The Constitutional Court: What Risk of 'Judicial Capture'?

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Swiss Cham Briefing, 27 Sep 2017

Some telling cases

- ConCourt has decided hundreds of cases since 1993 and made good rulings on free speech, due process, arrear rates, for example
- I can focus only on 8 key rulings
- Three deal with corruption and attempts to counter it (ie, with Scorpions and Nkandla)
- Others deal with mining rights and with race-based affirmative action

The Scorpions

- Corruption emerged as key issue early on (the arms deal, plus fraud in pensions, housing, driving licences) but little action against it
- New unit, the Scorpions (Directorate of Special Operations or DSO) was created in 1999 by Thabo Mbeki, began operation in 2001
- Fell under the NPA, not the police
- Modelled on FBI, elite unit, higher pay, etc

Institutional/operational autonomy

- Head of Scorpions was a deputy NDPP in the NPA, with security of tenure (limited grounds for dismissal, subject to Parliamentary veto)
- Head reported to NDPP who also had security of tenure and served for single term only
- Head's salary, like judge's, not easily reduced
- Little executive control over targets for investigation or decisions to prosecute

Scorpions soon under fire

- Travelgate investigation/prosecutions, which senior figures in ANC tried hard to stop
- Successful prosecution of Schabir Shaik
- Further investigation of Jacob Zuma: simultaneous raids, 93 000 documents seized
- At Polokwane national conference, Zuma faction won control, adopted resolution demanding disbanding of Scorpions

Ist ConCourt judgment (2008)

- After gazetting of bill to disband Scorpions, bill to create Hawks, Glenister wanted *former* bill struck down before it was adopted by Parliament
- Constitution requires protection against crime; binding treaties require *maintenance* of independent anti-corruption agency; Scorpions were unravelling; irreparable harm would come from waiting until bill was passed by Parliament
- Langa CJ: harm not clear enough to intervene; come back after bill's enactment to challenge it

2nd ConCourt judgment (2011)

- Both bills were signed into law in 2009
- 2 bills before ConCourt: one to disband Scorpions, second to create Hawks inside SAPS
- Court never dealt with first bill: instead ignored it and focused on second bill
- Minority: It is irrelevant that Scorpions could have been retained, key issue is legality of Hawks bill
- Majority: SA must *create* an independent agency and Hawks bill is flawed (too much exec control)

Public Protector on Nkandla

- Thuli Madonsela, *Secure in Comfort*, 2014
- SAPS in 2009 had listed necessary security upgrades, costed at some R28m
- Work done went far beyond this list, costs went up to projected total of R246m, included many items plainly not required for security
- Mr Zuma was constantly aware of work being done, chivvied ministers etc to speed it up

Public Protector on Nkandla

- Her list of non-security upgrades *included* visitors' centre, pool, kraal, amphitheatre, roads/ paving, relocation of 'dilapidated' homes, private clinic, private heli pad, 'safe haven' for R19m
- Procurement rules were constantly disregarded
- 'A licence to loot situation' had been created
- President knew but failed to act, he benefited improperly, and must pay back an appropriate portion of the costs of the non-security items

ConCourt on Nkandla

- Important and sound ruling in many ways
- 'Remedial actions' required by PP are binding, unless set aside on judicial review
- Mr Zuma breached Constitution by failing to comply, plus failing to assist/protect the PP
- BUT court accepted Mr Zuma's list of five non-security items, ignored the others listed by PP
- Gave no reasons for discounting all the rest

Agri SA case (2013) under MPRDA

- Two thirds of mineral resources were privately owned in 2004, when MPRDA took effect
- Act vested all mineral resources in the 'custodianship' of the state, no compensation
- Holders of 'old-order' mining rights could apply for 'new-order' rights, which are 30-year licences, revocable in various circumstances
- Old-order rights not converted would 'cease to exist' after specified periods

Agri SA case under MPRDA

- In 2001, Sebenza (Pty) Ltd bought unused coal mining right for R1m
- After 1 May 2004, had one year to convert
- Could not afford R1.5m application fee (went into liquidation instead)
- Its old-order right thus 'ceased to exist'
- Agri SA took over claim, sued for damages for expropriation

Pta High Court in *Agri SA* case

- Sebenza had lost all the powers and benefits, ie the 'competencies', of ownership
- These competencies were now vested in the state
- The state had 'acquired the substance' of the competencies Sebenza used to have
- It made no difference that the state's rights were termed 'custodianship' rather than ownership
- Expropriation had occurred, so compensation of R750 000 was payable

ConCourt judgments in *Agri SA* case

- Mogoeng CJ: 'The assumption of custodianship' does not give rise to expropriation, as it does not make the state the owner of the right
- No compensation was thus payable
- 2 judges: This approach could put an end to the private ownership of property without compensation having to be paid
- 3 judges: state acquisition is not always needed for expropriation, unwise to make new rule

ConCourt in *Agri SA* case

- Mogoeng approach evident in new definition of 'expropriation' in Expropriation Bill of 2015
- Means 'compulsory acquisition' by the state
- Could allow state to take land as 'custodian', without paying compensation (as it planned to do in Agri Land Bill of 2014, since withdrawn)
- Will allow regulatory expropriation without compensation: 51% BEE deals, price controls on minerals, private hospitals under NHI

ConCourt in *Harksen* case, 1993 Constitution

- Surviving spouse on insolvency unfairly treated, contrary to equality clause (section 8)
- Section 8 prohibited unfair discrimination on race or other listed grounds; said discrimination on a listed ground was unfair unless the contrary was established
- AA measures may discriminate on a listed ground and will then be presumed to be unfair, but the presumption can be rebutted

Equality clause in 1996 Constitution

- 9 (1): guarantees equality before the law
- 9(2): allows measures designed to advance those disadvantaged by unfair discrimination
- 9(3): the state may not unfairly discriminate on race or other listed grounds
- 9(4): private persons may also not so discriminate
- 9 (5): discrimination on a listed ground is unfair unless the contrary is established

High Court in *Van den Heever* case

- Smaller state contribution to pension of MP from pre-1994 period, vis-a-vis new MPs
- Cape High Court: There had been discrimination on race + political affiliation, both were listed grounds; reverse onus thus applied; state had not shown it was fair
- (Pta High Court had used same approach in deciding AA case in the public service)

ConCourt in *Van den Heever* case

- Constitution seeks to bring about substantive equality, not simply equality before the law
- High Court approach on reverse onus is wrong
- AA or remedial measures falling within Section 9(2) 'are not presumptively unfair'
- Abandoned *Harksen* approach, ie that AA measures which discriminate on a listed ground are presumed to be unfair, while this presumption can then be rebutted

Ignores Constitutional scheme

- Ignores reverse onus in Section 9(5)
- Ignores overall Constitutional scheme:
- Non-racialism is key founding value: Sec 1(b)
- Discrimination on race is automatically unfair, unless contrary is shown: Sec 9(3) (4) (5)
- Colour-blind AA measures may be taken: 9(2) Eg, better education & living standards, budgetary redistribution (intention at time)

Ignores Constitutional scheme

- Public service should be 'broadly representative', but employment practices must be based on ability, objectivity, fairness, as well as redress for past imbalances (s195)
- Judges must be 'fit and proper' persons, but need for broad representivity must also be considered (subsidiary criterion) (s174)
- No other authorisation for race-based AA/BEE

ConCourt in *Van den Heever*

- AA measures under 9(2) cannot be presumed unfair; they are authorised remedial measures
- 3 questions to see if 9(2) tests are met:
- 1: does measure target those disadvantaged by unfair discrimination?
- 2: is it designed to protect/advance them?
- 3: does it promote the achievement of equality? (Is it “reasonably likely” to do so?)

SCA in *Barnard* case against SAPS

- White police officer, best qualified for higher post, but post was instead withdrawn and later re-advertised (happened twice)
- Why? whites over-represented under EE Plan
- SCA: She was discriminated against on grounds of race, SAPS bore onus of disproving unfairness, SAPS had failed to do so
- EE targets could not be key criteria for appointment, as they would then be quotas

ConCourt in *Barnard* case

- ‘SCA misconceived the issue before it, as well as the controlling law’
- It was wrong to use the *Harksen* approach to unfair discrimination, as Barnard had never challenged the EE Plan as unlawful
- In these circumstances, there was ‘no warrant to burden the SAPS with an onus’ to disprove unfair discrimination
- SCA decision overturned, no remedy for her

ConCourt in *Department of Correctional Services (DCS)* case

- The 'Barnard principle' is that employers may refuse to appoint those who are 'already adequately represented' at a particular level
- DCS EE Plan: 9.3% for whites, 79.3% for Africans, 8.8% for Coloureds, 2.5% for Indians (national)
- 9 Coloureds in W Cape not appointed because Coloured employees exceeded this 8.8% target
- But DCS should have used regional figures too, as required by EE Act, so its EE Plan was invalid

ConCourt in DCS case

- DCS targets not rigid enough to count as quotas as National Commissioner could allow deviations in order to appoint people with special skills, eg doctors and social workers
- 13 deviations had been allowed (2010-2013)
- White male had been rightly rejected as whites were already over-represented
- Coloureds had been excluded on invalid plan, and should instead have been appointed

Minority ruling in *DCS* case

- EE Plan based 'only on cold and impersonal arithmetic', to be 'unswervingly applied'
- Detailed figures of how many from each race group to be appointed at each level (eg 13 African and 4 coloured females at level 13)
- No flexibility for posts not excepted from Plan (eg posts for doctors), so quotas, not targets
- Regional figures overlooked, so plan invalid

Judicial capture?

- Bad decisions on Scorpions, 2008 and 2011
- Zuma's liability for Nkandla limited to 5 items
- *Agri SA* case opens way to expropriation without compensation, if state takes as custodian or uses regulatory expropriation
- Sound decision in *Harksen* abandoned
- Reverse onus clause in Section 9(5) ignored by ConCourt in *Van den Heever* case

Judicial capture?

- Constitutional scheme for non-racialism and redress also ignored in *Van den Heever* case
- SCA decision in *Barnard* overturned on weak reasoning
- No quotas in 'cold' arithmetic in DCS EE Plan
- Concourt not strong enough on corruption
- Increasingly weak on racial quotas, which help only the few while harming most black people

Judicial capture?

- Some disturbing flip-flops by ConCourt eg it rejected floor-crossing, until ANC wanted this
- ANC seeks control over judiciary: key lever of state power, important to success of its NDR
- ANC wants East German approach to separation of powers, being implemented??
- ConCourt will be stronger on corruption, but not on AA, BEE, property rights, or 'RET'