Competitions Commission and the Independent Communications Authority of South Africa. On this front, the picture is mixed, but more positive than negative.

The Public Protector provides the most vivid example of both the positive and negative. Over the past three years, a major scandal involving President Zuma and costly upgrades to his private home in Nkandla, KwaZulu-Natal, has unfolded. In October 2012, the Public Protector, Advocate Thuli Madonsela, began an investigation into the publicly-funded construction at Nkandla. Zuma addressed Parliament in November 2011, claiming that the costs of Nkandla upgrades are required for security purposes and that secrecy about the details is justified under the National Key Points Act. He further claimed that his family paid for the costs of the building that were not expressly covered by the national security requirements.

The Public Protector's final report on Nkandla, entitled "Secure in Comfort", was published in March 2014. In a comprehensive and detailed 400-page examination of the facts, found that Zuma had "unduly benefited" from upgrades to his private Nkandla residence and should have to pay back at least part of the spending on improvements to the property not related to security. She reached these conclusions despite numerous attempts by leading officials of the ruling party to attempt intimidate her, the Public Protector has held her line with commendable firmness. That she has done so, on an issue that at its highest has the potential to bring down a President, and one who has very strong motives for

wanting to hold onto office, demonstrates her robustness. On the hand, the fact that the ANC is willing to attempt to try and intimidate her, indicates the lengths to which it – and Zuma – is willing to go to try and undermine those institutions.

It also reveals a new fault-line. At one point during the recent parliamentary ad hoc committee hearings on Nkandla, ANC MP Mthole Motshekga asked rhetorically 'how can the Public Protector be treated as more important than we who have been elected to parliament by the people?' (or words to that effect). In constitutional law terms it is very simple: the Constitution is supreme and so a constitutional body such as the Public Protector has greater authority. During the transition to democracy in the early 1990s, South Africa turned its back on its system of parliamentary sovereignty and chose instead to be a constitutional democracy. The ANC was fully behind this choice. It did not want a repeat of the executive abuse of power that had characterized the apartheid era. But having laid its bed, now it is having to lie in it and, apparently, it is no longer finding it such a comfortable thing to do.

And while the legal answer to Motshekga's question is absolutely and categorically clear, decisive and comprehensive, it does not provide a satisfactory *political* answer. Notwithstanding the Constitution, what the ANC is really pointing to is the counter-majoritarian impact of the constitution and its various institutional manifestations – whether it is in the form of the courts over-turning government law or policy, or the Public Protector ordering 'remedial action' to be taken by the executive that is not to the President's liking.

As February and Pienaar suggest, "[f]rom one perspective, it may be a matter for some regret that the Chapter Nine institutions, established by the Constitution to strengthen constitutional democracy, and the courts, have been called on to pronounce on so many issues of cardinal significance to democratic and accountable governance, and to the rule of law. In doing so, they have become unavoidably politicised. Viewed differently, their judgments, workloads and reports testify to the need for their services – and to the foresight and wisdom of the drafters of the country's founding document. The necessity of resorting to these forums to assert constitutional rights and claim their protections can be understood as a reflection of the persistent, deep divisions in ideology, identity and understandings of vertical and horizontal accountability that continue to characterise South African society" (February & Pienaar, 2014: 26).

Progressive thinkers have hit back against the crudeness of populist approaches such as that advanced by Ramathlodi, describing it as "insane" and "dangerous" (Naidoo, 2011), and as rendering the Constitution vulnerable to what the Chairman of AngloGoldAshanti, and Founding Chairman of the Council for the Advancement of the South African Constitution (CASAC), Sipho Pityana has

described as a potentially destabilizing assault by populist factions within the ruling party (Pityana, 2013: vii). Following directly from this concerning trend in South African political attitudes to the constitution and, thereby, to the rule of law and the principle of legality, there is much to be said in favour of Pityana's argument that what is urgently needed is a vibrant, meaningful public articulation of the idea of what he calls 'progressive constitutionalism' that will "create a popular narrative that is not self-serving of the interests of the rich and powerful, but which is truly transformational for the lives of the majority" (Pityana, 2013: ix).

If the South African Constitution is sustainably strong it is because the political case for it has been made and the struggle for rights has been won outside of the courts (as well as inside of them). Equally, if it is weak and vulnerable to political attack, it is because the politics of South Africa has moved away from its 1990s progressive equilibrium point towards a more conservative and populist character, which is neither loyal to the Constitution and its political origins nor concerned about the centrality of its future role in South Africa's democratic and socio-economic development.

References:

Calland R. 2013A. Things Fall Apart; The Centre Cannot Hold, in Bentley K. Calland R. & Nathan L, (eds). *Falls the Shadow: The Gap between the Promise of the South African Constitution & the Reality.* UCT Press, 2013.

Democratic Governance & Rights Unit (DGRU), University of Cape Town. 2014. Has the south african constitutional court over-reached? A study of the court's application of the separation of powers doctrine between 2009 and 2013. http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Separation%20of%20Powers%20Draft%20August%202014.pdf

De Vos, P. 2010. Key institutions affecting democracy in South Africa, in Misra Dexter, N. & February J. (eds.) *Testing Democracy: Which way is South Africa going?* Cape Town: Idasa.

February J. & Pienaar G. 2014. Twenty years of constitutional democracy in Meyiwa T., Nkondo M., Chitiga-Mabugu, M., Sithole M., & Nyamnjoh F. (eds) *State of the Nation 2014*. HSRC: Pretoria. 2014.

Klare, K. 1998. Legal Culture and Transformative Constitutionalism. SA Journal on Human Rights, 146.

Naidoo, Jay. 2011. Stop Insane Attacks on Our Constitution. http://www.jaynaidoo.org/stop-insane-attacks-on-our-constitution/ (accessed on 9 November 2012).

O'Regan, K. 2012. Helen Suzman Memorial Lecture – Forum for reason: Reflections on the role and work of the Constitutional Court. *South African Journal on Human Rights* 28: 116-134.

Pityana, S. 2013. Foreword to Bentley K. Calland R. & Nathan L, (eds). *Falls the Shadow: The Gap between the Promise of the South African Constitution & the Reality.* UCT Press, 2013.

Venter, F. 2011: South Africa as a "Diceyan Rechtsstaat", in Matthias Koetter /Gunnar Folke Schuppert, Understandings of the Rule of Law in various legal orders of the World, Rule of Law Working Paper Series Nr. 18, Berlin (ISSN 2192-6905): http://wikis.fuberlin.de/download/attachments/173736195/Venter+South+Africa.pdf.

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[i] President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999): **http://www.saflii.org/za/cases/ZACC/1999/11.html** (accessed on 29 August 2014).

[ii] Albutt v Centre for the Study of Violence and Reconciliation and Others (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC) ; 2010 (2) SACR 101 (CC) ; 2010 (5) BCLR 391 (CC) (23 February 2010): **http://www.saflii.org/za/cases/ZACC/2010/4.html** (accessed on 29 August 2014).

[iii] Democratic Alliance v President of South Africa and Others (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012): **http://www.saflii.org/za/cases/ZACC/2012/24.html** (accessed on 29 August 2014).

[iv] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004): **http://www.saflii.org/za/cases/ZACC/2004/15.html** (accessed 29 August 2014).