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The Constitutional Court was established in 1994 by South Africa's first democratic constitution - the interim constitution of 1993. The Court, the key institution of our constitutional democracy, continues to function under the final Constitution of 1996.

The 1993 constitution, agreed upon at multiparty talks, ushered in a legal order based on the concept of constitutional supremacy. From 27 April 1994, the interim constitution became the law's touchstone. And the 11-person court it established became the highest legal authority in the land in all constitutional matters.

Why did South Africa need a Constitutional Court?

In 1994, the judiciary was overwhelmingly white (and male) and therefore limited in its legitimacy and its capacity to draw on the sense of justice of all communities and both sexes. It was agreed that a new court, more representative of South Africa's diverse population, should be established to protect the Constitution and the fundamental human rights it entrenches.

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The history of the idea

The notion of a bill of rights for South Africa can be traced back to an ANC document in the early 1920s. The Freedom Charter of 1955 carried the idea forward. In the following decades the idea of an entrenched bill of rights received support from liberal academics and judges. The question of who would enforce it, was, however, left open. This issue was debated at a conference organised by the Constitutional Committee of the ANC in 1991. What emerged was a commitment to a Constitutional Court in a hybrid continental form, such as that of Germany: able to hear cases by direct access, as well as by referral and on appeal.



The signboard in 11 languages

A question that arose in the negotiating process concerned the sort of institution needed to protect a constitution and the rights enshrined in it. Should South Africa create a specialist Constitutional Court, use the existing court structure to act as the guardian, or opt for a hybrid?

In many English-speaking countries, ordinary courts can scrutinise constitutional issues. But these courts needed to be credible and command respect. Could the highest structures of the South African judiciary - the Supreme Court and the Appellate Division - be transformed into such institutions?

The ANC felt that this task would be too difficult and that the new Constitution needed as its protector a new court - one untainted by the past. In this sense, the decision to create a Constitutional Court was a political one. And the process of appointment to the Court - clearly laid down in the interim constitution - was the product of compromise.

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The appointment of the judges

In **June 1994**, Arthur Chaskalson, senior counsel and the national director of the Legal Resources Centre, was appointed as President of the Constitutional Court by President Nelson Mandela, in consultation with the cabinet and the chief justice of the time, Judge Michael Corbett.

Then began the process to select the Court's other 10 members. The appointment process, set out in the interim constitution, required the president - again, in consultation with the cabinet and the chief justice - to appoint four judges from the ranks of the Supreme Court.

The four were Laurie Ackermann, Richard Goldstone, Tholie Madala and Ismail Mohamed.

The president - again after consultation - was then to choose the remaining six judges from a shortlist of 10, sent to him by the Judicial Service Commission. The commission, the members of which are largely drawn from the legal profession and members of Parliament on the basis of proportional representation, was responsible for whittling down the initial list of 100 to 25.

The commission interviewed those on the short list of 25 over four days in October 1994. The interviews lasted about an hour each.

The list was finally reduced to 10 candidates: Justice Johann Kriegler, Justice John Didcott, Advocate Pius Langa SC, Associate Prof Kate O'Regan, Prof Yvonne Mokgoro, Prof Albie Sachs, Prof CJR Dugard, Prof Charles Dlamini SC, Advocate Bernard Ngoepe and Advocate Thembile Skweyiya SC.

Six of these - Kriegler, Didcott, Langa, O'Regan, Mokgoro and Sachs - were appointed to the Court. The judges were each to serve a non-renewable term of seven years.

This period was subsequently extended to a period of between 12 and 15 years, depending on the age of the judge when first appointed as a judge.

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The Court is opened

The members of the Court met for the first time on the last day of October 1994. At the end of that year they undertook a study visit to Germany, a country whose constitution - along with those of Canada, India and Namibia - had had a strong influence on the writers of South Africa's interim constitution.

The Court was formally opened by President Nelson Mandela on the morning of **14 February 1995**.

Mandela told the Court: "The last time I appeared in court was to hear whether or not I was going to be sentenced to death. Fortunately for myself and my colleagues we were not. Today I rise not as an accused, but on behalf of the people of South Africa, to inaugurate a court South Africa has never had, a court on which hinges the future of our democracy."

The judges took oaths of office wearing their specially designed green robes in front of the president and the Minister of Justice, Dullah Omar.

The inauguration was completed with the unveiling, in the foyer of the Court, of a commemorative plaque that depicts the Court's logo - a representation of the African concept of justice under a tree.

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The first hearing

On **15 February 1995**, the 11 judges took their seats to hear the first case. The case, *S v Makwanyane*, raised the question of the constitutionality of the death penalty

For three days the judges heard arguments. The facts of the case, in which Makwanyane had been sentenced to death, were not directly relevant: the core issue was what bearing the interim Constitution had on the death penalty. Did the death penalty violate sections 9, 10 and 11(2), which guaranteed every individual the right to life, the right to dignity and the right to be free from torture and cruel punishment?

In its judgment, handed down on **6 June 1995**, the Court unanimously found that the death penalty was indeed unconstitutional.

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The first judgment

The very first judgment the Court handed down related to the second case it heard

The case *S v Zuma* concerned the constitutionality of section 217 of the Criminal Procedure Act, which put the burden on an accused who claimed that a written confession to a magistrate had been made under duress, to prove that it had been made under duress. The judgment, delivered on **5 April 1995**, struck down this provision as a violation of the presumption of innocence.

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Certification of the Constitution

The Court played a crucial role in the adoption of the final Constitution of 1996. The Constitutional Court had to certify that the new text, passed by the Constitutional Assembly, complied with the 34 constitutional principles agreed upon by the negotiators of the interim constitution.

The Court rejected some limited aspects of the first version of the Constitution but certified an amended text. See the certification process [for more](#).

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Landmark cases

The Court has handed down some judgments that have had a profound impact on the law in South Africa. Some of them, and the themes they have tackled, are:

The death penalty

- S v Makwanyane (1995) - **the death penalty**,
- Mohamed v President of the RSA (2001) - **the constitutionality of extraditing an accused person to a country that imposes the death penalty**

Violence

- Kaunda & Others v The President of the Republic of South Africa and Others (2004) - **The responsibility of the South African government to its citizens who are arrested in other countries**
- S v Baloyi (1999) - **the state's constitutional duty to provide effective remedies against domestic violence**
- Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail (2004) - **the obligation of rail service providers to protect the safety of commuters on trains**

Equality

- Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amicus Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others (2005) - **the common law definition of marriage and section 30(1) of the Marriage Act of 1961 declared inconsistent with the Constitution. The Court found that the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage constitutes an unjustifiable violation of their rights.**
- Hoffmann v South African Airways - **employment discrimination against an HIV-positive person**
- Larbi-Odam v MEC in the Department of Education of the North-West Province (1997) - **striking down regulations preventing permanent residents from holding permanent posts in the Department of Education**
- National Coalition for Gay and Lesbian Equality v Minister of Justice (1998) - **striking down the criminal prohibition on sodomy between consenting adult males**
- National Coalition for Gay and Lesbian Equality v Minister of Home Affairs (1999) - **unfair discrimination against same-sex life partners**
- Brink v Kitshoff (1995) - **unfair discrimination on grounds of sex and women's access to insurance policies**
- Bhe and Others v The Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa (2004) - **gender equality and the right of African women to inherit under the African customary law of intestate succession**
- KZN MEC of Education v Pillay (2007) - **prohibition against wearing a nose stud to a public school amounted to unfair discrimination on grounds of religion and culture**
- Shilubana and Others v Nwamitwa (2008) - **development of customary law to bring it in line with the constitutional commitment to gender equality. Appointment by customary institutions of a female chief, contrary to tradition, was permissible**

Political cases

- August v Electoral Commission (1999) - **right of prisoners to vote**
- Azapo v President of the RSA (1996) - **challenge to the TRC's amnesty powers**
- United Democratic Movement v President of the RSA (2002) - **constitutionality of amendments allowing "floor-crossing"**
- Certification of the Constitution (1996)

Socio-economic rights

- Government of the RSA v Grootboom (2000) - **right to housing**
- Minister of Health v Treatment Action Campaign (2002) - **right to health care and access to HIV/Aids treatment**

- *Khosa and Others v Minister of Social Development; Mahlaule and Another v Minister of Social Development and Others* (2004) - **right of access to social security by permanent residents**
- *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* (2008) - **before government evicts residents from their homes it has the duty to engage meaningfully with them about possible steps that can be taken to alleviate their homelessness**
- *Lindiwe Mazibuko and Others v City of Johannesburg and Others* (2009) – **found the use of prepayment water meters lawful and that the City’s free basic water policy was reasonable**
- *Leon Joseph and Others v City of Johannesburg and Others* (2009) – **when depriving residents of electricity, a service that is provided in fulfilment of constitutional and statutory duties, the City is obliged to provide them with procedural fairness, including fair notice of the disconnection.**

Privacy and religion

- *Case v Minister of Safety and Security* (1995) - **striking down prohibition on possession of pornography**
- *Prince v Law Society of the Cape of Good Hope* (2002) - **freedom of religion, religious exemption for Rastafarians wanting to smoke marijuana**
- *Islamic Unity Convention v Independent Broadcasting Association* (2002) - **freedom of expression relating to broadcasting code restrictions**
- *S v Lawrence* (1997) - **right to freedom of trade and religion relating to the sale of liquor**
- *S v Jordan* (2002) - **constitutionality of the law criminalising prostitution**

Criminal procedure and the judiciary

- *S v Zuma* (1995) - **striking down presumption that a confession was freely and voluntarily made**
- *S v Williams* (1995) - **corporal punishment as a sentence for juveniles declared unconstitutional**
- *Carmichele v Minister of Safety and Security* (2001) - **the duty of courts to develop the common law, in this case concerning duty of police to prevent sexual violence against women**
- *Van Rooyen v Minister of Justice* (2002) - **independence of the judiciary (magistrates)**
- *Centre for Child Law v Minister for Justice and Constitutional Development* (2009) – **striking down statute making minimum sentencing provisions applicable to 16 and 17 year old children**

Control of public power

- *President of the RSA and Others v South African Rugby Football Union and Others* (1999) - **exercise of presidential powers to appoint Commission of Inquiry, the compulsion of the president to give oral evidence in civil proceedings; and**
- *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and others* (1995) - **legislative authority of Parliament and the delegation of powers**

Costs

- *Biowatch Trust v Registrar, Genetic Resources and Others* (2009) – **dealing with costs in constitutional litigation. Private litigants who bring constitutional claims, including non-governmental organisations, are given some measure of protection against exposure to adverse costs awards**

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Move to the new building

After a long process to choose a design and construct a new building, the Court moved into its new home. The new Constitutional Court building, the flagship structure of Constitution Hill, was officially opened on **21 March 2004**. See the new Constitutional Court building for more.