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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**EXCHANGE OF VIEWS BETWEEN THE SOUTHERN AFRICAN
JUDGES COMMISSION AND THE VENICE COMMISSION
ON CONSTITUTIONAL REVIEW IN COMMON LAW COUNTRIES
AND COUNTRIES WITH SPECIALISED CONSTITUTIONAL COURTS
(VENICE, 17 MARCH 2006)**

Report by

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Introduction

It is not easy to summarise the work and role of the Constitutional Court in the short time available to me. I must necessarily focus on but a few of the more interesting aspects for comparative purposes of the Court's jurisdiction and role. I will also touch briefly on the manner in which judges are appointed to the Court. However, before I do that I would like to devote some time to the historical situation that gave rise to South Africa's first Constitutional Court.

The history of the Court's establishment

In 1991 South Africa's 'negotiated revolution' began at the Convention for a Democratic South Africa (also known as CODESA) in a suburb of Johannesburg where various political groupings met to discuss the transition process and a new Constitution for South Africa. The Constitution that was drafted after a period of negotiations is known as the Interim Constitution and it was during these negotiations that the idea of a Constitutional Court first emerged. The Constitutional Court was, therefore, both born out of, and formed an integral part of South Africa's transition from a racist, apartheid state to a democratic nation founded on human rights and the rule of law

During the negotiations the political parties realised that the new Constitution would require a new judicial body to guard it. There were a number of reasons for this. The foremost motivation was that the judiciary of the time lacked any meaningful political legitimacy. Although not all members of the old judiciary supported apartheid, it was the same judiciary that had upheld tyrannical apartheid laws for over forty years in the name of "parliamentary sovereignty". In 1993 the bench was composed, almost without exception, of white, male judges who were appointed by the Executive and predominantly from the ranks of senior advocates. The judiciary was perceived by the majority of South Africans as a cog in the apartheid machinery of exploitation rather than as a force for freedom or justice.

Combined with this, the legal culture prior to the Constitution was exceptionally conservative and positivistic. Courts were meant to (and did) interpret and apply the common law or "the will of the legislature" without question. There was no possibility of judicial review of legislation and human rights were seen as political rather than legal principles. The judges of the time were accordingly not free agents in advancing human rights. But they were obliged to administer oppressive laws. For all these reasons there was no faith that the apartheid judiciary would be able to give effect to the transformative aspirations and spirit of the new Constitution and Bill of Rights.^[1]

The new Constitutional Court was the solution to this crisis of judicial legitimacy. In almost all aspects it served as a complete break from the previous judicial system. The eleven judges would be drawn from all realms of the legal fraternity, although four were required to be previous members of the Supreme Court. The new judges would be widely representative of the South African population.^[2] The Head of the new Court was to be appointed by the newly elected President, Nelson Mandela. The remaining six judges would be appointed after public hearings, the first ever judicial public hearings in South Africa's history. The hearings raised significant public debate about the past of various candidates and their suitability for judicial office. This process characterised the transition from a society of authority to one of openness

and candour.^[3] The eventual make-up of the first Court, although still a far-cry from exact demographic representation, was the most representative court South Africa had ever had, and one that was worthy of the country's faith and capable of fulfilling the weighty expectations that had been laid on us.^[4] I personally had the privilege of being a part of this new Court as one of its first members.

Probably the most important and challenging role assigned to us under the Interim Constitution was the unique task of certifying the text of the final constitution.^[5] After the 1994 election, the country's first democratic parliament served as a "Constitutional Assembly" to draft the final Constitution. However, before the Constitution could come into effect, it had to be approved by the Constitutional Court. The Court was to measure the text against thirty-four "Constitutional Principles" that had been included in the text of the Interim Constitution. These principles ranged from very broad and universal concepts such as judicial independence and the protection of human rights, to very particular South African concerns, such as the recognition of the role of traditional leaders and the necessity of affirmative action. Some of these principles were direct responses to political pressures that arose during the transition period.

Two months later we delivered our judgment. In a unanimous decision the Court rejected the text on nine counts.^[6]

The Constitutional Assembly revised the text and corrected it to give effect to the concerns expressed by the Court and this time the Constitutional Court approved and we finally had a new Constitution..

Today the Constitutional Court occupies premises on the site of the notorious Old Fort Prison where political prisoners were kept and which was a symbol of the dehumanising oppression of apartheid. People like Mahatma Gandhi and Nelson Mandela had been prisoners there.

The Old Fort Prison used to be symbolic of all that was wrong with South Africa. The Court has not replaced the prison but has incorporated itself into the site. Many of the same bricks that were part of the destruction of human dignity, now form part of the Constitutional Court, human dignity's ultimate guardian. While the Fort used to be hidden from view, today it is open to the public and tourists and school children regularly visit the Fort and the Court to learn about the past we come from and the future to which we aspire.

The Court building has itself become symbolic of the constitutional project of creating a bridge between a terrible past and a brighter future. It is not a bridge that can simply be crossed once, leaving the past behind. It is a bridge that must be crossed again and again in the constant search for justice in our young democracy. The Prison in the Court and the Court in the Prison is a constant reminder of this fact.

The Jurisdiction of the Court

The Court can hear cases in four different instances. Firstly, it acts as a court of appeal for cases emanating from the SCA and in some instances the High Court and is the highest Court of appeal on all constitutional issues. Secondly, the Constitution and the Rules of the Court provide for a matter to be brought directly before the Court under certain circumstances.^[7]

Thirdly, the Constitutional Court has exclusive jurisdiction over a number of issues and no other Court is permitted to take decisions on those issues. Fourthly, if the High Court or the SCA declares that legislation is unconstitutional, the matter must be referred to the Constitutional Court for a confirmation of the order of invalidity, and no such order of invalidity has any force or effect until confirmed by the Constitutional Court.^[8]

^[1] See in this regard J Van der Westhuizen 'The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions Ideas, with reference to the German Experience' (1991) 24 *De Jure* 1 at 4-5; TJ Kruger 'A Constitutional Court for South Africa' (1993) 6 *Consultus* 13 at 14; C Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' 2005 (21) *South African Journal of Human Rights* 509 at 510-511 and R Spitz *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (2000) Chapter 11.

^[2] See s 174(1) and 174(2) of the Final Constitution (FC).

^[3] D Davis, G Marcus & J Klaaren 'The Administration of Justice, Law Reform and Jurisprudence' (1994) *Annual Survey of South African Law* 715 at 719-727.

^[4] The transcripts of the public hearings are available at the Court's website: www.constitutionalcourt.org.za.

^[5] For an excellent and detailed summary of the certification process from which many of these insights are drawn, see C Rickard 'The Certification of the Constitution of South Africa' in P Andrew & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic* (2001) 224.

^[6] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253.

^[7] FC, s 167(6) and Rule 18 of the Rules of the Court.

^[8] FC, s 167 (5).