Britannia Beach and *Lagoonbay*: The Constitutional Court in Muddy Waters? Some Comparative Reflections on the Benefits of an Active Judiciary

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I Introduction

In their very illuminating paper De Visser and Steytler offer ample explanation for the outcome of the Constitutional Court's 2013 decisions. In my view, the most striking element in their reasoning is that they do not stick to legal explanations. They see an overall trend: the Court protects the integrity and revenue stream of a well-functioning municipality. This all against the backdrop of the recent report of the Ministry of Cooperative Governance and Traditional Affairs in which municipalities were divided into three groups: 'a third of the municipalities was carrying out their task adequately, a third was just managing and the last third was "frankly dysfunctional" because of poor governance, inadequate financial management and poor accountability mechanisms.'[1]

Picking up on De Visser and Steytler's analysis, the main question in this paper is whether the Constitutional Court is an *active court* in the sense that it has an *active* approach to finding the law, establishing the law, and determing the facts in order to bring the dispute to an end? I deliberately use the term 'dispute' instead of 'case' because very often we see that courts' decisions only attach a new legal pearl to an already lengthy string, and thereby do not really bring an end to or offer a solution for the conflict. The dispute on the ground persists.

II *Britannia Beach*

In *Britannia Beach*[2] the Constitutional Court did not accept accountability as an independent right, although democratic accountability as laid down in s 195 of the Constitution is, in the wording of the Court, 'a fundamental value of the

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[1] J De Visser & N Steytler 'Confronting the State of Local Government: The 2013 Constitutional Court Decisions' (2016) 6 *Constitutional Court Review* 1, 1.

[2] *Britannia Beach Estate Ltd & Others v Saldanha Bay Municipality* [2013] ZACC 30, 2013 (11) BCLR 1217 (CC)('*Britannia Beach*').

Constitution'.[3] The Court also stated that there were more specific remedies available and pointed to the constitutional right of access to information held by the state[4] and the Promotion of Access to Information Act.[5]

De Visser and Steytler refer to the applicants' reliance on s 195 of the Constitution as a 'lazy' constitutional argument. Of course they are right, however in my view there are also grounds for the conclusion that there is some 'lazy' reasoning on the part of Court as well. Why? First, one must admit that in general judges are very reluctant to step into the domain of 'accountability', because it is often considered to be an exclusive playing field of the two political powers, namely the executive and the legislature. The problem with accountability, however, is that it is not always a clear legal concept. In fact it is a container term or concept. It is susceptible to input of various elements into it, depending on what is useful to an interpreter in any given situation. We see this happening in parliamentary debates all over the world. We saw this recently in South Africa when questions on the obligations of the President under s 92 of the Constitution with regard to matters of accountability about upgrades at his Nkandla homestead arose.[6] However, in constitutional law literature there is a common understanding that accountability not only means giving information and answering questions. It also means giving reasons[7] for your actions and decisions, clarifying them and even defending them.[8]

I am not certain, therefore, whether the Constitutional Court was correct when it argued that the applicants had other efficacious legal avenues and instruments available to them to get what they wanted. Access to information is only one element of the much wider concept of accountability. It would have been very helpful if the Court had given more insight to its understanding of the meaning of the constitutional value of accountability and of 'a duty to account'.[9] In short, I would have welcomed more clarity.[10]

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[3] Ibid at para 17. See also GE Devenish *A Commentary on the South African Constitution* (1998) 271.

[4] Constitution s 32(1)(a).

[5] Act 2 of 2000, referred to in *Britannia Beach* (note 2 above) at para 20.

[6] In 2014, the Public Protector, Thuli Madonsela, found that President Zuma had committed unethical conduct. According to her, the President had benefited unduly from the use of state funds to improve his rural home. The changes to Mr Zuma's private home, including a swimming pool and a cattle enclosure, cost taxpayers about $23 million. Public Protector *Secure in Comfort: Report on an Investigation into Allegations of Impropriety and Unethical Conduct Relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in Respect of the Private Residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province* (2014).

[7] For interesting reading on reason-giving, see M Bishop 'Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 *Constitutional Court Review* 313; and G Staszewski 'Reason-Giving and Accountability' (2008-2009) 93 *Minnesota Law Review* 1253.

[8] AW Heringa & P Kiiver *Constitutions Compared: An Introduction to Comparative Constitutional Law* (2nd Ed, 2009) 114–7; L Verhey 'Political Accountability: A Useful Concept in EU Inter-Institutional Relations?' in L Verhey, P Kiiver & S Loeffen (eds) *Political Accountability and European Integration* (2009) 55, 62–70.

[9] See *Britannia Beach* (note 2 above) at para 19.

[10] Especially when and if the Court's decisions have an *erga omnes* effect.

As I state above, and as I elaborate later, it is of great value to have *active courts*, ie courts that, for instance, go the extra mile in gathering sufficient facts to enable them to really and finally resolve disputes before them.

Could there be any truth in the argument that the Court's approach in *Britannia Beach* is informed, at least partly, by the fact that Saldanha Bay is a well-functioning municipality? If so, then immediately the 'what if' question arises. What if it had been a dysfunctional municipality, a municipality with poor accountability mechanisms? Would the outcome have been different? Should the outcome have been different? In politics one does not answer 'what if' questions because they steer one into choppy waters, but in academia these kinds of questions are paramount.

Many scholars would argue that, since the principle of accountability lies in the political domain, disputes concerning government responses have to be solved in that same domain, and that there is no room for judges to interfere. This line of reasoning, of course, has a strong basis in the strict application of the notion of separation of powers. However, there are only a few countries left that stick, or purport to stick, to such an approach.[11] This strict approach to separation of powers is not very helpful because, while the powers stay in their allocated fields, the intended constitutional mechanism comes to a halt. The notion of checks and balances is a far more fruitful and productive invention of constitutional scholars. It implies that there is a mutual responsibility for making the constitutional framework work. If there is a branch that does not live up to its constitutional responsibilities at any given time, it is the duty of another branch to send a wake-up call to that branch. Therefore, constitutional courts all over the world send messages to the legislature and the administration in the form of interpretations, declarations of unconstitutionality, setting terms for the resuming of constitutional duties, obligations to report back to the court on the progress and so on, until constitutional norms are enforced, and the normal order has been reinstalled.[12]

So the question is, if a municipality is 'dysfunctional' in the sense that the authorities are offering no explanation for their decisions, are not willing to discuss them, and are only defending them on the basis that they have the majority, should courts not find ways to intervene in order to make the constitutional/legal mechanism function properly? An affirmative answer may be especially appropriate for local government since accountability is supposed to be enhanced by decentralisation.[13]

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[11] Heringa & Kiiver (note 8 above) at 146. The US seems to be the odd one out. Krotoszynski even talks about a 'US separation of powers obsession'. See RJ Krotoszynski Jr 'The Separation of Legislative and Executive Power' in T Ginsburg & R Dixon (eds) *Comparative Constitutional Law* (2013) 248.

[12] On the remedies the Constitutional Court has to offer, see M Bishop 'Remedies' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 9. Also very enlightening: CB Lewis *Judicial Remedies in Public Law* (5th Edition, 2014).

[13] J de Visser *Developmental Local Government*: *A Case Study of South Africa* (2005) 25.

III *Lagoonbay*

The most interesting element of *Lagoonbay*,[14] by far, is its *obiter dictum* explaining that parts of the Land Use Planning Ordinance[15] (LUPO) are unconstitutional and what its argument would have been if the relevant provisions had been attacked.[16] The Court made it clear that the outcome would have been different if the correct arguments had been presented to it. Why this reluctance on the part of the Court to apply constitutional law *ex officio* in order to solve the case in a way that would have provided clarity for everybody? It would have provided clarity, not only for provinces and municipalities but also for future applicants on the question of whether or not provincial ministers were competent to make decisions on rezoning of properties.

In many countries there is a fierce debate going on with regard to judicial activism. In legal literature this term is mostly framed as the 'activism vs self-restraint' dichotomy. Posner is quite right that the term judicial activism serves as a vague, all-purpose pejorative.[17] This line of reasoning might be understandable when you have the classical issue of the political question doctrine in the back of your mind. But it becomes quite different when one places the term in the context of the pursuit of an answer to the question: what is the actual role of the judge in determining the relevant law and facts for purposes of solving the dispute (in practice)?

In the words of Balakrishan:

> [I]n many countries, especially in those with a common law tradition, constitutional litigation is being seen as an adversarial process where the onus is on the pleaders to shape the overall course of the proceedings through their submissions. In this conception, the role of the judge is a passive one. But can a judge or court be effective when it is cast in that passive mould? In many countries judges have started to ask incisive questions for the parties involved as well as exploring solutions. This has caused a raging debate on the proper scope and limits of the judicial role.[18]

Very often this debate is cast in the dichotomy of adversarial vs inquisitorial systems. This is especially so when it comes to criminal law. Literature shows, however, that many countries are mitigating their adversarial systems towards more inquisitorial ones – at least there is a strong appeal by academics to become less adversarial. This is the case, even in countries with a very strong adversarial tradition, like the United States,[19] England & Wales and Australia.[20]

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[14] *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd & Others* [2013] ZACC 39, 2014 (1) SA 521 (CC), 2014 (2) BCLR 182 (CC)('*Lagoonbay*').

[15] 15 of 1985.

[16] *Lagoonbay* (note 14 above) at para 46.

[17] See for example RA Posner 'The Rise and Fall of Judicial Self-Restraint' (2012) 100 *California Law Review* 519, 533.

[18] KG Balakrishan 'Judicial Activism under the Indian Constitution' Speech (Trinity College Dublin, 14 October 2009), available at http://supremecourtofindia.nic.in/speeches/speeches_2009/judicial_activism_tcd_dublin_14-10-09.pdf.

[19] RC Cramton 'Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable' (2002) 70 *Fordham Law Review* 1599.

[20] H Stacy & M Lavach (eds) *Beyond the Adversarial System* (1999).

When courts take up a more active role, serious questions of course arise in light of the separation of powers doctrine. On the other hand, the individual costs (sometimes even bankruptcy) and societal costs can be unacceptably high when lawyers/judges restrict themselves to a narrow legal playing field and cause problems to drag on for ages in a stream of ongoing litigation.

That is why in the Netherlands in recent decades procedural law, especially in the area of administrative law, has been reformed so as to empower courts to take up a more informal, active role.[21] For instance, a court may bring, on its own motion/initiative, additional legal grounds or additional facts to substantiate its judgment.[22] The court may set time limits for the administrative authorities to arrive at a new decision. It even has the power to rule that its judgment shall take the place of the annulled decision or the annulled part of the administrative authority's decision.[23] This power is only used in cases where, according to the law, there is only one possible decision.

The Administrative Jurisprudence Division of the Council of State, one of the highest administrative courts in the Netherlands,[24] in recent years has developed a very active and informal approach to the handling of cases.[25] One example is that legal representatives are no longer allowed to orally present their (lengthy) heads of argument. Instead the court sends them questions before the hearing and expects them to present answers during the hearing. This has resulted in improved timeliness, fewer court delays and greater overall satisfaction on the part of the litigants.[26]

What follows may seem a side issue but hopefully it becomes clear that it bears relevance to my key point. The preliminary results of research conducted by the South African Human Sciences Research Council (HSRC) on the adjudication of socio-economic rights shows that lawyers find that courts are not suited for implementing socio-economic rights, let alone the progressive realisation of these rights.[27] This is remarkable, coming from lawyers in a country whose Constitutional Court achieved worldwide acclaim for the *Grootboom* judgment and

[21] This approach fits very well in the more general Dutch legal culture which can be qualified as one of *informal pragmatism*. See FJ Bruinsma *Dutch Law in Action* (2nd Edition, 2003) 14.

[22] General Administrative Law Act s 8:69 (2)(3).

[23] Ibid s 8:72 (4)(5).

[24] The occasional reader might wonder why I do not bring in the Dutch Constitutional Court. The Kingdom of the Netherlands does not have 'a' constitutional court. Every court is a constitutional court in the sense that they are obliged to apply the Constitution and they are allowed to annul administrative decisions when they are not in line with the Constitution. The only thing the courts are not allowed to do is to test the constitutionality of statutes. But since self-executing treaty provisions override national legislation, and by virtue of the Constitution every court is allowed to test that, at least when human rights are concerned, there is no pressing need for the introduction of constitutional review of legislation. This is admittedly an anomaly. For more on this see Heringa & Kiiver (note 8 above) at 165.

[25] T Barkhuyzen, W den Ouden & YE Schuurmans 'The Law on Administrative Procedures in the Netherlands' (2012) *Netherlands Administrative Law Library* 1, 15.

[26] F van Dijk 'Improved Performance of the Netherlands Judiciary: Assessment of the Gains for Society' (2014) 6 *International Journal for Court Administration* 83.

[27] G Pienaar *Presentation at Colloquium on Poverty and Human Rights in Africa* (Cape Town, 27 November 2014).

the *TAC* judgments.[28] These are judgments studied and hailed all over the world for the way the Court made socio-economic rights legally enforceable![29]

The reasons lawyers give for their opinions in the HSRC study are that these rights are too political, but also that courts do not have enough information or evidence in order to decide specific cases. The first argument I understand, the latter I do not. Courts can easily ask parties to produce the necessary information. In India courts have even developed a practice of appointing fact-finding commissions on a case-by-case-basis which are deputed to enquire into the subject-matter of the case and report back to the court. And when it comes to matters involving complex legal considerations, the courts also seek the services of senior counsel by appointing them as *amicus curiae* to the court.[30]

Against this background, we still have to find an answer for the question why the South African Constitutional Court only deals with the unconstitutionality of impugned provisions of LUPO as an *obiter dictum*? This is the more astonishing since the Court points out that it 'enjoys a wide jurisdiction and, when deciding a constitutional matter within its power, is obliged to "declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency"'.[31] But then comes this:

> That being said, this court has time and time again reiterated the importance of challenging the constitutional validity of legislation in a manner that is accurate, timeous and comprehensive. Unless considerations of justice and fairness require otherwise, parties must be held to their pleadings. It is not for the Court to trawl trough the record and submissions in the hope of finding a means of assisting a particular litigant.[32]

The Court then dutifully continues by explaining in fact how wide its discretion is, but ending with the conclusion that it will not consider the constitutionality of LUPO, because the Supreme Court of Appeal did not consider the constitutional validity of ss 16 and 25 at all: '[i]f we were to evaluate LUPO's validity in these proceedings, we would be forced to do so without the valuable insights of and analysis of that Court – a situation that should be avoided where possible.'[33]

[28] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC). Coming back to what I wrote earlier on the role of courts' remedies in 'reminding' other powers what their constitutional duties are, it must be said that, although I already stated that the HIV/AIDS-case was lauded worldwide, there is also some severe criticism for the fact that the Constitutional Court did not demand that the Mbeki-Government report back on the progress, thus leaving a lot of room for President Mbeki and his ministers to stick to their old policies and practices. See RW Johnson *South Africa's Brave New World, The Beloved Country Since the End of Apartheid* (2013) 201.

[29] Although I am well aware of the fact that the Court has been accused of avoidance in socio-economic rights decisions in recent years. See B Ray 'Evictions, Aspirations and Avoidance' (2014) 5 *Constitutional Court Review* 173, 175.

[30] KG Balakrishan (note 18 above) at 5. See also J Fowkes 'How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL' (2011) 27 *South African Journal on Human Rights* 434.

[31] *Lagoonbay* (note 14 above) at para 35.

[32] Ibid.

[33] Ibid at para 40.

And then, once again, it emphasised the fact that Lagoonbay did not bring the constitutionality of LUPO to the floor.[34]

With all due respect to the Court, it cannot on the one hand state that it could not decide the issue without the insights of the Supreme Court of Appeal, and yet deliver an *obiter dictum* that clearly showed that the Court was in fact able to evaluate and decide the same issue.

The Court's decision contains a lesson for the 'lazy lawyer', who did not bring in the correct arguments. However, at what expense? New costly and time-consuming cases, or at least one, have to be brought to the Court in order to get clarity on the constitutionality of LUPO. Would it not have been preferable if the Court ruled *ex officio* on this issue?

On a final analysis, I am not sure if I agree with De Visser and Steytler when they end on the positive note that the Constitutional Court was upholding the principle of legality. This principle implies that authorities act on the basis of the law and according to the law, which means the law as the entire complex, including the highest legal levels. It is arguable the principle of legality does not mean acting in conformity with unconstitutional legal arrangements simply on the basis that they have not, yet, been constitutionally contested.

IV Concluding Remarks

Kader Asmal once said: '[t]hose who assert that a wall separates law and politics urge that in general judges should be oblivious to the social consequences of their decisions. This should be rejected. A preferable starting point is that law's highest purpose is to serve social ends.'[35] In my view this is not only true for the big social issues. It is also relevant for the smaller ones, the social consequences of a court's decision for the parties, and perhaps even their families and relatives. Is a court decision really helpful in bringing conflicts between parties to an end, or is it only a contribution to a lawyer's paradise of ongoing legal debates? Going to court very often is time-consuming and costly; it should not only be lawyers who are satisfied with the outcome. And this is because court decisions, while delivering another building block or even a solution in a legal debate, very often do not create a solution for the practical problem that lies at the root of the legal debate. This leads to high costs for individuals, and sometimes to bankruptcy when court cases drag on. This often has high societal costs, for instance, in never ending conflicts between groups of persons or continued uncertainty of the feasibility of investment plans that could bring more economic prosperity or welfare in a certain area.

That is why it is very important that courts, especially constitutional courts, have an active approach in finding the law, establishing the law and in finding the relevant facts in order to bring disputes to an end. This does not mean that

[34] Ibid at para 41.

[35] Cited in: A Krog *Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa* (2009) 291. The opposite view is expressed in most extreme terms by US Supreme Court Judge A Scalia when he said that indifference to hundreds of deaths that might result from embracing a broad interpretation of the Second Amendment is the sign of a good judge. Cited in Posner (note 17 above) at 541.

the court can no longer decide cases cautiously, incrementally, emphasising the particular rather than the general, and avoiding large scale reasoning.[36] It also does not mean that I would like constitutional courts to take principled decisions that run counter to strongly held public attitudes or that threaten to bring them into direct confrontation with the political branches.[37] The point I make is neither about 'judicious avoidance' nor about some form of 'political question doctrine'. It is simply about solving the case at hand by bringing the dispute to an end while taking into account all the ordinary constraints the judiciary normally has to deal with.

To come back to my initial question: is the Constitutional Court an *active court*? Based on this very small sample of cases my answer has to be negative. But perhaps it is better if I would employ the same reserved approach as the distinguished South African Constitutional Court and conclude that that an active role has not been shown in the presented cases.

Is there an explanation for the Court's approach to be found in South Africa's adversarial tradition in litigation? Perhaps this is indeed the case. However, is the Constitutional Court obliged to strictly uphold this tradition? Although I am well aware of the fact that the Court functions against the backdrop of a somewhat conservative legal culture,[38] I see no constitutional ground for that. This runs counter to developments in other parts of the world where it is arguable that there is a tendency towards a more active role for judges in resolving disputes. Even if the South African Constitutional Court would want to cling to the adversarial tradition, I suppose it could have done more given its self-proclaimed 'wide jurisdiction when deciding a constitutional matter'.[39]

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[36] See I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 165.

[37] See T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 133.

[38] D Bilchitz 'Avoidance Remains Avoidance: Is it Desirable in Socio-Economic Rights Cases?' (2014) 5 *Constitutional Court Review* 297, 298.

[39] *Lagoonbay* (note 14 above) at para 35.