"Transforming a notorious icon of repression into its opposite": The South African Constitutional Court and institutional 'newness'

Working Papers in Gender and Institutional Change, No. 4

November 2015

Rachel E. Johnson

University of Durham

rachel.johnson-2@durham.ac.uk

Published by the ERC funded project: 'Understanding Institutional Change: A gender perspective'

www.manchester.ac.uk/uic @UICGENDER

Funders

This Working Paper is based on research supported by the European Research Council (ERC) who provided financial support under the European Community's Seventh Framework Programme (FP7/2007-2013)/ERC grant agreement No. 295576-UIC for the project "Understanding Institutional Change: A Gender Perspective."

Introduction

> *"The Constitutional Court building, indeed the entire Constitutional Hill precinct, will also stand as a beacon of light, a symbol of hope and celebration. Transforming a notorious icon of repression into its opposite, it will ease the memories of suffering inflicted in the dark corners, cells and corridors of the Old Fort Prison. Rising from the ashes of that ghastly era, it will shine forth as a pledge for all time that South Africa will never return to that abyss. It will stand as an affirmation that South Africa is indeed a better place for all".* **Nelson Mandela, speaking at the ceremony announcing the winning design for the new Constitutional Court building in 1997.**

The decision to establish a Constitutional Court in South Africa and all that the Court has come to symbolize, through its new building, new judges and new practices, cannot be understood apart from the processes of transition to democracy in South Africa. Nelson Mandela was speaking specifically to the design of a building to house the new Court in the epigraph quoted above, but his comments also apply to the transformation of the law more generally. The political transition from apartheid minority-rule to post-apartheid democracy in South Africa required a transformation of the law – from that which had upheld and legitimized apartheid to that which underpinned a new legal order enshrining equality. The South African transition to democracy was shaped by a strong 'urge for legal continuity' seen for example in the insistence that the interim constitution was the last act passed by the old tri-cameral Parliament.[1] Beyond this, some have seen the moral renewal of South African law as one of the central aims of the transition process.[2] Roux suggests that South Africa's tradition of judicial independence was 'fragile' in the late 1980s and that in this context 'why the negotiators placed so much trust in law – to the point of giving judges the power of judicial review' in the Constitutional Court is difficult to explain.[3] Some have suggested that the timing of South Africa's transition as concurrent with 'the ascendancy of rights based constitutionalism in international political culture' (and ANC exiles contact with this culture) as an explanation. Others have emphasized the 'memory' of the, albeit compromised, application of 'formal rational law' under apartheid as providing a bedrock of trust in the law.[4] It may well also be as Martin Chanock has argued that the commitment to legality intensified during 'the protracted constitution-making processes', because the negotiations 'were accompanied by a counterpoint of violence which, paradoxically, led to an exaggeration of the security that would be provided by a new legality'.[5]

Whatever the reasons, the legality of the South African transition profoundly shaped and continues to shape its newly established institutions and political realities. As Heinz Klug has put

---

[1] Hugh Corder, 'Judicial Authority in a Changing South Africa', *Legal Studies* 24, no. 1–2 (2004): 260.
[2] Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2001).
[3] Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press, 2013), 150.
[4] Ibid.; Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (Hart Pub., 2010); Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (Cambridge University Press, 2010).
[5] Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge University Press, 2001), 513.

it, 'just as the 1996 Constitution contains the hopes and aspirations of the majority of South Africans, the embrace of constitutionalism and the rule of law means that the processes for fulfilling these dreams will be shaped by the encrusted processes and encumbered resources that makes up the South African legal tradition'[6]. The new Constitutional Court sat at the heart of this transition, in what Roux calls the 'awkward' but which might also be seen as paradoxical, position of being required to 'be faithful to the purposes of the new constitution, including its transformatory purposes, and, on the other hand, [needing] to justify its decisions according to the very legal-professional norms and practices it [was] mandated to transform'.[7] This working paper attempts to unpick the awkward and paradoxical newness of the South African Constitutional Court and scrutinise what kind of environment it has been for those wishing to feminise the Court, the judiciary, and legal professions more broadly.

The aim is to produce a gendered, historical analysis of the South African Constitutional Court, *as a newly established institution*. In doing so this paper draws upon a historical institutionalist, (what some have preferred to call interpretive institutionalist) and an emerging feminist institutionialist literature on Courts.[8] These approaches put the decision-making activities of courts, for a long time the sole focus of political scientists' interest in the judiciary, within institutional and historical context. One commentator has summed up the shifting focus of political accounts of courts thus: where behaviouralist accounts view judicial decision-making as essentially reactive, and rational choice approaches emphasise judges' decisions as interactive, historical institutionalists view that decision-making as both regulatory and constitutive.[9]

Whilst it is hoped this Working Paper will be useful to those studying the Constitutional Court and its place within South African politics, it is also, under the auspices of the Understanding Institutional Change: A Gender Perspective (UIC) programme, a contribution to a broader project of rendering historical institutionalist concepts sensitive to gender.[10] As such the paper proceeds in four main sections and has two objectives. The first objective is to summarise the existing literature on South Africa's Constitutional Court and to try to draw out insights into the institution's gender politics – this task is taken up in sections two, three and four. The second objective of the paper, to suggest a way of theorizing institutional 'newness' as deeply entangled with gender politics is outlined in section one and picked-up upon once more in section four. Section two examines the design of the institution within South Africa's negotiated transition to democracy. I retell the most common narratives of the birth of the Court and ask what this founding narrative highlights and obscures. Following this, in section three the 'legacies' with which the Court was tasked with grappling are outlined. This approach has been suggested by a number of institutionalist concepts, such as that of 'nested newness' which seek to highlight the affects of the fact that new institutions are always born into a pre-existing institutional landscape. However, the interest in legacies here is also about thinking-through the aspects of

[6] Klug, *The Constitution of South Africa*, 21.
[7] Roux, *The Politics of Principle*, 63.
[8] Gilman prefers 'Interpretive Institutionalism': Cornell W. Clayton and Howard Gillman, *Supreme Court Decision-Making: New Institutionalist Approaches* (University of Chicago Press, 1999) see discussion in:; Keith E. Whittington, 'Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics', *Law & Social Inquiry* 25, no. 2 (2000): 601–34.
[9] Whittington, 'Once More Unto the Breach', 612.
[10] See: http://www.socialsciences.manchester.ac.uk/subjects/politics/our-research/projects-and-networks/understanding-institutional-change/

'the old' which the Court's newness has been marked against. In the fourth section the existing assessments of the Court, particularly of its gendered transformation, are outlined, before some additional methods for assessing and understanding the Court as an institution, which draw upon the approach to 'newness' advanced below.

'Newness' and New Institutionalism

It might seem unnecessary to question a common-sense understanding of a 'new institution' as one which has been recently established. However, recent theory in New Institutionalism has already begun to do so, at the margins of its re-examination of the origins of institutions and how they change over time. It is clear there is a politics to the claiming or acknowledgement of newness (for example, why the 'new' in New Institutionalism?), especially when the object of study is formal political institutions. In particular, analysing the gendered nature of formal political institutions places certain aspects of the 'newness' of recently established political institutions under scrutiny through concepts such as 'nested newness'.[11]

The concept of path dependency is drawn from descriptions of technological development and has been applied in various ways by social scientists to focus upon the material and socio-cultural contours of the context within which institutions are established, operate and reproduce. It is suggested that institutions, newly established and pre-existing, are not blank-slates and that actors within institutions find that the dead weight of previous institutional choices seriously limits their room to maneuver'.[12] Some historical institutionalists such as Thelen advance a softer or more flexible version of path dependency in which, rather than the past straightforwardly determining the future, an analysis of the foundations of political stability is necessary for understanding the trajectories of change.[13] Nevertheless, the way in which most historical institutionalism uses path dependency seems to conceptualise the past as a fixed inheritance. For example, Goodin suggests that 'social engineers always work with materials inherited from and to some extent unalterably shaped by the past'.[14] This often prompts us to ask questions about the extent to which the past has been carried over or is influencing the present. I want to suggest we might perhaps more usefully think about *the form* that that influence takes in specific contexts. To put it another way, we need to examine the nature of the interaction between the 'old' and the 'new', not assume that the old always effects the new just to a greater or lesser extent. Such a conception of the past also blinds us to the ways in which 'the old' is continually

[11] Fiona Mackay, 'Nested Newness, Institutional Innovation, and the Gendered Limits of Change', *Politics & Gender* 10, no. 04 (December 2014): 549–71.
[12] Paul Pierson, 'The Limits of Design: Explaining Institutional Origins and Change', *Governance* 13, no. 4 (1 October 2000): 493.
[13] Kathleen Thelen, 'Historical Institutionalism in Comparative Politics', *Annual Review of Political Science* 2 (1999): 369–404.
[14] Robert E. Goodin, 'Institutions and Their Design', in *The Theory of Institutional Design*, ed. Robert E. Goodin (Cambridge University Press, 1998), 30.

reformulated in the present, something that historical institutionalist have more recently paid attention to.[15]

Historical institutionalists often make the call for work that is 'genuinely historical'. In this spirit some concepts from historical theory might prove useful in unpicking the dynamics of change and continuity. Historians interested in contemporary politics have advanced a conception of the past as a mutable 'presence' in the present.[16] This is not to suggest we have total control over the past but rather to point-up that our understandings of the past are not fixed, they are fragile and subject to change but also that the affects of any given past on any given present are not fixed either. The past can make itself felt in the present in very surprising ways and it is just as likely to be suppressed or forgotten as remembered (all three of which are active processes). This understanding of the past would complicate the existing theories of path dependency since it suggests that there are always also submerged pathways within an institution's history that can remain invisible to the social scientist who does not attempt to historicise that past. Crucially, claims to 'newness' always involve articulating particular historical narratives and an understanding of this as a creative process, and not just a fixed constraint, is vital. Understanding the active role that history-making practices play in the reproduction and contestation of institutions would enrich New Institutionalism's conception of change which cannot always currently account for the timing or scale (the particular mix of 'old' and 'new') of observable change.[17] Streeck and Thelen observe in institutionalist approaches a 'widespread propensity to explain what might seem to be new as just another version of the old'.[18] I would add an apparent propensity to misunderstand 'the old' as able to move unchanged through time.

What is perhaps most straightforwardly seen as new about newly (re)designed institutions is their relationship with their context. The idea and even the forms of judicial courts are not, in the twenty-first century, new, in any absolute sense – what might be new about a particular court is its place – in time and space – and perhaps the particular combination of rules and practices by which it is constituted. When an institution is described as 'new' ultimately what is being expressed is a statement about its relationship with its context. When Streeck and Thelen argue that already existing institutions can also become 'new' through change over time, they are making a statement about a fundamental change in the relationship between that institution and its context.[19] I would suggest that identifying whether institutions are 'really new' or not yet 'really new' will always be problematic since the relationship between an institution and its context is never static. We would do better to describe institutions as newly or recently established and explore the contestations and struggles over 'newness' as a constitutive part of processes of institutional establishment and reproduction.

---

[15] Wolfgang Streeck and Kathleen Ann Thelen, *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press, 2005); James Mahoney and Kathleen Thelen, *Explaining Institutional Change: Ambiguity, Agency, and Power* (Cambridge University Press, 2010).
[16] Eelco Runia, 'Presence', *History and Theory* 45, no. 1 (1 February 2006): 1–29.
[17] Thelen suggests, 'we need to know which particular interactions and collisions are likely to be politically consequential, which of these, in other words, have the potential to disrupt the feedback mechanisms that reproduce stable patterns over time, producing political openings for institutional evolution and change'. Thelen, 'Historical Institutionalism in Comparative Politics', 397.
[18] Streeck and Thelen, *Beyond Continuity*, 1.
[19] Streeck and Thelen, *Beyond Continuity*.

This is particularly useful if we want to render institutionalist concepts sensitive to gender. In her influential essay on gender as a useful category of analysis, Joan Scott suggests a definition of gender with two parts (and several subsets). The first part is that 'gender is a constitutive element of social relationships based on perceived differences between the sexes', which corresponds to an understanding of gender as social structures.[20] However, the second part is, I think, also useful for us, particularly in unpicking the dynamics of gendered institutional change: 'gender is a primary way of signifying relationships of power'.[21] This is gender not just as social structure but an ideational structure, a set of organising principles, what some would call a 'discourse'. In our work on newly established institutions and gender reform projects we need to unpick how power, novelty and legitimation are articulated through gender. Scott again,

> 'Political history has, in a sense, been enacted on the field of gender. It is a field that seems fixed yet whose meaning is contested and in flux. If we treat the opposition between male and female as problematic rather than known, as something contextually defined, repeatedly constructed, then we must constantly ask not only what is at stake in proclamations or debates that invoke gender to explain or justify their positions but also how implicit understandings of gender are being invoked and reinscribed'.[22]

We must be attentive not only to the way processes of institutional change might be gendered but also how gender is invoked and reinscribed through processes of institutional change. This is where paying attention to the (creative and contested) historical claims to continuity and 'newness' that institutional actors make becomes so important for understanding the gender politics of institutions.

The Design of the Constitutional Court

This section provides a summary of the mainstream historical narrative of the negotiations and the design of the Constitutional Court as a result of this process. Paying attention to dominant 'founding narratives' gives us clues as to the ways in which an institution is understood in relationship to the existing institutional landscape (local, national and international). It alerts us to the specific place of gender, race, class (etc.) in common understandings of the institution's significance. As such it can help reveal the precise ways in which gender is entangled with newness for a particular institution.

South Africa's transition to democracy is often described as 'two stage' but this elides the complexity of those negotiations, the precursors to the formal, official process and the multiple 'endings' of the transition. Dikgang Moseneke, who served on the Constitutional Committee that drafted the 1993 interim constitution and became a Constitutional Court judge in 2002, suggested of the negotiation process to one interviewer that 'the game for those in power was to create as many independent institutions as possible and for those who were about to acquire power to

[20] Joan W Scott, *Gender and the Politics of History*, Rev. ed, Gender and Culture (New York: Columbia University Press, 1999), 42.
[21] Ibid.
[22] Ibid., 49.

have as many institutions as possible controlled by the political process'.[23] This idea of the negotiations as a zero sum institutional power game is the hallmark of most of the historical narratives of the process. The story surrounding the birth of the Constitutional Court is usually subsumed into just such a narrative. The disagreement over the method of appointing judges is the most prominent of the negotiation narratives on the Constitutional Court. This is what Goodin would describe as an 'intentional' account of institutional design.[24]

Tentative, largely secret, talks between representatives of the African National Congress and the government began in the mid-1980s. The ANC established a department of legal and constitutional affairs and within this a standing constitutional committee in 1985 to consider and recommend specific constitutional solutions.[25] The ANC was unbanned in 1990. Between 1990 and 1994 various draft versions of a bill of rights were written, mostly by political parties but two emerged from the South African legal community, one from the South African Law Commission and A Charter for Social Justice written by a group of progressive Western Cape lawyers.[26] Formal talks opened in 1991 at the Convention for a Democratic South Africa (CODESA) at Kempton Park involving nineteen political groups. It has been argued that at these meetings in the early 1990s there was 'a remarkable confluence of thinking on constitutional democratic matters…at the level of general principle'.[27] At this time a justiciable bill of rights and a constitutional court emerged as two keystones of a future constitution, as imagined by the main negotiating parties. Constitutionalism and human rights emerged as a 'unifying language' in which the National Party and the ANC could speak to one another.[28] However, this unity, was, Wilson has argued, largely enabled by the ambiguity of human rights talk. The exact nature of a future constitutional court's relationship with the existing court system and with parliament was a matter of some debate, as was the process for appointing judges. Negotiations took place within a context of an 'international trend' of 'constitutional borrowing', facilitated by the involvement of international legal experts and an exiled elite, often with legal training; 'international legal instruments, other national constitutions and international decisions' were all used as models and means of reaching compromises.[29]

The official process stopped-and-started for most of 1992 and 1993 - CODESA II broke down following the Boipatong Massacre, although bilateral communication between the ANC and the NP continued; culminating in the 1992 Record of Understanding. Multi-party talks re-started in 1993. During the Multi-Party Negotiating Process (April- November 1993) the then government made a submission on the structure of the highest court.[30] The NP government recommended a new constitutional chamber for the Appellate Division in Bloemfontein (then the highest court in

[23] Quoted in: Kenneth S. Broun, *Black Lawyers, White Courts: The Soul of South African Law* (Ohio University Press, 2000), 112.
[24] Goodin, 'Institutions and Their Design', 28.
[25] Roux, *The Politics of Principle*, 157.
[26] Jeremy Sarkin, 'Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions, The', *University of Pennsylvania Journal of Constitutional Law* 1 (1999 1998): 180.
[27] Corder, 'Judicial Authority in a Changing South Africa', 256.
[28] Wilson, *The Politics of Truth and Reconciliation in South Africa*, 5.
[29] Sarkin, 'Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions, The', 177.
[30] Corder, 'Judicial Authority in a Changing South Africa', 259.

South Africa), thereby 'ignoring the highly contested nature of the part which the Appellate Division had played in the maintenance of the injustice of apartheid and emergency rule'.[31] The South African Law Commission and South African attorneys represented by the Association of Law Societies of the Republic of South Africa also preferred to give the power of judicial review to the higher branches of the existing court system. However the MPNP technical committee favored the ANC's proposal for a new separate court that would be the final arbiter on constitutional matters, arguing that such a court would benefit from the constitutional expertise of specially selected judges and 'would develop its own identity, legitimacy, rules and procedures'.[32] 'International experience was invoked to support the new court'.[33] The then Chief Justice Corbett arguing against the proposed new court, 'barely hid his fears for the prestige of existing courts and their judges who might feel slighted by the introduction of a separate constitutional court'.[34] Whilst the Democratic Party had reservations about the technical committee's proposal for a separate court, Spitz and Chaskalson claim that they concentrated their criticism upon the proposed judicial appointment's procedure, and in forcing this issue to be reconsidered 'wrested [their] most notable prize at Kempton Park'.[35] A bilateral agreement between the ANC and the NP issued on 12 November 1993 stated that judges would be appointed to the new Constitutional Court by presidential appointment after 'consultation' with the Cabinet and Chief Justice. There was an outcry from the DP and, sections of the media and some university law faculties at this concentration of appointment power in the executive. The Democratic Party's Tony Leon has given the following version of events:

> 'Kobie Coetsee [of the NP] had agreed to the proposal between the government and the ANC, then realised that he'd made a mistake, that he'd given away far too much...that's how those last minute negotiations started off. I got Zach de Beer [leader of the DP] to complain about the proposal to De Klerk and Mandela. Mandela was not the slightest bit interested in talking about it, he was quite adamant that it would go through as it was. Kobie Coetsee was more amenable. He rang me on the Saturday night [before the conclusion of the negotiations] in a very agitated state. He was taking part in a television debate on the Monday morning, and he asked whether I could drive with him from the television studios to Kempton Park...he said he'd tried to leave a window open, and that I should open it more and upset the agreement. We then had an open debate – Dullah Omar [of the ANC], Kobie Coetsee and myself, in tri-lateral negotiations – and a day and a half later, we managed to produce a compromise. This was high-wire, last-minute stuff, and no record was kept of it'.[36]

The result of this 'high-wire', unrecorded compromise was an expanded role for a Judicial Services Commission (see figure two).

---

[31] Ibid., 260.
[32] Richard Spitz and Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Witwatersrand University Press, 2000), 193.
[33] Sarkin, 'Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions, The', 190.
[34] Spitz and Chaskalson, *The Politics of Transition*, 194.
[35] Ibid., 198.
[36] Quoted in ibid., 206.

The Interim Constitution in the end stipulated the creation of a new Constitutional Court with ultimate jurisdiction over the Constitution. The Supreme Court had a limited constitutional jurisdiction, and the Appellate Division none, 'an effective sanction for its track record', whilst remaining the highest court for non-constitutional matters.[37] Existing judges were incorporated into the new legal order through a requirement to swear an oath of allegiance to the new constitution. Following democratic elections South Africa's final constitution was negotiated by Parliament sitting as a Constitutional Assembly between 1994 and 1996. The 1996 Constitution was different from the interim constitution with regards to the Constitutional Court in a number of ways. The tenure of judges was extended from seven to twelve years, or until the age of seventy (this was subsequently extended again to fifteen years by an amendment). However, the final Constitution retained the interim provision that academics, attorneys and junior advocates who have been practicing for at least ten years are eligible to be appointed as judges to the Constitutional Court, thereby breaking with the pre-1994 rule that judges must be drawn from the ranks of the Senior Counsel of advocates.[38] In 1996 the Constitutional Court was given the

Figure 1: The Constitutional Court

Appointments process under 1993 Interim Constitution:

- A President of the Constitutional Court to be appointed by national President 'in consultation with Cabinet and after consultation with the then Chief Justice'.
- Four judges appointed from amongst sitting judiciary (higher courts) by national President 'in consultation with the Cabinet and with the Chief Justice'.
- Six further judges appointed from a list of ten names submitted by the JSC to the national President 'in consultation with the Cabinet and after consultation with the President of the Constitutional Court'.

Appointments process under 1996 Constitution:

- Chief Justice and Deputy Chief Justice to be appointed by the national President after consultation with the JSC and leaders of the political parties represented in the National Assembly.
- Remaining nine judges are to be appointed from a list submitted by the JSC (list must contain three more names than the number of vacancies) by the national President after consultation with the Chief Justice and leaders of the political parties represented in the National Assembly.

  ***** *If the president finds all the nominees unacceptable then the JSC must supplement the list and the President must appoint from this new list.*

[37] Corder, 'Judicial Authority in a Changing South Africa', 260.
[38] Patric Mzolisi Mtshaulana, 'The History and Role of the Constitutional Court of South Africa', in *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Witwatersrand University Press, 2001), 534.

power to develop the common law in line with constitutional values and the Supreme Court of Appeal (the new name for the Appellate division), was given a limited constitutional jurisdiction. The Constitutional Court was thus more fully integrated within the existing judicial system.[39]

Considering what aspects of the design of the Constitutional Court this narrative highlights or obscures it might be suggested that this story enfolds a broader struggle about the composition of the judiciary into a zero-sum power game about preventing one political grouping's capture of the Court. Concerns about the gender composition of the judiciary are not part of this narrative, perhaps because it wasn't the position of a single actor, and the negotiation narratives about gender reform have focused mostly upon the equality clause within the Bill of Rights and the new National Gender Machinery. Yet there was an explicitly gendered element to the new Court, not least because the Court was one of the principle means through which the values of the Constitution would be upheld and protected. That gender is not commonly highlighted as central to the Constitutional Court's newness in founding narratives is important for understanding the politics of gender and newness at play in assessments of the Court's institutional performance.

Figure 2: The Judicial Services Commission

- Chief Justice (Chair)
- President of the SCA
- One Judge President (of a High Court) designated by all Judges President
- Two practicing advocates (barristers), two practicing attorneys (solicitors) and one teacher of law, in each case nominated by their constituency
- The Minister of Justice (a member of the Cabinet)
- Six members of the National Assembly, of whom three must be from opposition parties
- Four delegates to the National Council of Provinces designated by the Council with the support of two-thirds of the nine provinces
- Four persons designated by the President (as Head of Government) after consultation with the leaders of all the parties in the National Assembly.

Institutional Legacies

Historical institutionalists argue that even when a new institutional form is pioneered, this newness can often be shown to be 'nested', i.e. it contains within it or is surrounded by pre-existing practices, some of which might be inimical to that which was new in the design. Newly established institutions are interconnected or 'nested' within 'past institutional legacies and by initial and ongoing interactions with already existing institutions'.[40] New institutions 'do not

[39] Ibid., 547.
[40] Mackay, 'Nested Newness, Institutional Innovation, and the Gendered Limits of Change'.

emerge fully formed'.[41] What is new in design will be contested in practice and, in particular, contestation and inertia are likely to emerge from interactions with already existing institutions.

Several terms have been suggested that attempt to capture both the complexity of institutional design processes and the translation of design into practice. 'Institutional bricolage' suggested by Leach and Lowndes attempts to capture the complexity of the layering of institutional practices and processes of de and re-contextualization as rules and practices are 'patched together' by institutional actors.[42] 'Institutional matrix' suggested by North and developed by Lowndes also urges us to map-out the various sets of rules and practices by which a particular institution is constituted and to be mindful that 'there is no necessary assumption that different rule sets (political, managerial, professional, constitutional) will move in the same direction or with the same speed, or that they will be in some way compatible or reinforcing'.[43] Mackay has advanced the concept of 'nested newness' to acknowledge that newly established institutions operate in a 'dense environment'.[44] Adopting a similar approach Streek and Thelen have characterized most institutional design as 'bounded change within an existing system'.[45] Central to all of these concepts is the importance of mapping-out institutional genealogies and contextual locations to enable us to trace 'remembering', 'forgetting' and 'borrowing' in institutional rules and practices across time and location that will reveal how it is that an institution works.[46] It is suggested here that mapping out institutional legacies within which a newly established institution is located is also important for understanding the politics of 'newness' playing out around that institution. So, several key concepts stand out from the disputed history of South African law as features which it has been argued are enduring legacies with consequences for the post-apartheid legal system and the Constitutional Court. These are aspects of the institutional environment which many expected the Court to either break with, or advance, and as such are ways of seeing the Court's newness.

'Positivism', 'legal formalism', or more broadly 'jurisprudential conservatism', have been identified by many critics of law under apartheid as the defining feature of South African legal culture, explaining most judges acquiescence with the injustices of apartheid and, some have argued, an abiding judicial attitude shaping the Constitutional Court's jurisprudence. In the mid 1980s Hugh Corder was emerging as one of a number of liberal critics of South African law, in his study of the Appellate division 1910-1950 he summed judicial attitudes as follows:

> 'The overall picture which emerges is one of a group of men who saw their dominant roles as the protectors of a stability [in the society]. This conception of their task was, doubtless, influenced by their racial and class backgrounds, education and training. The

[41] Louise Chappell, 'Nested Newness and Institutional Innovation: Expanding Gender Justice in the International Criminal Court', in *Gender, Politics and Institutions: Towards a Feminist Institutionalism* (Basingstoke: Palgrave Macmillan, 2011), 164.
[42] Steve Leach and Vivien Lowndes, 'Of Roles and Rules Analysing the Changing Relationship between Political Leaders and Chief Executives in Local Government', *Public Policy and Administration* 22, no. 2 (1 April 2007): 183–200.
[43] Vivien Lowndes, 'Something Old, Something New, Something Borrowed …', *Policy Studies* 26, no. 3–4 (1 September 2005): 293.
[44] Mackay, 'Nested Newness, Institutional Innovation, and the Gendered Limits of Change'.
[45] Streeck and Thelen, *Beyond Continuity*.
[46] Lowndes, 'Something Old, Something New, Something Borrowed …'.

> judges expressed it in terms of a positivistic acceptance of...legislative sovereignty, despite a patently racist political structure, and a desire to preserve the existing order of legal relations, notwithstanding its basis in manifest social inequalities'.[47]

Corder's critique built upon a perspective that had first emerged publically in the 1960s. The work of Millner, an exiled South African lawyer in 1961, together with a report by the International Commission of Jurists suggested that 'the judiciary was allowing itself to be affected *subconsciously* by racial fears and prejudice'. As Corder notes, these critics stopped short of arguing that judges had a conscious bias or were corrupted.[48] In the 1970s John Dugard, Anthony Mathews and Barend Van Niekerk had developed the characterisation of 'positivism'.[49] For Dugard, South African judges' choice to embrace positivism allowed them to 'apply and legitimate the harshest of statutes with [as they saw it] no personal or institutional blame for the inevitably unjust outcome'.[50] Critics of the positivism of South African judges differed on the extent to which they saw them possessing a choice. Dugard argued that when it came to interpreting the law 'the judge is not a mere automaton' and that the roots of Roman-Dutch and English law contained liberal values and freedoms which could be upheld by judges to limit apartheid.[51]

However, Corder suggested that this attitude to judging was 'a product of the inevitable influence of the political and social environment'.[52] Dyzenhaus argued that the training of judges in South Africa led them to see morality in the enforcement of the rule of law, no matter how repressive the laws. Similarly Forsyth saw that 'conservative choices were not the only alternatives available but they were certainly the ones that appealed to individuals raised in a moral climate that feared black rule and the perceived catastrophic consequences sure to follow it'.[53] Critics of the South African legal system who accepted the view of judging contained within positivism, like Wacks, reasoned that in the context of apartheid South African judges 'had no choice but to reach a right legal answer that was always morally wrong' and therefore should resign.[54] Martin Chanock has noted that as criticism of apartheid intensified so too did this anxiety within South Africa's legal professions over the nature of the choice facing South African judges. He also notes that, 'one of the effects of these struggles within the law was, then, the almost exclusive focus on the judiciary as vectors of law'.[55] Arguably the place of the Constitutional Court since 1994 within debates over the transformation of the legal profession and law more broadly has intensified this focus upon the judiciary.

---

[47] Hugh Corder, *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-1950* (Juta & Company, 1984), 237, 240.
[48] Hugh Corder, 'The Judicial Branch of Government: An Historical Overview', in *Essays on the History of Law*, ed. D.P. Visser (Cape Town: Juta, 1989), 73.
[49] John Dugard, *Human Rights and the South African Legal Order* (Princeton University Press, 1978); Anthony S. Mathews, *Law, Order and Liberty in South Africa* (University of California Press, 1972).
[50] Quoted in Stacia L. Haynie, *Judging in Black and White* (Peter Lang Publishing, Incorporated, 2003), 16.
[51] John Dugard, 'Should Judges Resign - A Reply to Professor Wacks', *South African Law Journal* 101 (1984): 286.
[52] See discussion in Haynie, *Judging in Black and White*, 17.
[53] Ibid., 18.
[54] See Raymond Wacks, 'Judges and Injustice', *South African Law Journal* 101 (1984): 266; Raymond Wacks, 'Judging Judges: A Brief Rejoinder to Professor Dugard', *South African Law Journal* 101 (1984): 295.
[55] Chanock, *The Making of South African Legal Culture 1902-1936*, 520.

It has been argued that 'positivism' embedded in the training and socialization of South African judges continues to shape the judiciary in the post-apartheid era. For many, this attitude could be seen in the abstention of the judiciary from participating in the Truth and Reconciliation Commission's special legal hearing.[56] Kader Asmal argued in 1998 that, 'I would suggest that the chutzpah of apartheid era judges in current debates is intimately linked to their calculated refusal to take on board the full extent of their culpability in the policies of the past'.[57] With regards to the Constitutional Court it has been argued that a continued adherence to a positivist view of law or a more broadly defined 'jurisprudential conservatism' has shaped (read: limited) the application of socio-economic rights contained within the 1996 Constitution.[58] One commentator, referring to the final 1996 constitution, has put it thus: 'the constitution simply does not allow the degree of deference to which judges schooled in South African legal culture have become accustomed'.[59]

Alongside judicial positivism there emerged in South Africa a tradition of 'cause lawyering' that was particularly evident during the states of emergency in the 1980s. The use of the courts to try to advance human rights causes was encouraged by a number of South African law schools and the Legal Resources Centre, co-founded by John Dugard and Arthur Chaskalson, who went on to be the first Chief Justice of the Constitutional Court.[60] 'Cause lawyering' required the courts to be seen as a potential bulwark against the repressive power of the state and was thus intimately linked ideologically as well as through specific individuals like John Dugard to the critiques of legal positivism. It has been suggested that this critique and the practice of 'cause lawyering' 'restructured the moral and jurisprudential values of generations of lawyers who began to permeate the practice and teaching of the law'.[61] The prominent role of former human rights lawyers and academics in developing the Constitutional Court meant, as Justice Ishmael Mahomed put it that after 1994 'to sustain a human rights culture it is no longer necessary to collide with the law. It is necessary only to harness it creatively'.[62]

Whilst legal positivism and cause lawyering are seen as features of South African legal culture which were inculcated through practice and reinforced through social norms over time, the idea of the 'bifurcated state' or 'plural legalities' is a structural legacy which was present from the very beginnings of the South African legal system. It has been argued by Mahmood Mamdani and others that the South Africa Act of 1909 created a 'bifurcated state'.[63] Heinz Klug, describes the South African colonial order thus: 'the white state was simultaneously a pseudo-democratic system based on a Westminster-style parliamentary system and also an authoritarian order in

[56] Ruth B. Cowan, 'Women's Representation on the Courts in the Republic of South Africa', *University of Maryland Law Journal of Race, Religion, Gender and Class* 6 (2006): 297.
[57] In Foreward to David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing, 1998), x.
[58] Jackie Dugard, 'Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation', *Leiden Journal of International Law* 20, no. 04 (2007): 977.
[59] Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights', *South African Journal on Human Rights* 20 (2004): 383.
[60] Cowan, 'Women's Representation on the Courts in the Republic of South Africa', 296.
[61] Ishmael Mahomed, speaking in 1998, quoted in Dugard, 'Judging the Judges', 965.
[62] Quoted in Mtshaulana, 'The History and Role of the Constitutional Court of South Africa', 529.
[63] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1996).

which the majority of the country's inhabitants lived under a classical system of colonial 'indirect rule' and the exercise of autocratic administrative authority by colonial authorities in the form initially of the Governor-General in Council and later, under the Republic of South Africa Constitution Act of 1961, the State President'.[64] In this way the South African legal system was 'overtly based upon the principle that differing cultural groups in some way naturally "have" and require different laws'.[65] The transition to democracy retained but subordinated to the 1993 and then the 1996 constitutions, the system of customary law that underpinned the 'indirect rule' experienced by South Africa's black African population – the remnant of family law that was administered by Chiefs acting as state functionaries.[66] Customary law had been 'marginalised' and 'denigrated' under apartheid and traditional leaders argued during the constitutional negotiations that 'customary law and South African law should be parallel legal systems, neither empowered to interfere with each other'.[67] A further complication arises in distinguishing between: an official customary law, codified and institutionalised under apartheid, and seen by many as a 'dubious distortion' of customary law by the state which 'considerably overstates the subordinate status of women'; and living customary law which 'develops from practices in the community which are considered binding'.[68]

In 1993 the 'subordination' of customary law to the Constitution was ambiguously articulated. In 1996 the subordination was more clear-cut with the Constitutional Court given the power the develop common law and customary law. However, as Lehnert notes this does not mean that all customary law rules that are in conflict with the Bill of Rights are unconstitutional and nor does it prevent judges from weighing-up the values of customary law as justifying the violation of a human right through the limitation clause of the Constitution.[69] A situation in which the area of family law, and perhaps particularly marriage law, is overburdened with carrying cultural 'African-ness' and the particular problems this poses for the gender equality provisions of the Constitution continues to be an issue for the Constitutional Court to negotiate. Since, at the same time as upholding gender equality, 'the courts have a responsibility to ensure that human rights standards do not obliterate the African legal heritage which is part of the identity of many South Africans'.[70]

In 1994 the new government recognized that 'the judiciary could not consist of ninety-seven percent white male judges and expect legitimacy'.[71] The legacies of 'different cultural groups "having" different laws' and the role of white judges in enforcing South Africa's laws prior to 1994 made racial transformation an acute issue. In 1994 there were two women judges and a

[64] Klug, *The Constitution of South Africa*, 9.
[65] Martin Chanock, 'Law, State and Culture: Thinking about Customary Law after Apartheid', *Acta Juridica/African Customary Law* 1991 (1991): 55.
[66] Ibid., 68.
[67] Penelope Andrews, 'The Stepchild of National Liberation: Women and Rights in the New South Africa', in *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Witwatersrand University Press, 2001), 333; Ian Currie, 'The Future of Customary Law: Lessons from the Lobolo Debate', in *Gender and the New South African Legal Order*, ed. Christina Murray (Juta, Limited, 1994), 149.
[68] Wieland Lehnert, 'Role of the Courts in the Conflict between African Customary Law and Human Rights, The', *South African Journal on Human Rights* 21 (2005): 255, 271.
[69] Ibid., 248.
[70] Ibid., 277.
[71] Cowan, 'Women's Representation on the Courts in the Republic of South Africa', 299.

handful of women magistrates in South Africa.[72] In his study of the formation of a South African legal culture from 1902 to 1936, Martin Chanock notes that:

> 'The legal culture in the period that I am describing was multi-vocal, and it contained many voices other than those heard and possible choices other than those made. There were also limits to that multi-vocality. It is significant that there were no women's voices in any of the sites in which law was talked about: no women lawyers, no women politicians, no women 'experts'. An alliance of patriarchies relegated African women to the bottom of the social structure, and simultaneously elevated and demeaned white women. They became, not invisible but inaudible to state, polity and law'.[73]

The position of women within South Africa's legal professions since 1994 has been documented most comprehensively by Ruth Cowan. In the course of making a 2008 film *Courting Justice*, Cowan heard accounts of resentment from the women judges she spoke to. One woman judge described her treatment from male colleagues as follows: 'normally, among judges who will hear a case together, you talk beforehand about issues you will want to raise when the matter is argued in court. In the first few years they would not talk to me and even once we were in court, on the Bench, I would sit there like a spare wheel'.[74] Cowan also uncovered the 'nested' nature of women's judicial authority. In 2003 an African woman magistrate told the Judicial Law Delegation that she needed the permission of her father in law (a tribal leader) before she could accept a judicial appointment and use the family surname and wear non-traditional clothes.[75] Other accounts have suggested that women advocates face sexual harassment and discrimination in the allocation of briefs. Kgomotso Moroka was an advocate in Johannesburg, she told Kenneth Broun in 2000 that,

> 'I think being female was very difficult. Some of my male colleagues were very supportive but others were not. We live in a very sexist society. We give a woman work and she owes you a favour, and some of the favours include payment in kind, if you get what I mean. It was very difficult to say, "treat me like you treat the other advocates that you brief. Why should I be different? Why should I go to bed with you? You don't ask them to go to bed with you."...the lawyers who were looking for favours from me were black. Of course they were black. I never get work from white lawyers...If the white man couldn't break us; the black male is going to do it'.[76]

Cowan has argued that 'although "race" and "gender" became linked, as if one word' in the public discourse about the transformation of the judiciary that 'the subsequent focus has been and continues to be on race'.[77] It's my tentative suggestion that in the Constitutional Court's early years, whilst it was perceived as very important that the Court was seen to act on gender equality, and produce judgements in this area, this was not always tightly coupled with a

[72] Christina Murray and Michelle O'Sullivan, 'Brooms Sweeping Cceans? Women's Rights in South Africa's First Decade of Democracy', in *Advancing Women's Rights: The First Decade of Democracy*, ed. Christina Murray and Michelle O'Sullivan (Juta, 2005), 38.
[73] Chanock, *The Making of South African Legal Culture 1902-1936*, 26.
[74] Cowan, 'Women's Representation on the Courts in the Republic of South Africa', 304.
[75] Ibid., 307.
[76] Quoted in Broun, *Black Lawyers, White Courts*, 211–212.
[77] Cowan, 'Women's Representation on the Courts in the Republic of South Africa', 311.

perceived need for women judges to be producing such judgements.[78] The focus on an increased presence of women within the judiciary has increased in the second decade of the Court's existence (see further discussion in 'assessing the constitutional court' section below).

Finally, in addition to these cultural and structural legacies in 1994 were a set of inherited material conditions. As Cowan, again, has identified 'in addition to issues of illegitimacy the inherited court system was fragmented in its organisation and its infrastructure in a state of disrepair'.[79] For example, commenting on the library facilities available to the Constitutional Court in its infancy Chief Justice Chaskalson described "a smallish storeroom, consisting of shelves with a few law reports and even fewer textbooks" and presumed that the government architect who had designed the office building that the Court started its life in must have been "of the opinion that there would be little use for books, and if it was really necessary for a judge to look at one of them it could be taken to the judge's chambers".

Assessing the Constitutional Court

> *'The advent of the liberating and empowering provisions of the Constitution did not act, as might have been expected, like the flick of an attitudinal switch'.*
>
> **Judge C.J. Howie**, President of the Supreme Court of Appeal.[80]
>
> *'Cultures are not simply reflections of practices, but are made up of acts of imagination. In representing and re-imagining social narratives the banal world of practice is extended, fantasised and changed'.*
>
> **Martin Chanock.**[81]

Since its very first judgement the Court has been closely watched by a national and international community of legal scholars. There is a substantial academic literature commenting upon the Court's developing jurisprudence. There is also a high profile public discourse that concentrates particularly on perceptions of the Court's political independence. There has been relatively scant attention paid to holistic assessments of the Court as an institution: as regulatory and constitutive not just reactive or interactive. However, there is Theunis Roux's 2013 historical institutionalist study of what he terms the 'Chaskalson Court'; there are annual statistical pictures of the Court published in the *South African Journal of Human Rights* for the first thirteen years of

[78] If so, this would mark the Constitutional Court out as an institution containing a different narrative about the connection between women's bodies and the advancement of gender equality measures, from Parliament where women MP's presence was tightly linked to substantive legislative gains and where over time women's presence might be seen to have come to 'stand-in for' substantive gains. In the Commission for Gender Equality too Sheilia Meinjies has suggested that a 'women empowerment' rather than a gender transformation model came to dominate the institution's practice. In this light the increased focus upon getting more women into the judiciary in recent years might be viewed slightly ambivalently.
[79] Cowan, 'Women's Representation on the Courts in the Republic of South Africa', 298.
[80] Ibid., 302.
[81] Chanock, *The Making of South African Legal Culture 1902-1936*, 35.

the Court's operation and finally the Court itself oversaw the publication of a booklet on its first ten years. These various assessments of the Court focus overwhelmingly upon the judgements written by the Court. Roux focuses upon the content of the written opinions of the Court as 'legal cultural acts' and whilst acknowledging that NI assessments of other courts have chosen to study the management of cases, the allocation of majority opinion writing, bargaining practices between judges and public speaking engagements, he argues that the Court has 'mainly acted through it's written opinions'.[82] The statistics collected by *SAJHR* focus upon the practices surrounding judgement writing including voting patterns and unanimity trends, mapping the decision making patterns of the court in its first twelve years.[83] The Court's own assessment, whilst including information on the Court's history and 'how it works', again focuses upon the content of judgements, through 'three surveys of jurisprudence'. After sketching some of the existing assessments of the Constitutional Court as they pertain to gender equality I suggest two alternative ways of assessing the Court: writing histories of the appointments process and exploring accounts of the everyday life of the institution. The challenge posed here is to try to tie together the commentary upon the Court's jurisprudence with an understanding of the Court as a site of developing institutional practices, nation building and political reconstruction. In particular trying to unpick how power, novelty and legitimation are articulated through gender.

Rules about Assessing the Constitutional Court through its Jurisprudence

The study of Courts as sites in which gender equality might be advanced is relatively recent, following in the wake of laws that include gender equality as a right, or more rarely a duty, which legal systems must uphold. Louise Chappell's research into the International Criminal Court, newly established by the Rome Statute, offers an example of how to assess the effectiveness and implementation of gender equality laws and practices. Chappell suggests four ways of measuring the ICC, in terms of (1) the application of the gender-based crimes available under the Rome Statute; (2) the willingness of the Court and the Assembly of States parties to take procedural and structural gender aspects seriously; (3) the actions by State parties to implement the gender justice provisions of the Statute at the domestic level; and (4) the ability of the Court to create new conceptions of 'women'.[84] An assessment along these lines has also emerged in the existing literature on the South African Constitutional Court, through a close scrutiny of the Court's jurisprudence.

There is a vast body of literature on the Constitutional Court's jurisprudence that I cannot hope to cover in this working paper. There is however, a slightly smaller literature concentrating upon the Court's developing approach to gender equality. Equality is present in the South Africa Constitution as both a value and a right. Albertyn and Goldblatt outline the important distinction thus:

> 'As a value equality gives substance to the vision of the Constitution. As a right, it provides the mechanism for achieving substantive equality, legally entitling groups and

[82] Roux, *The Politics of Principle*, 130.
[83] Michael Bishop, Lisa Chamberlain, and Sha 'ista Kazee, 'Twelve-Year Review of the Work of the Constitutional Court: A Statistical Analysis', *South African Journal on Human Rights* 24 (2008): 354.
[84] Louise Chappell, 'Nested Newness and Institutional Innovation: Expanding Gender Justice in the International Criminal Court', 163.

> persons to claim the promise of the fundamental value and providing the means to achieve this. The fact that there is a relationship between value and right – the value is used to interpret and apply the right – means that the right is infused with the substantive content of the value'.[85]

In South Africa women 'had long struggled' for 'substantive equality' in which affirmative action and other measures taken to achieve equality 'were not to be viewed as exceptions but as an intrinsic part of the right to equality'.[86] The Court produced a number of significant judgements on gender equality early on its life (it has been suggested to me that the Court was so keen to establish its stance in this area that it took on awkward cases in which they should have argued that gender was moot). Of fourteen cases involving gender equality decided between 1994 and 2007, six of the cases were brought by men. The Court has received mixed responses from South African feminists. Even so, in the mid-2000's, as delays in law reform left women experiencing serious violations of their rights, individual women and women's groups have increasingly turned to the courts to win relief from those ongoing violations and to defend the legislative gains of the 1990s such as the Domestic Violence Act and the Choice on Termination of Pregnancy Act.[87]

Early on the Constitutional Court seemed to indicate 'that equality must be understood substantively rather than formally'.[88] However, perhaps the first judgement that caused 'outrage' amongst South African feminists was *Jordan V. S* (2002) in which the criminalisation of prostitutes but not their clients was challenged as discriminatory on the basis of gender and as an infringement of prostitutes' rights to dignity and privacy.[89] The Court was almost evenly split with only six judges supporting the majority judgement and the remaining five supporting a minority judgement. Whilst the majority judgement held that the prostitute/client distinction was not based on gender; the minority judgement suggested that since the majority of prostitutes are women and their client's male the disproportionate impact that the legislation would have on women amounted to indirect gender discrimination. However, even the minority judgement was sharply criticised for holding that women who engage in prostitution 'erode their own constitutional dignity'.[90] In 2005 the *Volks NO v Robinson* judgement also provoked criticism. In both cases the Court was accused of using 'formalistic a-contextual reasoning' and of failing to extend the Constitution's protection to 'women who transgress the norms of middle-class morality around family formation and sexuality'.[91] More recently, South African feminists have also begun to call for the 'engendering' of socio-economic rights given the gendered dimensions of poverty in South Africa.[92]

---

[85] Cathi Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality', *South African Journal on Human Rights* 14 (1998): 249.
[86] Murray and O'Sullivan, 'Brooms Sweeping Cceans? Women's Rights in South Africa's First Decade of Democracy', 14–15.
[87] Ibid., 4.
[88] Albertyn and Goldblatt, 'Facing the Challenge of Transformation', 250.
[89] Elsje Bonthuys, 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court', *Canadian Journal of Women and the Law* 20 (2008): 10.
[90] Analysis drawn from ibid., 11.
[91] Ibid., 4–5.
[92] Beth Goldblatt and Kirsty McLean, 'Women and Social and Economic Rights', *South African Journal on Human Rights* 25 (2009): 407.

The more holistic assessments of the Court pay scant attention to assessing the Court through a gendered framework. In ways that link back to the dominant founding narratives of the Court as a zero-sum power struggle, Roux's main focus in *The Politics of Principle* is tracing the political positioning that he reads in the Court's written opinions. In his assessment the Court did not enjoy legitimacy (as measured by public opinion) but it did sustain 'a certain measure of institutional efficacy' and beyond this was able to act in a 'morally appealing and instructive' way.[93] The 'newness' of the Constitutional Court in *The Politics of Principle* crystallises around the very existence of constitutional jurisprudence as novel within South Africa's legal system. However, Roux does also pay some attention to the 'Africanisation' of South Africa's Constitutional law as a new development. He considers the possibility that when black South Africans entered the legal profession they brought with them 'a distinct set of attitudes to the practice of law, one more in keeping with traditional notions of restorative justice, non-adversarialism and value syncretism' whilst also being subject in turn to the 'powerful socialising effects of the existing mode of legal reasoning'.[94] He argues that this process presented the Constitutional Court with an 'opportunity' to challenge the 'dominant mode of legal reasoning' and instead 'engage in substantive reasoning in a way that was authentically African'. He does not contemplate the possibility of women bringing new ideas or attitudes into the old institutions (or seemingly of white judges acting as vectors for transforming the law in the same way).

Roux appears see the non-sexism of the Constitution as in tension with this 'Africanisation' agenda. In a number of places Roux labels gender equality as 'western', for example in the following: 'the equality clause makes no attempt to reconcile western notions of gender equality with traditional African notions of the extended family, reciprocal relationships of support, and the system of male primogeniture in the customary law of succession'.[95] Labelling gender equality as 'un-African' in this way ignores the long history of women's struggles in South African society and the role of South African women in articulating and securing demands for gender equality. It also ignores the structural institutional barriers to any previous articulation of such demands. It is a characterisation that feminists in South Africa have long contended with and as discussed in the 'legacies' section above, invokes implicitly a particular way of dichotomising and essentialising 'white' and 'black' legal cultures intimately linked with colonial and apartheid power structures.

In order to explore the entanglement of newness and gender with which this working paper is concerned I suggest two further additional ways of assessing the Court. The first of these, the appointments process, draws on the work of Sally Kenney on gender and judging. When studying the incorporation of women into judiciaries from which they have been historically excluded Kenney warns us to expect to see differences in 'how each individual woman "does" gender, and how her differences are gendered in different ways'.[96] Here I suggest the value of studying the appointments process as a way of interrogating the Court's newness. Elsewhere I have written at greater length on the insights that can be gained from such an approach and produced a historical narrative of appointments that reveals the gendered and raced bodies of Constitutional

[93] Roux, *The Politics of Principle*, 38.
[94] Ibid., 217.
[95] See ibid., 159, 164 and 205.
[96] Sally J. Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (New York: Routledge, 2012), 45.

Court judges have figured differently in institutional claims to newness.[97] In the case of the South African Constitutional Court, whilst individual black male judges have been read as embodying the new judiciary, women's importance (black and white) has most often lain in their continued absence.[98]

The Appointments Process

The Judicial Services Commission was the subject of much political and public scrutiny at the establishment of the Court. This scrutiny has continued and perhaps even intensified in recent years. The JSC is either; consulted, when the president is appointing Chief or Deputy Chief Justice of the Constitutional Court; makes recommendations, as in the case of the appointment to the Constitutional Court; or appoints, in the case of all other Courts in South Africa. The JSC also has a role in the continuing training and education of judicial officers and handles complaints about Judges.

Irrespective of whether the JSC is making a recommendation or an appointment the process runs the same. Once a vacancy has been announced nominations for suitable candidates are invited. Written nominations are accepted and circulated to the Commission. A sub-committee will draw up a shortlist which must be approved by the whole Commission and only then are the shortlisted names announced and the candidates invited for interview. The interviews are compulsory, even if only one candidate is shortlisted and are public – they can be attended by the public and the press but cannot be filmed or recorded, the same as Court hearings themselves. Some commentators have argued for more public scrutiny of the short listing process itself, since non short listed nominees are not revealed in public it has been suggested that 'there is no independent check, outside of the JSC membership, on whether there might be a trend to exclude a certain category of person from so much as being seriously considered by the commission'.[99]

The 1996 Constitution stipulates two things about the Judiciary. Firstly, Section 174(1) requires appointed candidates to be 'appropriately qualified', and 'fit and proper'. Secondly, Section 174(2) of the Constitution requires that the judiciary 'reflect broadly the racial and gender composition of South Africa'. On September 10 2010 the JSC issued a summary of criteria used when considering candidates.[100] In reference to the Constitution the first three were listed as:

1. Is the particular applicant an appropriately qualified person?

2. Is he or she a fit and proper person, and

[97] The Constitutional Court appointments process has also been scrutinised for its gender politics by Elsje Bonthuys, 'Gender and the Chief Justice: Principle or Pretext?', *Journal of Southern African Studies* 39, no. 1 (1 March 2013): 59–76, doi:10.1080/03057070.2013.768022; Rachel E. Johnson, 'Women as a Sign of the New? Appointments to South Africa's Constitutional Court since 1994', *Politics & Gender* 10, no. 4 (2014): 595–621.

[98] Johnson, 'Women as a Sign of the New?'

[99] Carmel Rickard, 'The South African Judicial Service Commission. Paper from the Conference on Judicial Reform: Function, Appointment and Structure, Held at the Centre for Public Law, University of Cambridge', October 2003, http://www.law.cam.ac.uk/faculty-resources/summary/the-south-african-judicial-service-commission/879.

[100] Available at: http://www.justice.gov.za/saiawj/saiawj-jsc-criteria.pdf

3. Would his or her appointment help to reflect the racial and gender composition of South Africa?

Following this a further six 'supplementary criteria' were listed, including 'integrity', 'energy and motivation', 'competence', 'experience', 'appropriate potential' and finally 'symbolism' in which the question, 'what message is given to the community at large by an appointment?' was asked.

In 2006 Richard Calland described the JSC public interviews thus: 'The elegant calm of the Vineyard Hotel in the leafy-green Cape Town suburb of Newlands, where the JSC now always conducts its hearings, belies the intensity of the proceedings. With light streaming in from large windows, it is a metaphor for the transparency of its work'.[101] However, this calm transparency has come under fire several times in recent years and most recently in April 2013 when Advocate Izak Smuts resigned from the JSC. An internal report written by Smuts, in which he suggested that the JSC held a bias against appointing white, male candidates, was leaked to the South Africa press. Smuts' report stated that, "If the majority view is that, for the foreseeable future, white male candidates are only to be considered for appointment in exceptional circumstances (an approach I consider to be unlawful and unconstitutional), the JSC should at the very least come clean and say so, so that white male candidates are not put through the charade of an interview before being rejected."[102] Following a day-long, closed-session, discussion of the report Chief Justice Mogeng held a press conference in which he re-affirmed the JSC's commitment to transformation of the judiciary. Mogeng argued that 'it would be a "dereliction of duty" on the commission's part if black South Africans appearing in the country's court still echoed the words of former president Nelson Mandela during the Rivonia trial from 1963-64, where he remarked that he felt like a "black man in a white man's court"'.[103] Mogeng also suggested that it was 'not a constitutional imperative to appoint the best of the best … merit does count, but it is not all about merit'. [104]

The pitching of merit against transformation in this case and others has been publically criticized, especially by feminists who argue that this dichotomy both precludes the possibility of viewing diversity itself as a merit, and upholds gendered and exclusionary constructions of merit. During the April 2013 controversy it was also suggested by many that the issue over the non-appointment of 'white males' was in fact a distraction from a growing trend for the JSC to recommend and appoint 'executive minded' judges of all races and genders, a point made by the cartoonist Zapiro in *The Times*.

[101] Richard Calland, *Anatomy of South Africa: Who Holds the Power?* (Cape Town: Zebra, 2006), 221.
[102] Niren Tolsi, 'JSC Defends Transformation Imperatives for the Judiciary', *The M&G Online*, 9 April 2013, http://mg.co.za/article/2013-04-09-jsc-to-recommend-two-judges-for-supreme-court-of-appeal/.
[103] Niren Tolsi, 'JSC Extends Davis's Tenure at Competition Appeals Court', *The M&G Online*, 11 April 2013, http://mg.co.za/article/2013-04-11-jsc-extends-daviss-tenure-at-competition-appeals-court/.
[104] Ibid.

In 2005 there were 2 women judges out of 11 on the Constitutional Court, 2 women out of 20 judges sitting in the Supreme Court of Appeal, 27 women amongst 167 High Court judges, and 524 women of the 1822 Magistrates in the country. Among the heads of Court, there was no female Judge President and there was only one Deputy Judge President.[105] In the context of South Africa's legal profession, leading feminist legal scholars described this change in the gender profile of the bench as 'not insignificant'.[106] However, Chief Justice Chaskalson, at his retirement in May 2005 described the two out of eleven women Judges sitting in the Constitutional Court as 'far from what is required' and went on to say that 'transformation must remain high on the agenda'.

A number of factors have been indentified as militating against the appointment of women judges. The JSC 'is now very reluctant to consider anyone for appointment unless he or she had served as an acting judge, controversial since acting judgeships are in the gift of the executive and administrative head of the courts'.[107] The link between appointments to the Bar and appointments to the Bench also continues to be made.[108] In 2013 the *Sunday Times* reported that of 473 senior counsel in South Africa, from whose ranks the judiciary are most usually drawn there were twenty white women and nine black women, of which only four were African. In addition the composition of the JSC itself has been raised – in 2004 only four of the twenty-three members were women. In 2013 there were six women Commissioners but several were criticised for not playing an active role during appointment processes.[109] Several former Constitutional Court judges have pointed attention to the role of the President in making the final appointments to the Constitutional Court. On his retirement in February 2013 Justice Zak Yacoob suggested that President Zuma should reject the all-male list of candidates submitted by the JSC from which he could select Yacoob's replacement, and request a new list from the JSC containing women. Referring to the appointment of Justice Ray Zondo above Appeals Court Judge Mandisa Maya to the Constitutional Court in 2012, Yacoob was quoted as saying: 'my own sense is that the

[105] Cowan, 'Women's Representation on the Courts in the Republic of South Africa', 303.
[106] Murray and O'Sullivan, 'Brooms Sweeping Cceans? Women's Rights in South Africa's First Decade of Democracy', 38.
[107] Corder, 'Judicial Authority in a Changing South Africa', 264–5.
[108] Cowan, 'Women's Representation on the Courts in the Republic of South Africa', 312.
[109] Niren Tolsi, 'JSC is getting to grips with gender', Mail and Guardian October 11 to 17 2013: 10.

president is not taking the importance of appointing women to (the Constitutional Court) seriously enough. That's the only inference I can draw (from the non-appointment of Maya)'.[110]

It was widely acknowledged that the first bench of the Constitutional Court was *relatively* diverse, socially and intellectually. What the continuing and intensifying debates over the JSC show is that the continuing 'newness' of the Constitutional Court has been more and more closely linked to the bodies wearing the Court's distinctive dark green robes. A close reading of the evolving debates over the transformation of the judiciary can reveal just how, when and by whom the issue of the gender of judges has been raised and whether the presence of women as judges has indeed become a more prominent marker of the newness of the Constitutional Court over time.

Everyday Practices

This second approach draws upon Louise Chappell's assessment of the ICC's procedural and structural commitment to gender equality as well as emerging approaches to the study of 'informal institutions'. The development of distinctive judicial and legal practices within the Constitutional Court have been intimately linked with the new Court building, used since 2004. However, the Court was in operation for ten years in its first temporary home, an office block in Braampark not far from Constitution Hill. The opportunity that the first judges of the Court had to participate, and indeed lead the design and development of the new building was a chance to set in stone some of the ideals and practices that they had already sought to inculcate in the new Court. Alongside the building, some of the remaining Justices from the first court have also started an oral history project to collect the experiences, intentions and ideals of those who (almost literally) built the Court.[111] Both the building and this oral history project can be viewed as important sites for making institutional memory – they are thus a way of accessing the internal production the Court's 'newness'. Understanding the active role that history-making practices play in the reproduction and contestation of institutions offers a chance to deepen historical institutionalism's conceptions of change. The oral history project, which collected the stories of a wide-range of those who have worked in the Court from cleaners to Judges also enables an alternative perspective to the judge-centric assessments of the Court that currently exist. Below I offer some preliminary thoughts on the insights into the Court that this archive can offer us.

The first thing that can be gleaned from the oral history project interviews and the Constitutional Court archives is the outlines of an organisational history of the Court. In 1994 the management of the new court were drawn from the personnel of the then Department of Justice. A court registrar, Martie Stander was appointed in 1994 (she is still there now), along with a court director, the first of whom was Danie du Plessis, who was initially asked to postpone his retirement for three months to set the court up-and-running. Through these figures there is

[110] Charl du Plessis, 'Yacoob Asks Zuma to Appoint Women', *City Press*, accessed 31 October 2013, http://www.citypress.co.za/politics/yacoob-asks-zuma-to-appoint-women/.
[111] I would like to thank the Constitutional Court Trust for permission to use the oral history interviews conducted for the Audible Legacy project. Available at http://www.historicalpapers.wits.ac.za/?65/N/Oral-history-of-the-Constitutional-Court

strong thread of continuity with the existing court system. In his oral history Du Plessis tells us that 'we knew how the Appeal court in Bloemfontein functioned, how it was structured, and that was basically in our minds'. A second court director, Phindiwe Sangweni took over in 2002, leaving in 2004. A third court director, Vick Misser has been in charge of the court since January of 2004. He has overseen a structural re-arrangement of the court's organisation and a professionalization of the court's personnel. A key aspect of the Court's functioning since 1994 has been its independence from the Department of Justice – having its own budget and the ability to manage its own staff. This independence has been built upon by the last two Chief Justices who have started to expand the Office of the Chief Justice (OCJ). The current Chief Justice Mogeng is pushing for the whole court system to come under the management of the OCJ and thus to be independent of executive control.

Perhaps the most striking thing about the oral histories of these key organisational figures is the tone of collegiality with which the staff speak of one another. More than one describes the Court as 'a family'. The current director of the Court Vick Misser says of Martie Stander 'I regard her as a mother of this Court'. A widespread 'sense of belonging' is an aspect of institutional culture which judges and management staff have clearly worked hard to sustain. There is more than one story within the oral history archive of an employee with few or no formal qualifications joining the Court as a menial worker and being encouraged to return to their studies and then rising within the Court structures or going on to legal training. However, families, whilst potentially supportive and nurturing, are also excellent at keeping secrets. There is an, entirely understandable, reluctance to discuss conflicts and problems that are referred to obliquely or euphemistically, for example 'misbehaviour' or 'stickiness'.[112] My reading of the interviews so far also reveals a mapping of the familial onto what might be termed 'conservative' gender roles.

Concluding Summary

The approach advanced here is to treat the 'newness' of the Constitutional Court not as a statement of fact about its newly established nature but instead to explore the contestations and struggles over 'newness' as a constitutive part of the process of institutional establishment and reproduction. I have argued that there is a politics to the claiming or acknowledgement of newness that must be integrated into our theories of institutional change. This politics of newness will be particular to specific institutions. This working paper has sought to scrutinize the ways in which 'new' and 'old' have been invoked in the project of transforming the judiciary and South African law since 1994.

[112] Of 100 or so interviews conducted I have been given access to around 80; the rest are yet to be transcribed. In the current batch there is no interview with the second court director Phindiwe Sangweni, if her oral history is not included in the remainder, this will be a notable absence.

References

Albertyn, Cathi, and Beth Goldblatt. 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality'. *South African Journal on Human Rights* 14 (1998): 248.

Andrews, Penelope. 'The Stepchild of National Liberation: Women and Rights in the New South Africa'. In *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, edited by Penelope Andrews and Stephen Ellmann, 326–59. Witwatersrand University Press, 2001.

Bishop, Michael, Lisa Chamberlain, and Sha 'ista Kazee. 'Twelve-Year Review of the Work of the Constitutional Court: A Statistical Analysis'. *South African Journal on Human Rights* 24 (2008): 354.

Bonthuys, Elsje. 'Gender and the Chief Justice: Principle or Pretext?' *Journal of Southern African Studies* 39, no. 1 (1 March 2013): 59–76. doi:10.1080/03057070.2013.768022.

———. 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court'. *Canadian Journal of Women and the Law* 20 (2008): 1.

Broun, Kenneth S. *Black Lawyers, White Courts: The Soul of South African Law*. Ohio University Press, 2000.

Calland, Richard. *Anatomy of South Africa: Who Holds the Power?* Cape Town: Zebra, 2006.

Chanock, Martin. 'Law, State and Culture: Thinking about Customary Law after Apartheid'. *Acta Juridica/African Customary Law* 1991 (1991): 52.

———. *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*. Cambridge University Press, 2001.

Clayton, Cornell W., and Howard Gillman. *Supreme Court Decision-Making: New Institutionalist Approaches*. University of Chicago Press, 1999.

Corder, Hugh. *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-1950*. Juta & Company, 1984.

———. 'Judicial Authority in a Changing South Africa'. *Legal Studies* 24, no. 1–2 (2004): 253–74.

———. 'The Judicial Branch of Government: An Historical Overview'. In *Essays on the History of Law*, edited by D.P. Visser. Cape Town: Juta, 1989.

Cowan, Ruth B. 'Women's Representation on the Courts in the Republic of South Africa'. *University of Maryland Law Journal of Race, Religion, Gender and Class* 6 (2006): 291.

Currie, Ian. 'The Future of Customary Law: Lessons from the Lobolo Debate'. In *Gender and the New South African Legal Order*, edited by Christina Murray, 146–68. Juta, Limited, 1994.

Dugard, Jackie. 'Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation'. *Leiden Journal of International Law* 20, no. 04 (2007): 965–81.

Dugard, John. *Human Rights and the South African Legal Order.* Princeton University Press, 1978.

———. 'Should Judges Resign - A Reply to Professor Wacks'. *South African Law Journal* 101 (1984): 286.

du Plessis, Charl. 'Yacoob Asks Zuma to Appoint Women'. *City Press*. Accessed 31 October 2013. http://www.citypress.co.za/politics/yacoob-asks-zuma-to-appoint-women/.

Dyzenhaus, David. *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order.* Hart Publishing, 1998.

Goldblatt, Beth, and Kirsty McLean. 'Women and Social and Economic Rights'. *South African Journal on Human Rights* 25 (2009): 407.

Goodin, Robert E. 'Institutions and Their Design'. In *The Theory of Institutional Design*, edited by Robert E. Goodin, 1–53. Cambridge University Press, 1998.

Haynie, Stacia L. *Judging in Black and White.* Peter Lang Publishing, Incorporated, 2003.

Johnson, Rachel E. 'Women as a Sign of the New? Appointments to South Africa's Constitutional Court since 1994'. *Politics & Gender* 10, no. 4 (2014): 595–621.

Kenney, Sally J. *Gender and Justice: Why Women in the Judiciary Really Matter.* New York: Routledge, 2012.

Klug, Heinz. *The Constitution of South Africa: A Contextual Analysis.* Hart Pub., 2010.

Leach, Steve, and Vivien Lowndes. 'Of Roles and Rules Analysing the Changing Relationship between Political Leaders and Chief Executives in Local Government'. *Public Policy and Administration* 22, no. 2 (1 April 2007): 183–200.

Lehnert, Wieland. 'Role of the Courts in the Conflict between African Customary Law and Human Rights, *South African Journal on Human Rights* 21 (2005): 241.

Louise Chappell. 'Nested Newness and Institutional Innovation: Expanding Gender Justice in the International Criminal Court'. In *Gender, Politics and Institutions: Towards a Feminist Institutionalism*, 163–80. Basingstoke: Palgrave Macmillan, 2011.

Lowndes, Vivien. 'Something Old, Something New, Something Borrowed …'. *Policy Studies* 26, no. 3–4 (1 September 2005): 291–309.

Mackay, Fiona. 'Nested Newness, Institutional Innovation, and the Gendered Limits of Change'. *Politics & Gender* 10, no. 04 (December 2014): 549–71.

Mahoney, James, and Kathleen Thelen. *Explaining Institutional Change: Ambiguity, Agency, and Power.* Cambridge University Press, 2010.

Mamdani, Mahmood. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism.* Princeton University Press, 1996.

Mathews, Anthony S. *Law, Order and Liberty in South Africa.* University of California Press, 1972.

Meierhenrich, Jens. *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000.* Cambridge University Press, 2010.

Mtshaulana, Patric Mzolisi. 'The History and Role of the Constitutional Court of South Africa'. In *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, edited by Penelope Andrews and Stephen Ellmann, 525–54. Witwatersrand University Press, 2001.

Murray, Christina, and Michelle O'Sullivan. 'Brooms Sweeping Cceans? Women's Rights in South Africa's First Decade of Democracy'. In *Advancing Women's Rights: The First Decade of Democracy*, edited by Christina Murray and Michelle O'Sullivan, 1–41. Juta, 2005.

Pierson, Paul. 'The Limits of Design: Explaining Institutional Origins and Change'. *Governance* 13, no. 4 (1 October 2000): 475–99.

Pieterse, Marius. 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights'. *South African Journal on Human Rights* 20 (2004): 383.

Rickard, Carmel. 'The South African Judicial Service Commission. Paper from the Conference on Judicial Reform: Function, Appointment and Structure, Held at the Centre for Public Law, University of Cambridge', October 2003. http://www.law.cam.ac.uk/faculty-resources/summary/the-south-african-judicial-service-commission/879.

Roux, Theunis. *The Politics of Principle: The First South African Constitutional Court, 1995-2005.* Cambridge University Press, 2013.

Runia, Eelco. 'Presence'. *History and Theory* 45, no. 1 (1 February 2006): 1–29.

Sarkin, Jeremy. 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions, *University of Pennsylvania Journal of Constitutional Law* 1 (1999 1998): 176.

Scott, Joan W. *Gender and the Politics of History.* Rev. ed. Gender and Culture. New York: Columbia University Press, 1999.

Spitz, Richard, and Matthew Chaskalson. *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement.* Witwatersrand University Press, 2000.

Streeck, Wolfgang, and Kathleen Ann Thelen. *Beyond Continuity: Institutional Change in Advanced Political Economies.* Oxford University Press, 2005.

Thelen, Kathleen. 'Historical Institutionalism in Comparative Politics'. *Annual Review of Political Science* 2 (1999): 369–404.

Tolsi, Niren. 'JSC Defends Transformation Imperatives for the Judiciary'. *The M&G Online*, 9 April 2013. http://mg.co.za/article/2013-04-09-jsc-to-recommend-two-judges-for-supreme-court-of-appeal/.

———. 'JSC Extends Davis's Tenure at Competition Appeals Court'. *The M&G Online*, 11 April 2013. http://mg.co.za/article/2013-04-11-jsc-extends-daviss-tenure-at-competition-appeals-court/.

Wacks, Raymond. 'Judges and Injustice'. *South African Law Journal* 101 (1984): 266.

———. 'Judging Judges: A Brief Rejoinder to Professor Dugard'. *South African Law Journal* 101 (1984): 295.

Whittington, Keith E. 'Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics'. *Law & Social Inquiry* 25, no. 2 (2000): 601–34.

Wilson, Richard. *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State.* Cambridge Studies in Law and Society. Cambridge: Cambridge University Press, 2001.