Change v certainty: precedent under the Constitution

Kate O'Regan
Judge of the Constitutional Court

Section 2 of the Constitution provides that "This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed upon it must be fulfilled." The supremacy of the Constitution shifts the foundations of our legal system. A law – whatever its source – is valid only if it conforms to the Constitution. Shifting the foundations of a legal system is no small task, nor is it completed with the stroke of a pen. A legal system is a social structure continually constructed by many actors in many roles. Parliament, provincial legislatures, members of the executive in all spheres of government, judges, magistrates, lawyers, administrators and law teachers are all engaged in the task.

Not unlike an earthquake, the aftermath of constitution making requires a careful investigation and analysis of the legal system that remains. That re-examination is now underway. Lawyers are challenged daily by complex questions, the answers to that will contribute to the development of our legal system. Some implications of the Constitution are obvious and beyond dispute. For example, the Constitution fundamentally changed the structures of government from those that had gone before. Not only was the racial basis of government emphatically abandoned, the structure, role and functions of both Parliament and the national executive were recast. Provincial boundaries were redrawn and the powers of provincial governments and legislatures rethought.

Of the three arms of government, the judiciary probably remains the least affected in structure, although it too has seen some significant structural changes. These include the establishment of the Constitutional Court, the final court of appeal in constitutional matters and the creation of a Judicial Service Commission that plays an important role in the appointment and removal of judges. If the adoption of the Constitution brought relatively fewer structural changes to the institution of the judiciary, on the one hand, the effect of its adoption on the judiciary in other areas is profound and almost certainly more significant than the obvious structural changes I have mentioned.

One of the most important changes lies in the enhanced power of courts under the Constitution to ensure that legislation adopted by Parliament conforms to the principles of the Constitution. Granting this power to courts realigns the balance of power between the three arms of government. The expansion of the powers of the judiciary by the Constitution is of enormous constitutional and practical significance and imposes an onerous obligation of conscientious reflection on lawyers and judges alike. A second important change is the substantive reach of the Constitution and in particular the Bill of Rights. The sheer number of rights entrenched and their scope of application means that our constitutional transformation affects potentially every area of law.

In this note, I wish to consider briefly some aspects of the doctrine of precedent in the context of our new constitutional order.

The doctrine of precedent: The duty to follow what went before

Our legal system includes a doctrine of precedent in terms of which decisions of higher courts bind lower courts. The higher court decision is binding whether or not the lower court agrees with the decision. In this sense, therefore, decisions of higher courts are an independent source of law.[1]

The doctrine of precedent is founded on a series of principles that are central to our legal system. The first principle is that there should be uniformity in law and decision-making in the legal system. The doctrine of precedent clearly serves this principle in ensuring that there is uniformity between the decisions of higher and lower courts. A second and related principle (and one expressly found in the Constitution) is that all should be equal before the law. It requires that litigants in similar circumstances should be similarly treated. A third principle underlying the doctrine of precedent is the principle of legal certainty that seeks to ensure that citizens are able to arrange their affairs according to a predictable set of legal rules. All of these normative principles are closely related to the doctrine of the rule of law, a founding value of our Constitution.

The doctrine of precedent is not only supported by normative principle, however. There are sound pragmatic reasons for it as well. Precedent ensures that there is economy of judicial effort – judges are not repeatedly considering the same issues afresh and higher courts need not be approached on issues they have already resolved. Confidence that precedent will be followed enables litigants in advance to determine the outcome of cases upon which firm precedents are established and result in the avoidance of litigation.

Given these powerful reasons underlying the doctrine of precedent, it is not surprising that it is a doctrine that, in one form or another, is adopted in most legal systems. While it used to be widely believed that the major difference between common law legal systems and codified legal systems lay in the absence of a doctrine of binding precedent in codified systems, it is now clear that the difference is not as stark as once thought. Although there can be no doubt that there are differences concerning the doctrine of precedent between common law systems and code systems, recent research suggests that the doctrine of precedent, in an attenuated form, exists in many codified legal systems.[2]

The Constitution: the need to assert our new constitutional values

Although the principles served by the doctrine of precedent are extremely important, the doctrine has never been absolute in our legal system. One of the exceptions to the rule, admittedly a very narrow one, permits a lower court not to follow the decision of a higher court if that decision was rendered *per incuriam.* Another exception to the rule permits the Supreme Court of Appeal, although ordinarily bound by its own decisions, to depart from an earlier decision if satisfied it is wrong[3] or when a point raised in a later case has not been considered in the earlier case.[4] In this respect, the doctrine of precedent is less rigidly observed in South Africa than in England.[5] In asserting this flexibility, the Appellate Division recognised that the doctrine of precedent at times could be overridden by other principles embedded in the legal system. As acknowledged by Innes J in *Habib Motan v Transvaal Government* 1904 TS 404 at 413:

"It is a lesser evil for a court to override its own legal opinion, clearly shown to be wrong, than indefinitely to perpetuate its error."

Justice O'Regan BA LLB (University of Cape Town) LLM (Sydney) PhD (University of London, School of Economics) taught law at the University of Cape Town before her appointment to the Constitutional Court Bench

In England of course, it was only in 1966 that the House of Lords in a practice statement acknowledged that it had the right to depart from earlier precedent.[6] This power has however been relatively sparingly exercised. Atiyah and Summers record that between 1966 and 1980, the House of Lord overruled 8 of its previous decisions, while, in the same period, the US Supreme Court overruled 55 of its decisions.[7]

According to our doctrine of precedent therefore the correct development of the law at times may trump the need for certainty and uniformity. Although this may be so, the need to respect the rights of citizens who have arranged their affairs on the basis of a settled principle of law remains powerful and generally courts have generally been more willing to overturn established principles where the effect on the regulation of private relationships is less profound.

The tension between the need to develop a coherent legal system on the one hand and the need to protect existing rights based on settled rules on the other, long recognised in our jurisprudence, has become more profound in the constitutional era. The effect of the supremacy clause of the Constitution requires existing law falling within the purview of the Bill of Rights to conform to the values of the Constitution. To that extent the Constitution calls for reconsideration of established rules and where necessary revision of them. On the other hand, the Constitution itself acknowledges the value of the rule of law, which encompasses legal uniformity and legal certainty.

This tension between these competing constitutional commands needs to be acknowledged. Every time a law is declared to be inconsistent with the Constitution, the constitutional values of certainty and uniformity are affected. From this must flow the principle that rulings of constitutional invalidity must only be made where it is clear that the law is indeed in breach of the Constitution. When judges erroneously and too easily make findings of constitutional invalidity, legal certainty suffers. The same rule must apply when the common law is developed in a manner consistent with the Constitution. If judges are too quick to abandon established principles of law that are not in need of development, legal certainty will be the victim. It is not sufficient to disagree with the earlier decision; it is necessary to be sure that it is wrong.

However, rights entrenched by the Constitution must be protected and enforced. They are rights solemnly adopted for the benefit of all South Africans. If existing legal rules do not provide that protection, or indeed breach those rights, the Constitution requires that they may be declared invalid. Courts may not shirk their obligations in this regard. The substantive commitments of the Constitution require courts to ensure that laws are developed in a manner that will give effect to them.

Resolving the tension: the retrospective effect of orders and "prospective overruling"

Section 172(1) of the Constitution confers powers upon a court that has made a finding of constitutional invalidity that helps to reduce the tension between legal certainty and constitutionally necessitated legal change. It provides that:

"When deciding a constitutional matter within its power, a court –

(a) must declare that any law or conduct inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

This provision clearly grants wide remedial powers to a court that has made a declaration of constitutional invalidity. Of particular importance, of course, is the flexibility given in relation to the retrospective effect of such orders.[8]

There is no equivalent to section 172(1) in relation to cases in which the courts develop the common law in a manner consistent with the Constitution. The general rule in South Africa is that the development of the common law takes place with retrospective effect. In other words, the common-law rule is changed and applied to the facts before it.[9] The practice of prospective over-ruling is not one readily familiar to South African lawyers.[10] This practice can involve either the changing of an existing rule in such a fashion that it will not affect the litigants before the court, but only those that come later, or changing the rule for the litigants before the court and those that come after but none whose affairs have been finalised by the time the court makes its decision. Kentridge AJ described the practice in his judgment in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at paras 65-6. The Supreme Court has approved the practice in the United States of America.[11] Although English judges have discussed it, it has not been adopted, to my knowledge, in the United Kingdom to date.[12]

In *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC), Kentridge AJ observed that:

"It may be that a purely prospective operation of a change in the common law will be found to be appropriate when it results from the application of a constitutional enactment which does not itself have retrospective application." (para 66)

The invitation Kentridge AJ left open remains open still. It may be however that as the date upon which the Constitution came into force recedes into the past using that date as a justification for introducing a practice of prospective over-ruling becomes less persuasive. In this regard, it is perhaps important to note that although prospective over-ruling may reduce the conflict between legal certainty and legal change, it cannot avoid it altogether. Legal change requires a date. It can generally never be fully retrospective in effect. A changed legal rule therefore necessarily implies that people similarly situated (apart from the question of time) will not be similarly treated. The creation (or repeal) of a criminal offence means that conduct criminal on one day will not be criminal on the next (and vice versa). Statutory changes are generally prospective to reduce the negative implications for legal certainty, but citizens who have arranged their affairs in a particular fashion may still suffer negative effects.

Flexibility in relation to the retrospective effect of an order made may be one way in which the tension between the need for legal certainty and the need to give effect constitutional rights may be reduced. It can, in the final analysis, never completely avoid the tension.

Getting the balance right

The conflict between observing the principles of *stare decisis* on the one hand and developing the legal system, as the Constitution requires, on the other, necessitates producing an appropriate synthesis of the principles in each case. Such a synthesis cannot be achieved by ignoring one or other of the opposing principles. Thus, it would be simply wrong to take the approach that all existing law is suspect and that it may be overturned it or altered at will with scant regard to the prescripts of precedent and legal certainty. We must acknowledge that the doctrine of precedent protects important values in our legal system which are central to the vision of the new Constitution. Similarly it would be wrong to take the view that the Constitution is irrelevant to most areas of law and need not be considered at all when deciding cases not openly concerned with public law. We must acknowledge that the Constitution is a wide-ranging

document capable of affecting all areas of law and it demands a re-examination of existing laws to ensure that they are not inconsistent with it.

In each case therefore where such issues arise, the countervailing tensions should be identified and considered in argument. Where it is argued that existing decisions should be overturned, careful reasons should be given to support such a proposition and due weight should be accorded to the value of legal certainty as represented by the doctrine of precedent. The grounds upon which decisions are then reached should be openly and articulately formulated with due respect to existing decisions. The synthesis achieved will be open to public scrutiny, and where appropriate, criticism. The process of rational decision-making will be enhanced by informed debate about it.

Legal systems must continue to develop as societies change and develop. The tension therefore between the need to develop on the one hand and the need for certainty on the other exists everywhere. As Lord Reid remarked:

"People want two inconsistent things; that the law shall be certain, and that it shall be just and shall move with the times. It is our business to keep both objectives in view. Rigid adherence to precedent will not do. And paying lip service to precedent while admitting fine distinctions gives us the worse of both worlds. On the other hand too much flexibility leads to intolerable uncertainty."[13]

It is true that the transition in our system is particularly profound, but Lord Reid's observation serves as a timely reminder that we are not embarking on a journey that is completely uncharted. In moving forward, in our legal system, as in others, we need to accept both the need for legal change and the need for legal certainty. We cannot ignore either. Our jurisprudence must reflect a wise synthesis between these principles. Both are important if we are to develop a legal system that will be of value to all South Africans.

Endnotes

1 The strictness of the doctrine of precedent varies from legal system to legal system, and even over time within a system. For an interesting comparison of the application of precedent in the USA and UK, see the discussion in Atiyah and Summers *Form and Substance in Anglo-American law – A comparative study of legal reasoning, legal theory and legal institutions* Oxford University Press (1987) 118 – 150.

2 See D N MacCormick and R S Summers *Interpreting Precedents: A comparative study* Dartmouth (1997)

3 *Collett v Priest* 1931 AD 290 at 297.

4 *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) at 470-2.

5 Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* Juta (1960) 29-30.

6 See (1996) 1 WLR 1234. This practice statement marked an abandonment of the principle established in *London Tramways Co v London County Council* [1898] AC 375 (HL).

7 Cited above n 1 at 139. See (1996) 1 WLR 1234.

8 See, for example, *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at paras 31-2; *National Coalition for Gay and Lesbian Equality v M inister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 90-98.

9 See RHS Tur "Varieties of Over-ruling and Judicial Law-making: Prospective Over-ruling in a Comparative Perspective" 1978 *Juridical Review* 33 at 35.

10 For a discussion of this practice see Tur, cited above n 9; MDA Freeman "Standards of Adjudication, Judicial Law-making and Prospective Over-ruling" 1973 *Current Legal Problems* 166-207; and MI Freedland "Prospective and Retrospective Judicial Lawmaking" (1974) 12 *University of Toronto LJ* 170.

11 See *Great Northern Railway Co v Sunburst Oil Refining Co* (287 US 253 (1932).

12 See, for example, Lord Reid "The Judge as Law-Maker" (1972-3) *Journal for the Society of Public Law Teachers* 22-29; Lord Devlin "Judges and Lawmakers" (1976) 39 *Modern Law Review* 10; Sir Leslie Scarman "Law Reform by Legislative Techniques" (1967) 32 *Saskatchewan Law Review* 217; and also the speeches of Diplock LJ and Simon LJ in *Jones v Secretary of State for Social Services* [1972] AC 944 at 1015 and 1026 respectively.

13 Cited above n 12 at 26. 🕮

Legal Aid Board: executive appointments

Ashley Ally has been appointed as the new chief executive officer of the Legal Aid Board. The following appointments have also been made: Kumaran Naidoo (Finance and IT), Mpuseng Tlhabane (Human Resources), Sipho Magagula (Judicare), and Odette Geldenhuys (Justice Centres).

Pius Langa Scholarship

Applications are invited for the Pius Langa Scholarship for 2001.

A scholarship is awarded annually in the July intake to a pupil of any constituent Bar of the GCB to enable him or her to complete pupillage. The scholarship is awarded on the grounds of outstanding candidacy and taking into account the need to redress the balance of race and gender at the Bar.

The selection Committee comprises the chairman of the GCB, a representative of the chairman of Nedcor and a nominee of Justice Langa.

Application forms are obtainable from: The Secretary of the GCB, P O Box 2260, Johannesburg 2000. Fax 011-336 8970.

Closing date for applications: 15 June 2001

Sponsored by the Nedcor Group

Erratum

Judge JJ Fagan author of "The judicial inspectorate" 2000 (4) *Advocate* 20 was wrongly described as "former Judge President of the Cape High Court." He was, of course, a former Deputy Judge President. Our apology for the belated promotion, Judge Fagan! – *Editor*

Benoni legal aid centre

The Legal Aid Board has launched a community justice centre in Benoni. The centre will employ full-time attorneys to do work directly for the board, instead of outsourcing work as in the past. The Benoni Justice Centre, which already handles about 40 clients per day, will serve the East Rand areas of Nigel, Brakpan, Kwa Thema, Katlehong, Natalspruit and Daveyton. The LAB chairperson, Mahomed Navsa JA, said the centre would move away from focusing on defending only the accused in criminal cases but would also help ordinary citizens to enforce their rights to fair administrative and labour practices. The Benoni centre was the first of 60 planned to open between now and 2004.